

**The Hon. Mr. Justice Frank Clarke**

**Chief Justice of Ireland**

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***Address at the Supreme Court of Cyprus***

***Friday 21st September 2018***

**“Lessons from Recent Reform of the Appellate Structure of the Irish courts”**

**Introduction**

To understand the background to the recent developments in Ireland I propose to start with a brief account of the structure which pre-dated these changes.

**The Irish Courts in the 20th Century**

In 1922, Dáil Éireann (Irish Parliament) enacted the Constitution of the Irish Free State (Saorstát Éireann) Act 1922 which implemented the Constitution of the Irish Free State (“the 1922 Constitution”). This Constitution was based on the terms of the Anglo-Irish Treaty, the negotiation and agreement of which brought an end to the Irish War of Independence between Ireland and Britain. Thus, with the enactment of the 1922 Constitution, Ireland effectively gained its independence from Britain and became a sovereign nation (except, of course, for the 6 counties of Northern Ireland which remained under British rule).

Following independence, a Judiciary Committee was appointed to report to the government on the establishment of a new court system. The recommendations of the Committee were largely adopted in the Courts of Justice Act 1924 (“the 1924 Act”). As it happened, there was little substantial change of substance between the system which was in place prior to independence and the one set out in the 1924 Act.

At the lowest level of jurisdiction, a new District Court was established which was given jurisdiction over minor civil and criminal matters.[[1]](#footnote-1) However, this Court in substance replaced the functions performed at Petty Sessions by Justices of the Peace or Magistrates. However, the judges of the District Court were requested to have legal qualifications, in contrast to their predecessors who were laymen. With that exception the new District Court was virtually identical to the old Magistrates’ Court.

The 1924 Act also created a Circuit Court.[[2]](#footnote-2) Its civil jurisdiction replaced that of the previous County Courts, and its criminal jurisdiction took over from the Assizes which had formed part of the legal structure under British rule. Again there was a change of name but little alteration of the substance.

The 1922 Constitution required the establishment of a High Court.[[3]](#footnote-3) In this regard, there was a great deal of continuity in both name and substance between the new High Court and the High Court which existed under the previous system. Indeed, the 1924 Act provided that the High Court assume the same jurisdiction as that enjoyed by the previous High Court.[[4]](#footnote-4)

The 1922 Constitution also required the establishment of a court of final appeal to be entitled the Supreme Court.[[5]](#footnote-5) It was provided that this new Supreme Court would enjoy the same jurisdiction as the old Court of Appeal for Ireland.

Finally, the 1924 Act also made provision for a Court of Criminal Appeal which heard appeals from the Circuit Court and High Court in serious criminal matters.[[6]](#footnote-6) There was a further appeal from that Court to the Supreme Court in cases involving a point of law of exceptional public importance.

The level of continuity between the pre-1924 court system and the system established by the 1924 Act might be highlighted by the recent discovery of the minute book of the Registrar of the old Court of Appeal, which shows that when he became the Registrar of the new Supreme Court to which I have referred, he continued to use the same minute book and simply continued writing on the next page.

The 1922 Constitution was replaced in 1937 by Bunreacht na hÉireann, the present Constitution of Ireland (“the 1937 Constitution”). The 1937 Constitution also required the establishment of a new court system. However, this was not undertaken until the enactment of the Court (Establishment and Constitution) Act 1961. However, in reality there was no difference of substance between the system under the 1924 Act and the “new” system under the 1961 Act. Indeed, there was no change in personnel pre and post 1961, whereas following the introduction of the 1924 court system there was quite a significant degree of change in relation to the holders of various offices.

It might finally be noted that both the 1922 and the 1937 Constitution provided continuity not only in terms of the court structure, but also kept the existing law intact by providing that, unless inconsistent with the provisions of the constitution in question, any laws previously in force were to be carried forward.[[7]](#footnote-7)

Therefore, it can be seen that, despite the extremely significant political changes in Ireland in the early 20th Century, and the adoption of two constitutions, there was in fact little change of substance in the structure of the courts, excepting some minor variations in nomenclature and jurisdiction. That structure remained in place until the recent creation of the new Court of Appeal.

**The Court of Appeal**

In 2006, the government established the Working Group on a Court of Appeal, which was to consider the necessity for a general Court of Appeal together with any legal changes which would be necessary to establish such a court. The broad background which necessitated such an analysis is closely linked to the point highlighted previously regarding the lack of development in the Irish court system throughout the 20th Century. Increases in economic activity and demographic diversity, particularly in the latter half of the century, led to a concomitant increase in the volume and complexity of litigation. This in turn placed great strain on the superior courts, and in particular on the Supreme Court. Part of the reason for this strain was that, unlike in some other common law jurisdictions, there was an automatic right of appeal from the High Court to the Supreme Court in almost all civil cases, with no requirement that the appeal raise an issue of general public importance or meet any other criteria. Consequently, a significant backlog developed in the Supreme Court, which led to long delays in the Court.

While it was possible to deal with the increased demands of modern litigation in the High Court by increasing the number of judges of that court (in 1973 when I was called to the Bar there were eight judges of that court including its President where today the number is 40) it was more difficult to deal with the then only appellate court being the Supreme Court. Historically the Supreme Court had initially consisted of three judges and later increased to five. However, in the 1990s, the Court was increased to eight and provision was made for it to sit in more than one division. There was, however, a view that it was undesirable that there would be too much diversity in the personnel hearing important cases. Thus, the two divisions model was only used in practice for three judge courts to hear routine appeals. As a final interim measure, pending the establishment of the Court of Appeal, the Supreme Court was increased to ten judges in an attempt the stem the growth of the backlog. The precise number of judges which the court will have as its full complement into the future has not finally been settled. At present only eight of the ten positions are filled and it may well be that at least one if not both of those vacancies will not be filled in the future with the formal complement of the court being reduced.

In any event, the Working Group published its report in May 2009,[[8]](#footnote-8) and concluded that the best option to solve the problems which I have just mentioned would be the establishment of a new Court of Appeal, which would hear both civil and criminal appeals from the High Court and possibly other courts, with the possibility of a further appeal to the Supreme Court subject to the granting of leave. The Working Group felt that this was the best solution from the point of view of increasing efficiency. It was also felt that it would also mean that the Supreme Court would take on a more appropriate role as it would only hear appeals which raised issues of general public importance as is more typically the role of courts of final appeal in other common law jurisdictions.

The Working Group recommended that the new Court of Appeal be established in law and provided for in the Constitution, which would require a constitutional amendment and accompanying legislation. The necessary constitutional change was effected by way of a referendum held on the 3rd October 2013. Subsequently, the Oireachtas (Parliament) passed the Court of Appeal Act 2014, which provided for the establishment of the new Court of Appeal in accordance with the amended constitutional provisions. The Court was established on the 28th October 2014.

**The New Appellate Structure**

A starting point should be to set out the constitutional framework within which the Court of Appeal and Supreme Court now operate. The previous constitutional entitlement to appeal as of right from a decision of the High Court in almost all cases has now been changed to a right to appeal to the Court of Appeal. It is permissible to exclude or regulate that right to appeal but the exclusions are quite limited in number.[[9]](#footnote-9) Thus, the general right to appeal to the High Court now rests with an appeal to the Court of Appeal.

The new constitutional framework provides that an appeal may only be brought to the Supreme Court with leave of that Court and in circumstances where the Court is satisfied that a matter of general public importance arises on the potential appeal or that it is in the interests of justice that there be an appeal to the Supreme Court.[[10]](#footnote-10) Applications for leave to appeal are dealt with on paper unless the Court directs an oral hearing. There is a developing case law on the sort of circumstances that meet that constitutional threshold for leave to appeal.[[11]](#footnote-11)

While the main route to the Supreme Court is intended to be through the Court of Appeal, it is also possible to seek to bring an appeal direct from the High Court. However, in addition to the general constitutional threshold it is necessary that the applicant satisfy the Supreme Court that there are exceptional circumstances justifying such a direct appeal.[[12]](#footnote-12) It follows that the default position is that an appeal from the High Court is brought to the Court of Appeal with the possibility of a further appeal to the Supreme Court if the constitutional threshold is met. However, in a limited number of cases the Court may permit a direct appeal where, for example, there is urgent public importance in the question being resolved quickly.[[13]](#footnote-13)

**The Experience of the Court of Appeal to Date**

We are, therefore, approaching the fourth anniversary of the establishment of the Court of Appeal. This begs an obvious question: has the creation of the Court of Appeal solved the problems highlighted by the Working Group?

It is perhaps worth first briefly setting out how the Court of Appeal operates in practice. In accordance with the Court of Appeal Act 2014, the Court is made up of 10 members: one President and nine ordinary judges. In practice, these 10 members have operated in two informal divisions: civil and criminal. The criminal division typically made up of 3 to 4 judges, and the civil division typically made up of 6 to 7 with the civil division occasionally having two panels of 3 sitting at the same time.

It should be noted that the Constitutional amendment to permit the establishment of the Court of Appeal also provided for a mechanism whereby the Supreme Court could transfer existing appeals to the new Court of Appeal.[[14]](#footnote-14) A significant number of cases were, on that basis, transferred to the Court of Appeal while the Supreme Court retained a similar proportion in its list. Since that time the historic backlog cases which were retained by the Supreme Court have been largely disposed of save for a small number of cases which have problems of one sort or another. Thus the Supreme Court is now concerned almost exclusively with dealing with what are called “new jurisdiction” cases, being cases which have come to the Supreme Court through the leave to appeal mechanism, either as a further appeal from the Court of Appeal or, more rarely, directly from the High Court under what has come to be called the “leapfrog appeal” process. It would seem that the Supreme Court is granting leave in and disposing of approximately 70 cases per annum. This represents approximately one third of the cases in which leave is sought. Thus, the establishment of the Court of Appeal has met its objective, so far as the Supreme Court is concerned, in freeing up the Supreme Court to deal with the more important cases and allowing sufficient time to the Court to be able to deal with those cases in a proper fashion. In passing it is also worth adding that, while in the past the Supreme Court frequently sat as a panel of three, new jurisdiction cases will always involve five judges with the more important cases involving a panel of seven. Thus, for the most important cases almost the entire court sits. However, while the position in respect of the Supreme Court might be considered to be quite satisfactory, the same is not, unfortunately, the case with the Court of Appeal.

While the Supreme Court no longer faces significant backlog or delay, the civil division of the Court of Appeal appears to have simply inherited the difficulties previously encountered by the Supreme Court and indeed the problem may in fact be getting worse. At the start of 2017,[[15]](#footnote-15) there were a total of 520 civil appeals whose resolution was pending before the Court. 611 further civil appeals were lodged during the course of that year, and a total of 470 appeals were resolved. Therefore, at the end of 2017 the total number of civil appeals pending had increased to 661. In addition to that number must be added the significant number of appeals which were transferred from the Supreme Court to the Court of Appeal when the Court was established. As of the end of 2017, the number of such appeals which awaited resolution before the Court of Appeal totalled 706.

Indeed, in that context the Supreme Court has twice in the recent past collaborated with the Court of Appeal to take back some of the appeals which had been transferred from the Supreme Court to the Court of Appeal on the establishment of the latter court. For example, during a two-week period in November next, the Supreme Court will sit each day in two panels of three judges during which time it is hoped to dispose of upwards of 50 of the historic backlog cases which have returned to the Supreme Court. A similar exercise is envisaged to take place after Christmas. However, this assistance from the Supreme Court will simply help dispose of the backlog cases which were transferred from the Supreme Court in the first place. The underlying problem which the Court of Appeal faces stems from the fact that, on the basis of the figures referred to above, it is getting in more civil appeals in each year than it is capable of disposing of.

Furthermore, it seems that the Court of Appeal is seeing an increase in the number of incoming appeals when compared to the Supreme Court immediately prior to the establishment of the Court of Appeal. In 2013, there were 558 civil appeals lodged with the Supreme Court as compared with the 611 civil appeals lodged with the Court of Appeal in 2017.

By contrast, the criminal division of the Court of Appeal does not appear to be suffering from the same level of backlog. At the start of 2017, 532 criminal appeals were pending before the Court. A further 282 were lodged during the course of the year. The Court disposed of 283 appeals, thus leaving 531 outstanding at the end of the year.

Indeed, it is fairly clear that the criminal division of the Court of Appeal is able to dispose of all criminal appeals in a very timely fashion and has the capacity to expedite appeals beyond even its ordinary speedy process in cases where that is required. In that context it must be recalled that the Court of Appeal took over the jurisdiction of the former Court of Criminal Appeal. It is worth saying a little about that former court. It was presided over by a judge of the Supreme Court on a rotational basis. The two additional judges were judges of the High Court again nominated on a rotational basis. However, that court did not sit full time and thus it is hardly surprising that three to four judges of the Court of Appeal being assigned more or less full time to deal with criminal appeals have been able to bring outstanding appeals up to date within a relatively short period of time. So much so that a number of categories of case which might theoretically be described as civil but which are criminal in character are now typically dealt with on the criminal side of the Court of Appeal. For example, all European Arrest Warrant cases, bail issues, judicial reviews which are criminal in character, applications to prohibit criminal trials or the like are all dealt with on appeal as if they were criminal appeals.

However, the allocation of six or seven judges to the civil side of Court of Appeal has, equally unsurprisingly, proved to be inadequate given that the Supreme Court was unable to handle all of the cases when it had eight judges in circumstances where only a relatively small amount (perhaps 20%) of its time was spent dealing with criminal matters. Thus, the judicial allocation to the civil side of the Court of Appeal certainly was no greater than the previous allocation by the Supreme Court to civil appeals prior to the creation of the Court of Appeal. When that is coupled with the increase in the number of appeals the result is hardly surprising.

In that latter context there has been a welcome development with the confirmation by the Minister for Justice that he proposes to bring forward legislation to increase the total number of judges of the Court of Appeal to 14 which ought to allow ten judges to be assigned to the civil side.

If there is one lesson to be learned from the Irish experience, it is that the creation of a Court of Appeal can solve many problems not least freeing up a Supreme Court to deal with those important cases which will define the law for some time. But the overall success of the project requires a careful analysis of the demands likely to be placed, in both criminal and civil matters, on the Court of Appeal so as to ensure that it does not run into problems associated with an inadequate number of judges. The experience of the Irish courts to the effect that the creation of the Court of Appeal may have increased in total number of appeals suggests that it may not be possible to carry out such an exercise with absolute exactitude. However, it does seem important that at least a best estimate be made of the true demands likely to be placed on any Court of Appeal so as to ensure that its creation does not simply give rise to a transfer of the problem from one place to another.

**Brexit**

Given that I have been afforded the honour of speaking to the senior judiciary of Cyprus I cannot leave my remarks without making brief reference to the potential problems which Brexit may cause for those of us in the common law world who will remain in the European Union. I am familiar with the fact that Cyprus can, perhaps, properly be described as having a mixed system with administrative law matters being dealt with in a manner similar to civil law jurisdictions. However, after the departure of the United Kingdom from the European Union, Ireland, Cyprus and Malta will be the only remaining countries which are either in whole or in significant part in the common law world. There are inevitable potential problems likely to be encountered in ensuring that European legislation and European Case Law pays appropriate regard to the often different problems which may be encountered in transposing and adapting European legislation to a common law system. Speaking for myself I have never encountered any opposition to the idea that common law systems should be accommodated to the greatest extent possible. However, in order for such an accommodation to take place it is necessary that our voice be heard at the various tables at which decisions are made.

Insofar as bodies representative of the judiciary may exercise a significant influence on the thinking of European legislatures then it seems to me to be all the important that the voice as the remaining, and quite small, common law countries is effectively heard in the future. Can I express the hope, and indeed the expectation, that the Irish and Cypriot Judiciary will work together to ensure that, to the greatest extent possible, our perspective on issues of European law is fully represented on those bodies in the future?

1. Courts of Justice Act 1924, Part III [↑](#footnote-ref-1)
2. Courts of Justice Act 1924, Part II [↑](#footnote-ref-2)
3. Constitution of the Irish Free State, Article 64 [↑](#footnote-ref-3)
4. Courts of Justice Act 1924, s. 17 [↑](#footnote-ref-4)
5. Constitution of the Irish Free State, Article 64 [↑](#footnote-ref-5)
6. Courts of Justice Act 1924, s. 8 [↑](#footnote-ref-6)
7. Constitution of the Irish Free State, Article 73; Bunreacht na hÉireann, Article 50 [↑](#footnote-ref-7)
8. Report of the Working Group on a Court of Appeal (May, 2009). Available at [http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/D3E9CCA7BAAB5F868025760B0032EA4E/$FILE/Report+of+the+Working+Group+on+a+Court+of+Appeal.pdf](http://www.courts.ie/Courts.ie/library3.nsf/%28WebFiles%29/D3E9CCA7BAAB5F868025760B0032EA4E/%24FILE/Report%2Bof%2Bthe%2BWorking%2BGroup%2Bon%2Ba%2BCourt%2Bof%2BAppeal.pdf) [↑](#footnote-ref-8)
9. Bunreacht na hÉireann, Article 34.4.1 [↑](#footnote-ref-9)
10. Bunreacht na hÉireann, Article 34.5.3 [↑](#footnote-ref-10)
11. These ‘determinations’, as they are known, are available at the website of the Courts Service: [www.courts.ie](http://www.courts.ie) [↑](#footnote-ref-11)
12. Bunreacht na hÉireann, Article 34.5.4 [↑](#footnote-ref-12)
13. For more detailed discussion of these criteria, see *Wansboro v. Director of Public Prosecutions and anor* [2017] IESCDET 115 available at <http://www.courts.ie/Judgments.nsf/0/A422209C18D5248F802581E0005324B5> [↑](#footnote-ref-13)
14. Bunreacht na hÉireann, Article 64 [↑](#footnote-ref-14)
15. The source for the following figures is the Annual Report of the Courts Service, which is also available at [www.courts.ie](http://www.courts.ie) [↑](#footnote-ref-15)