



**UNIVERSITY OF
LIMERICK**
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School of Law

**Introduction to Studying Law and Legal
Terminology**

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1. INTRODUCTION TO THE STUDY OF LAW

Introduction

The law is one part of a set of processes: social, political, economic, and cultural that shape and direct our activities in society. Raz characterises as normative, institutionalised, and coercive. Consider the following questions:

- What is the nature and function of a legal system?
- Who develops the rules?

These introductory notes will provide an overview of the system of Irish law from both an institutional and ideational perspective.

Sources of Law

A source of law is the legal origin of rules. For lawyers, academics, and students of law, the source of different rules often establishes their relationship with other rules and relates to how the rules fit into the overall legal system. To that extent we sometimes refer to the existence of a “hierarchy of norms”.

Primary Sources of Law

Constitution of Ireland

The People, by a slim majority in a referendum, enacted *Bunreacht na hÉireann*, 1937. The Constitution is the fundamental and basic law of the State and takes precedence over other sources of domestic law. In fact, such sources of law depend on the Constitution for their validity. *Bunreacht na hÉireann* can be divided into two parts: the first dealing with the institutional apparatus of the State and the second dealing with fundamental rights. While there are many similarities between the 1922 and 1937 Constitutions it is important to

recognise significant differences. The 1937 document is much more rigid (for the purpose of amendment) than its earlier counterpart; it provides more clearly for popular sovereignty and represents a more definite break with the British constitutional tradition.

Common law

The common law consists of thousands of decisions that span the centuries and because of the doctrine of precedent (*stare decisis*) still enjoys the binding force of law. We associate the common law with the Anglophone world and it is characterised as essentially pragmatic as it is based on the case-by-case problem-solving through law. An important moment in the development of the common law was the fusion of the systems of common law and Equity in the 19th century.

Legislation

Legislation is a source of law enacted by a body or agency given the power to make law. In Ireland law-making power is based on a specific provision of the Constitution (Article 15.2) that grants sole and exclusive law-making power to the Oireachtas (parliament). The Oireachtas enacts *primary legislation* and bodies or individuals that are conferred with this power by legislation enact *secondary legislation*.

European Union Law

The EU possesses its own legal system complete with a body of laws that is applicable and enforceable in all of the Member States. The legal system is presided over by the European Court of Justice (not to be confused with the European Court of Human Rights). Community Law enjoys supremacy over national law both as a matter of Community Law and municipal (domestic) law.

It also qualifies or supersedes the Constitution of Ireland in certain areas and must be included as a source of fundamental law.

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Secondary Sources of Law

These do not enjoy the force of law but may influence the law in other ways.

International Law

This is the body of law that governs states in their relationships with one another. Ireland is a dualist state, i.e. for international law to become part of the domestic legal order it must be incorporated by means of legislation into Irish law (Article 29.6 of the Irish Constitution read with Article 15.2). Ratification of an international legal instrument is not the same as incorporation. The European Convention on Human Rights (ECHR) is somewhat different. Ireland has recently passed the European Convention on Human Rights Act, 2003 to give further effect to the ECHR in Ireland. This is a form of incorporation and it will be interesting to monitor the impact (if any) of the legislation that came into force on 1st January, 2004. The European Court of Human Rights will continue to adjudicate on whether Ireland is in compliance with its obligations under the Convention but the Convention will also be used in proceedings before the domestic Irish courts. While decisions of the European Court of Human Rights do not have the force of law in Ireland, the position is that we have agreed to be bound by the decisions as a matter of international law. It used to be said that the Convention applied *to* Ireland but not *within* Ireland. That may be about to change, albeit gradually.

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Custom

When common law was established in Ireland many of the customary laws (based on Brehon laws) that preceded it were eliminated. Two general conditions should apply before a custom enjoys the force of law, one being that it is certain, reasonable, and continuous and the other is that it exists in a particular locality in respect of some particular matter.

Canon Law

This is the law of the Christian Churches which, over time, has become codified. It does not form part of the civil law but has influenced its development in certain areas such as the law of marriage.

Academic Commentary

On occasion where there is no legal rule governing a situation or where the law is unclear the courts may have recourse to scholarly legal writing as a source of persuasive authority. Much depends on the area of law involved or the disposition of the court in question towards academic writing.

Divisions of Law

The various sources of law do not exist as a homogenous whole but have been divided into “divisions”. The various sources of law don’t exist as a whole but have been divided into various areas.

Substantive v. Procedural

Substantive law covers most legal subjects that confer rights or impose obligations and liabilities on people. Procedural law on the other hand is the law used to implement the substantive law.

Public v. Private Law

1. Public Law is concerned with the state and its agencies or with the vindication of the public interest.

a. Constitutional Law.

This is concerned with the powers and the functioning of the State and the rights of the individual under the Constitution. It has both a vertical and horizontal application and in respect of the latter shares some characteristics of private law.

b. Administrative Law.

This is the body of law that governs the administration of the State and the operation of public authorities.

c. Criminal Law

This defines conduct that is prohibited and provides punishment for breaches of the criminal law. The investigation and the prosecution of offences is a public matter undertaken by state agencies such as the

Garda Síochána and the Office of the Director of Public Prosecutions (DPP).

2. Private Law generally governs private relationships, but it should be noted that many public bodies are subject to private law when they act in certain capacities.

a. Contract Law

This is a body of law which governs voluntary relationships between two or more parties.

b. Law of Torts.

This is concerned with the private wrongs that can result in an injury to another person or their property. The purpose of tort is to provide compensation for an individual not punishment for an offender.

c. Property Law

This is the law that governs the ownership of property and this can be further sub-divided into real property and personal property. The question of legal personality is very important in this area of private law (natural persons, incorporations, unincorporated associations).

The Rule of Law

The rule of law forms the basis of most liberal democracies. The rule of law can be found in a common law rule, a section of an act of the Oireachtas and a constitutional provision. The government of a society must function according to certain legal rules, rules that are established in advance. The rule of law requires that all rights and liabilities are set out in a legal form and can only be altered and changed by an agreed method. Also any laws that govern our actions should be public and precise, and not retrospective. Laws should also

be understandable in an intelligible form for people to understand the ramifications of a particular law. Laws are to be enforced by an independent authority, usually the judiciary.

Recommended Reading

Byrne & McCutcheon, *The Irish Legal System* (4th Edition), chp. 1.

O'Malley, *Sources of Law* (2nd Edition), chps. 4 and 7.

Smith, *Glanville Williams: Learning the Law* (12th Edition), chp. 1.

2. LEGAL HISTORY

Introduction

Generally we can divide the history of Irish law into four distinct periods:

- Law in Ireland before the Anglo-Norman invasion of 1169; The Brehon laws
- The development of common law in England and Ireland
- The 19th Century Reforms
- The Constitutional Upheavals of 1922–37

The Brehon Laws

Ireland was ruled by a system of tribes, or chiefs, and we also had a rather sophisticated legal system, known as Brehon law. This system was based on custom and was administered by travelling justices known as Brehons. Each family or *tuath* controlled their own districts and made their own rules. Brehon law reflected the society in which it developed and included the following principles:

- it was community based
- there were many offences against property
- there was no pretence at egalitarianism
- the position of women was subservient BUT she did have an extensive right of divorce
- developed a system of compensation for wrongs done
- system of outlawry

Common law was introduced to Ireland after the Norman conquest of 1170. However, it only applied in the area known as The Pale and had little influence in the rest of the country until the Elizabethan reconquest in the late 16th century. The law that applied outside The Pale was known as Brehon law. What is known about Brehon law is based on old Irish law texts of the 7th and 8th centuries, though surviving manuscripts date from the 12th to the 17th centuries.

The basic territorial unit in early Ireland was the *tuath*, which can be translated as “tribe” or “petty kingdom”. Between the 5th and 12th centuries there would have been at least 150 kings in Ireland at any given date. Each *tuath* would have been more or less autonomous. Despite this, the same law applied in every *tuath*.

One reason for this uniformity was that each king, though supreme within his own *tuath*, had a negligible role as a lawmaker. The law lay in the hands of a class of professional wise men. In pagan times they would have been known as druids, but by the 8th century they were known as *filid*.

The branch of the *filid* that specialised in law and practised as judges were known as *brithemain* from which the word “Brehon” is derived. The law set out in the law texts was studied by *filid* in law schools all over Ireland (Cork, Cloyne, Killarney, Kildare, Slane). For this reason, the law was uniform all over the country. The other type of lawyer was the *aigne*, whose role can be equated with that of a barrister or solicitor.

The king did have some powers in the legal sphere as he could make ordinances in times of emergency (e.g. plague or invasion). These ordinances would only affect his own kingdom, not national law. It is also thought that each king appointed a chief judge within his *tuath*.

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Examples of Brehon principles:

- It is illegal to give someone food in which a dead weasel or mouse has been found.
- If your neighbour does not repay the debt he owes you, you may prevent him from going about his daily business. A withe-tie goes around the blacksmith anvil, carpenter's axe, or tree feller's hatchet. He is on his honour to do no work until the debt is settled or wrong righted. If a bard or physician is the debtor, immobilise his horse whip for both and ride their circuits. The creditor may fast in front of the debtor's house to humiliate him until the debt is paid.
- If a rational adult brings a simpleton into an ale house for amusement and the simpleton injures a patron, the adult who brought him must make compensation.
- The blacksmith must rouse all sleeping customers before he puts the iron in the fire to guard against injury from sparks. Those who fall asleep again will receive no compensation.

Differences between Brehon Law and Modern Law

Because the concept of a centralised state did not exist at that time, offences that would be seen as crimes today would have been prosecuted privately and the wrongdoer would have had to compensate his victim.

Another essential factor in any legal system is law enforcement. Ireland at the time had no prisons or police force, but, despite this, decisions of the *brithemain* were carried out. Failure to carry out the orders of a court meant that that person would be excluded from the protection of the law.

The Enforcement Of Contracts Under Brehon Law

The institution of suretyship ensured that contracts were observed and that any breaches of contract were remedied. A surety was a person who promised to safeguard the performance of an agreement. The rationale behind this was that the surety would be either more vulnerable to public disgrace, or better able to pay than the person making the contract. For example, a person of high standing in the community would be disgraced if he failed to carry out his promises. Irish society at the time was very hierarchical and status was extremely important. Every person within the system had an honour price and to lose that honour price was seen as a disgrace.

The presence of a surety was a formal requirement for the making of a contract, otherwise, with certain exceptions, the contract would be invalid. There were three types of surety:

- Enforcing surety
- Paying surety
- Hostage surety

The Blood Feud

This was another important concept in Brehon law. If someone was injured, his entire kin was automatically involved in the dispute (Kin: four generations descended from the same great-grandfather). This was an incentive to settle the dispute peacefully. The injured person might want blood, but his kinsmen would be likely to persuade him to accept compensation.

If someone was murdered, the victim's family became entitled to compensation from the killer and his kin. If the compensation was not paid, the victim's family would be entitled to kill a member of the murderer's kin. If liability were contested, it would be adjudicated by a judge in the Brehon courts.

Succession Under Brehon Law

Primogeniture, the right of the first-born son to inherit his father's estate, was unknown in Brehon law. The law of succession that applied in Ireland was known as *tanistry*. In accordance with *tanistry*, the chieftancy and all lands and property connected with it passed to the eldest and worthiest male kinsman of the late chief, the *tánaiste*.

In 1608, in the *Case of Tanistry*, this custom was held to be unreasonable by common law standards and was struck down by the common law courts. This marked the end of Brehon law.

Development of the Common Law

In theory, common law arrived in Ireland with the invasion of Strongbow in 1169. In 1171 King Henry II set up a King's Council (*Curia Regis*) in Ireland. The Council declared the laws of England were "by all freely received and confirmed."

A court system was developed and was staffed by the King's justices who had the power to resolve disputes.

System:

- Writs,
- filed with Chancery Department,
- Possibility of appeal to King – on basis of justice and equity – this subsequently delegated to Chancellor,
- ultimately led to another court, Court of Chancery (well established by 17th/18th century).

England was a feudalist country that adopted a clear social order with recognition of rights and duties based on the feudal relationship. The King enjoyed almost absolute power and was advised by the King's Council; the

mechanism for acting during the King's absence. A court system was developed and was staffed by the King's justices who had the power to resolve disputes. The judiciary were in fact the enforcers of the King's law throughout the kingdom, and ultimately the power was delegated to them.

The courts consisted of inferior courts mainly concerned with the application of criminal law and the regulation of local trade and fairs. The royal courts, more importantly, were to develop the scope of the common law by the use of the very technical *writ system*. To bring a case to the common law courts a person had to file a complaint with the Chancery Department in the form of a writ, if the case did not fulfil the writ criteria it would not be heard. Where the writ did not succeed there was an appeal to the King. The King delegated this function to the Chancellor and he was to decide the case in accordance with "justice and equity".

Early English Law

By the 10th century, English law was customary law, with Germanic influences. Courts resembled public meetings where the principal men of the community discussed local affairs, presided over by a **doomsman**. Parties to disputes were persuaded to reach an amicable settlement – a **loveday**. If a dispute could not be resolved an ordeal might be used – an ordeal of hot iron or ordeal of cold water. Proof in civil cases was provided by oath helpers – **compurgators**.

Establishment of the Common Law

William the Conqueror promised that the English could keep their own laws unless these were judged unreasonable by the standards of the common law. The common law began to emerge in the 12th century and judges travelled around the country, applying the King's laws. By the end of the 12th century, Henry II appointed five judges, who were to remain permanently in Westminster. This was the **Curia Regis**, the first central royal court.

Equity and Common Law

By the 13th century the common law did not enjoy exclusive jurisdiction and Chancery courts had developed to deal with the law of equity. The Royal courts developed the technical rules and the procedures that enshrined the common law. The Chancellor traditionally came from a religious background and was to assist the monarch in matters of conscience.

The two systems did clash, and this clash came to a head during the 17th century, when equity effectively reversed a common law decision. In the common law case of *Courtney v. Glanvil*, Coke C.J. held that the Court of Chancery did not have power to intervene in the matter decided by the common law courts. Meanwhile the Lord Chancellor in the *Earl of Oxford's case* held that equity took precedence. The issue was determined by the Judicature Acts of 1873–1877, which stated that where there was a conflict between equity and common law, equity took precedence.

In the early 19th century, the old forms of action still applied in the common law courts and delays had turned the Court of Chancery into a scandal. Reform was necessary as the old forms of action were swept away, parties to actions were made competent, and compellable witnesses and more judges were appointed to the Court of Chancery. More reform took place later in the century. In England this was done by means of the ***Judicature Acts, 1875 and 1877*** and in Ireland by ***Judicature (Ireland) Act, 1877***. The ***Judicature (Ireland) Act*** set up a new High Court of Justice in Dublin. Appeals could be brought to the new Irish Court of Appeal and thence to the House of Lords in London.

Parliamentary Supremacy

It was some time before the judges accepted that statute law could take priority over common law. This did happen in around the 16th century during the reign of the Tudors. Ultimately the Parliament became the sole source of law-

making power in England and the judge's role was changed to the interpreter of that law

Ireland and the Common Law

Initially the common law was only operating in the Pale. Between the 1300s and the 1500s English law went into a decline. Parliament tried to introduce changes to curb this situation, and in 1480 the situation came to a head when a number of Anglo-Norman traders said that English law did not apply to them. Henry VII sent his Lord Deputy, Edward Poyning, to Ireland. Poyning's Law was introduced in 1494 requiring any Parliament assembled in Ireland to seek the prior approval of the King's Lieutenant in Ireland and of the King's Privy Council in London.

1541 Henry VIII declared King of Ireland and beginning of "surrender and re-grant" land programme.

1607 Flight of the Earls and the plantation of Ulster.

1. Introduction of the Common Law to Ireland

The king's court was also established in Dublin and by 1300 had branched out just as the curia regis had in London. By 1500 there were four courts: the **King's Bench, Common Pleas, Chancery** and **Exchequer**. It was possible to appeal to the English King's Bench, and, after 1719, to the House of Lords. In 1494 ***Poyning's Law*** was passed, providing that all laws passed by the English Parliament were directly applicable in Ireland. In 1540 Dublin got its own Inn of Court – the **King's Inn**.

2. The Plantations

The English law became law outside of the Pale during the 17th century. In the mid-16th century the system of "surrender and re-grant" ensured that more

areas were brought within the common law system. Henry also broke with the Church of Rome and was involved in the dissolution of monasteries and the redistribution of their land. A failed rebellion led to the flight of the Earls and these lands of Ulster were then subject to the subsequent system of plantations bringing more areas of Ireland under English rule. Acceptance of the dominance of the English laws in succession matters resulted in the waning of the influence of the Brehon laws. By the mid-17th century Ireland saw the arrival of Oliver Cromwell and this resulted in further resettlements of Irish land. Finally, the defeat of James II by William III led to the introduction of the Penal Laws in Ireland, and by this time we had assimilated the common law system.

3. Grattan's Parliament

The Irish Appeals Act, 1783 repealed Poyning's Act and renounced the claim to legislate for Ireland. This gave rise to Grattan's Parliament that sat during 1783–1800. Grattan's Parliament allowed some independence and legislation was enacted that repealed some of the Penal Laws. The 1798 Rebellion led to the Act of Union 1800 ensuring direct rule of Ireland from England.

Nineteenth Century Reforms

The Roman Catholic Relief Act, 1829 relaxed the Penal Laws quite significantly. This Act removed the ban on Catholics being elevated to the bench among other things. Daniel O'Connell was also trying unsuccessfully to repeal the Act of Union. Land reform was the burning issue at this time and the Land League was founded in 1879 by Davitt and Parnell, leading to land reform.

A. Home Rule

Ireland was still ruled from England, the Act of Union was still operational and the next real movement was the Home Rule movement. There was some move towards Home Rule with the passage of the Government of Ireland Act, 1914.

This act became irrelevant with the 1916 Rising, which resulted in a victory for Sinn Féin in the 1918 elections; in 1919 Sinn Féin called a meeting of the First Dáil.

B. The Treaty

The treaty of 6th December, 1921 dissolved the legislative union between Ireland and the UK and the Free State was born. This new Free State had the status of a self-governing dominion. In 1922 the Westminster Parliament passed the Irish Free State (Agreement) Act, giving the treaty legal force. In Dublin the 1922 Constitution was being drafted. At this stage the civil war had broken out and the Third Dáil met to enact the Constitution. It was finally approved in October 1922, and in December 1922 the Westminster Parliament enacted the Irish Free State Constitution Act and the Irish Free State (Consequential Provisions) Act. The Northern Ireland Parliament exercised its right to opt out of the Free State on 7th December of that year.

During the War of Independence the First Dáil had a policy of superseding British institutions. In 1919 **national arbitration tribunals** were set up to adjudicate cases. These were abolished in 1920 when a full-scale court system was set up in opposition to the existing courts. These were known as the **Dáil Courts**, and consisted of a Parish Court, District Court, Circuit Court, and Supreme Court. They were abolished in 1922, as they were bringing the administration of justice into disrepute.

The ***Government of Ireland Act, 1920*** set up a new court system in Northern Ireland. In 1922 Northern solicitors set up the Incorporated Law Society for Northern Ireland. In 1926 a separate Inn of Court was set up in Belfast.

The Irish Free State was set up in 1922 by the ***Constituent Act***. This consisted of the treaty and the Free State Constitution. The old court system remained in place until the passing of the ***Courts of Justice Act, 1924***, which set up a new court system. In 1937 a new constitution, ***Bunreacht na hÉireann*** came into force.

Constitutional Upheavals 1922–37

A Constitutional Committee chaired by Michael Collins drafted the 1922 constitution. When Michael Collins had negotiated the treaty and he agreed with Lloyd George to show a version of the draft constitution to them for their approval. The constitution was deprived of one of the most essential characteristics of a constitution that of being an instrument of supreme law. Article 2 of the 1922 Constitution stated:

...all powers of government and all authority, legislative executive and judicial are derived from the People of Ireland ...

Section 2 of the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922 stated:

...the Constitution shall be construed with reference to [the Treaty] ... and if any provision of the said Constitution or any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, it shall, to the extent of such repugnancy, be absolutely void and inoperative.

If there were any conflict between the texts the treaty would have taken precedence over the Constitution. Equally the Constitution of 1922 acknowledged the British Monarch as a constituent part of the legislature (Article 12). Article 17 required members of the Oireachtas to swear an oath of allegiance to the King. Another crucial element of the 1922 Constitution was Article 50 that provided that the constitution could be amended by the Oireachtas without reference to the people for a period of eight years from the date when the constitution took effect. Before the eight-year period had expired the government changed the constitution by means of ordinary legislation to extend the eight-year period for another eight years. So during its short existence, the 1922 Constitution was amendable by means of legislation only. In 1932 De Valera and Fianna Fáil formed a government and his primary

aim was to sever the connection with the British Crown. He proposed to do this by means of a constitution and by 1937 he was ready to present a charter for the Irish People to the Oireachtas and, more importantly, to the people. Instead of going to the Crown for ratification after it had passed through the Oireachtas it was sent to the people to ratify it.

Probably the most important point about the 1937 Constitution was stressed by De Valera during the debates on the Constitution:

If there is one thing more than another that is clear and shining through this whole Constitution, it is the fact that the people are the masters.

Further Reading

Byrne and McCutcheon, *The Irish Legal System*, Chapter 2.

Grimes and Horgan, *Introduction to Law in the Republic of Ireland*, Chapter 1.

Kelly - *A Guide to Early Irish Law* (Dublin Institute for Advanced Studies) Ch 6

Byrne & McCutcheon – Chapter 2

Newark – *The Bringing of English Law to Ireland* – 23 NILQ 2

Osborough – *Law in Ireland 1916-26* – 23 NILQ 48

3. THE CONSTITUTION

Constitutional History

What follows is a chronology of significant events leading to the enactment of the 1937 Irish Constitution.

19th Century Constitutional Developments

Act of Union, 1800

The Act of Union came into force in January 1801 establishing the United Kingdom of Great Britain and Ireland. Ireland was to be represented in both Houses of Parliament at Westminster. The Act lasted until 1922, some of the legislation passed in this period is still in force having been carried over by the 1922 and 1937 Constitutions.

Home Rule

The impact of the Home Rule Party in Westminster was strengthened under the leadership of Parnell and its popularity in Ireland was enhanced through its connection with the Land League. In the 1885 general election, candidates supporting home rule won 85 seats in the House of Commons. In 1886 the first Home Rule Bill was introduced into the House of Commons and defeated. In 1893 Gladstone introduced a second Home Rule Bill that was passed by the House of Commons but defeated by the House of Lords that had an inbuilt Conservative majority that was always likely to oppose home rule.

The Parliament Act, 1911 curtailed the power of the House of Lords from one of veto to one of delay.

1912. On Asquith's initiative the third Home Rule Bill giving Ireland a narrow measure of autonomy was introduced and passed by the House of Commons. Its inevitable defeat in the House of Lords would mean that it would become law by 1914.

There was vehement opposition to home rule in Ulster leading to the formation of the Ulster Volunteer Force (UVF) in 1913. The outbreak of World War I in 1914 also postponed the implementation of the Home Rule Act.

Among a minority of separatists in Ireland there was dissatisfaction with the measure of autonomy contained in the Home Rule Act and with the delay in its implementation. They seized the opportunity of Britain's preoccupation with the war and initiated an armed rebellion (the 1916 Easter Rising) that was easily crushed by the British armed forces. While popular support for the Rising was minimal, the manner in which its leaders were court-martialled and executed resulted in a shift in public opinion. Support drifted away from the Irish Parliamentary Party (Home Rule Party) under John Redmond to Sinn Féin that was a decidedly more ardent separatist/nationalist political organisation. (For a very clear account of this period see further: Brian Feeney, *Sinn Féin – One Hundred Turbulent Years*, (O'Brien Press, 2002)).

General Election 1918

General election for the United Kingdom of Great Britain and Ireland (the Home Rule Bill had not yet come into effect). Two factors were to have a significant effect on the course of Irish history: first, the enormous increase in the support for Sinn Féin following the 1916 executions and, second, the enactment of the Representation of People Act, 1918 that extended the franchise to all males over 20 and some women over 30 thereby trebling the size of the electorate. Sinn Féin won 73 of the 105 seats and, rather than take those seats at Westminster, formed what became known as the First Dáil.

20th Century Constitutional Developments

The 1919 Constitution of Dáil Éireann dealt mainly with procedures to be followed by the Dáil itself. It laid the grounds for future constitutional development and was, as Chubb (*The Constitution and Constitutional Change in Ireland*, Chp. 1) describes:

the constitution of a would-be government, itself an arm of an independence movement...short simple and hardly intended to provide an adequate basic law for an effective sovereign state.

He goes on to state:

In general, though it was clear enough that this was intended to be a provisional Constitution for the republic for which these representatives were contending, which, as an assembly, they embodied and which they hoped to make a reality.

Drafted alongside the 1919 Constitution was a Declaration of Independence and a democratic programme that reaffirmed the contents of the 1916 Proclamation.

The democratic programme was a statement of social and economic aims. It stated that the nation's sovereignty extended "not only to its citizens but also to its natural possessions, the natural wealth producing processes" and that rights of private property should be subordinated to public welfare. It had a declaration of fundamental rights and duties showing concern for education, social welfare, and equality and for the development of the nation's resources for the benefit of the people.

1919–1922

Dáil Éireann was treated as an illegal assembly by the British Government. Rival courts were set up by Dáil Éireann to oppose the established courts that lost

status. The British government reacted to the success of Dáil Éireann and began to arrest its members and the action led to the War of Independence from 1919–1921.

The Government of Ireland Act, 1920 provided for two separate parliaments, one in the north and one in the south. The Act also provided for a Council of Ireland with representatives from both parliaments. There was a theoretical option of unification which, unsurprisingly, was not availed of.

Elections were held for both parliaments in May 1921. The **First Dáil** considered the election in the south to be elections for the **Second Dáil**. Sinn Féin returned 124 members unopposed. De Valera was elected President.

The War of Independence ended with the truce in July 1921. De Valera began to have correspondence with Lloyd George (the British PM) on the possibility of a settlement. A peace conference began in October and ended in December when the agreement for a treaty between Great Britain and Ireland was eventually signed by the representatives of both countries. De Valera did not attend this conference himself but designated a number of “plenipotentiaries” (including Griffith and Collins) to negotiate on behalf of the Irish Government.

1922

The Second Dáil approved the Articles of Agreement for the Treaty by 64 votes to 57. De Valera, who opposed the treaty, tendered his resignation and was replaced as President of the Dáil by Arthur Griffith. The treaty was formally approved by the Second Dáil acting as the provisional government on 14th January 1922. This provisional government was the means through which power and administration were transferred from the British Government to the Irish Free State.

The 1922 Constitution

In June 1922 a constituent assembly was elected in the same manner as the Dáil to **enact** the Free State Constitution (which was published the day before the election) and was, in fact, the **Third Dáil**. It met in September 1922 but civil war had broken out in the meantime. By then Griffith and Collins were dead and the anti-treaty members (led by De Valera) refused to participate. The constitution was brought into force from a British standpoint by Royal Proclamation in December 1922.

Anti-treaty activists formed a new political party in 1926 called Fianna Fáil and it was headed by De Valera. In 1927 they entered Dáil Éireann despite earlier objections to the oath.

In 1932 this party won the largest number of seats in the general election and formed a minority government with the support of the Labour Party.

Amending the 1922 Constitution

Article 50 of the Free State Constitution allowed for amendments by ordinary legislation for the first 8 years. This was extended for a further 8 years with the result that all constitutional amendments passed between 1922 and 1936 were passed by ordinary legislation. A further consequence of this was that a robust system of judicial review did not develop under the 1922 Constitution and this may also partially explain the slowness with which such a system developed under the 1937 Constitution as well. The 1922 Constitution can thus be characterised as a flexible constitution lacking the character of rigidity usually associated with the basic or fundamental law of most states.

As the treaty was viewed by its supporters as affording “the freedom to achieve freedom” the process of expanding the autonomy of the Irish Free State (within the confines of dominion status) through various constitutional amendments began under Cosgrave’s Free State Government. It was accelerated after the coming to power of De Valera in 1932. He intensified the

process of dismantling the treaty (which was a more important legal instrument than the 1922 Constitution) and establishing “external association” with the Commonwealth.

Pre-1932 Amendments

These amendments included an extension of the period for amendment of the constitution by ordinary legislation; removal of the provision for external ministers; the infamous Article 2A added to the 1922 Constitution in 1931 (and longer than the constitution itself) containing an extensive catalogue of emergency provisions and suspending the fundamental rights provisions of the constitution. This amendment, which gave rise to the case *The State (Ryan) v Lennon* [1935] IR 170 and, arguably, contributed to the downfall of the Free State Government in the 1932 general election..

Post-1932 Amendments

Many were concerned with the removal of regal symbols from the Constitution, for example, the Constitution (Removal of the Oath) Act 1933 and Constitution (Amendment No.22) Act 1933. This latter amendment was an Act to terminate the right of appeal (from decisions of the Irish Supreme Court) to the Judicial Committee of the Privy Council. This was challenged in *Moore v Attorney General* (1935) IR 472.

The most radical removal of Crown symbols took place in 1936 when De Valera seized the opportunity of the abdication crisis to complete the process of establishing “external association”. It should be noted, however, that there remained a residue of monarchical connection until the declaration of a republic (by John A. Costello) in 1948.

By 1936 the IFS Constitution was a radically different document than the one appended to the Treaty in 1922. It was, according to Brian Farrell, “shredded and

patched beyond recognition". There were political and legal reasons to justify the enactment of a new Constitution. The 1922 Constitution had never been directly adopted by the People and none of the many amendments to the original document had ever received popular approval. Many of the amendments passed (especially those passed after 1932) were of dubious validity as they conflicted with the Treaty. The only stricture on constitutional amendment was that all amendments had to be in conformity with the Treaty. This had been confirmed as a foundational constitutional principle by the Irish Supreme Court in *State (Ryan) v. Lennon* but the purpose of most of De Valera's amendments was to dismantle the Treaty.

Further Reading

Casey *Constitutional Law in Ireland* (3rd edition), Chapter 1.

Murphy, "The 1937 Constitution - Some Historical Reflections" in Murphy & Twomey (eds.) *Ireland's Evolving Constitution 1937-1997* (Hart Publishing, 1998)

Fitzgerald, "The Irish Constitution in its Historical Context" *ibid.*

4. THE LEGISLATIVE PROCESS

Introduction

The Constitution confers legislative authority on the Oireachtas in Article 15.2.1, which states:

[t]he 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.

Characteristics of Legislation

Legislation reduces rules to a written and fixed verbal form. Legislative rules are stated in a directive manner that seeks to minimise or, in certain cases, circumscribe discretion. For example, the Copyright and Related Rights Bill, 1999, states at section 22(1):

In this Act 'a work of joint authorship' means a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors.

All of these provisions are set out in a certain verbal format, any other wording that is used to describe these provisions only seeks to explain the actual legislative provision, and is not acceptable as an alternative provision.

The Legislative Process

The legislature is the Oireachtas consists of the two Houses of Parliament (Dáil and Seanad) and the President. Legislation is passed both by the Dáil Éireann and Seanad Éireann and is then signed/promulgated by the President. The Dáil has supremacy over the Seanad; see Arts. 21, 23, & 24.

The President may refuse to sign a bill in two situations:

The President may refer a bill to the Supreme Court for a review of its constitutionality (Art. 26 reference) and also the procedure established under Article 27 enables the President to decline to sign a bill. Under the latter procedure a bill, having passed through both Houses of the Oireachtas, contains what are known as proposals of “national importance” and therefore the will of the People must be sought. This gives the People the power to veto a legislative proposal. It was never used although mooted by Bertie Ahern as a way of dealing with the abortion question.

Formal Process – Parliamentary Procedure

A. First Stage

Minister responsible for the bill obtains the permission of the House to circulate the bill.

B. Second Stage

The general provisions of the bill are debated. This is really a general debate about the philosophy and aims of the bill rather than the actual nuts and bolts of the bill. The sponsoring minister presents the government’s case for the bill and why it should become law. The other parties will speak and either support

or oppose the given measure. The House can reject the bill at this stage, but with a government bill it rarely happens.

C. Third Stage or Committee Stage

The details of the bill are debated section by section. This process can be very time-consuming so, as an alternative, bills may be sent to a select committee to deal with this stage. The select committee consists of members chosen by their parties to represent the House as a whole.

D. Fourth Stage or Report Stage

The purpose of this stage is to review the work that was done at committee stage. Amendments, if they arise at committee stage, may be made.

E. Fifth or Final stage

This completes the process. Only linguistic amendments are allowed at this stage. This generally occurs immediately after the fourth stage.

Private Members Bills

Bills that are not sponsored by a minister, the Attorney General or the Leader of the Seanad go through a similar process to the one just outlined with some variations on the process. Each political party may have one private member's bill before the House at a given time. The second stage of the process is limited to six hours and the bill is sent to select committee rather than a committee of the whole house. Other than that, the procedure is the same as for other bills.

Consolidated Legislation

A Consolidation Act, as the name suggests, is an act that re-enacts all the legislation on a particular topic into one Act. The legislation is often in place already therefore a shortened procedure is adopted.

Private Legislation

Private legislation undergoes a totally different process. Today petitions are brought to attempt to alleviate an individual set of circumstances that are not provided for in the normal way. This was recently used in relation to a proposed reform of the governance structures in the University of Dublin, Trinity College. This process took up a lot of parliamentary time until the end of the 18th century. In the past there have been private bills in relation to:

- Harbours – Dublin United Tramways (Lucan Electric Railway) Act 1927
- Bank of Ireland – Bank of Ireland Act 1929
- The Methodist Church – Methodist Church in Ireland Act 1945

Informal Process

Read Byrne and McCutcheon paragraphs 13.47–13.53 for a discussion of the informal processes that exist and also for a discussion on the sources of and influences on legislation.

1. Delegated Legislation consists of instruments enacted by a subordinate official or body given that power by the legislature. We have already seen that Article 15.2.1 talks of the “sole and exclusive” legislative power of the Oireachtas, but this is obviously qualified.

The courts have accepted that power may be delegated to supply the necessary detail to facilitate the implementation of the principles and policies that have been enacted in statute by the Oireachtas. The delegate must be expressly conferred with the power by an Act of the Oireachtas since it doesn't possess any inherent law-making capacity. The exercise of that power must be exercised within certain limitations.

Statutory instruments are on the increase and this is an indication of the importance of delegated or secondary legislation. The rationale is that the contents of delegated legislation tend to be a technical or administrative and it is therefore better that experts deal with it. Power is also delegated to regulatory bodies such as Bord na gCon (Irish Greyhound Board) or local authorities to make by-laws and so on.

Statutory Instruments are governed by the **Statutory Instruments Act 1947**, s1(1) that defines a "statutory instrument" as an "order, regulation, rule, scheme or by-law" that is made in pursuance of a statutory power.

Orders are generally made in respect of a single exercise of a delegated power. For example, compulsory purchase power, or an order that brings a statute into effect.

Rules and regulations are legislative in nature. Regulations tend to contain detailed provisions that relate to a particular statute. For example, the Health and Welfare at Work (Signs) Regulations 1995 are made under the Safety, Health and Welfare at Work 1989. Rules, on the other hand, generally refer to an instrument that governs court practice and procedure such as the *Rules of the Superior Court 1986*.

By-laws has the definition accorded to it by Lord Russell in the case of *Kruse v. Johnson* [1898] 2 QB 91, which was adopted in the Irish case of *The State (Harrington) v. Wallace*, [1988] IR 290. Lord Russell stated:

an ordinance affecting the public, or some portion of the public,
imposed by some authority clothed with statutory powers ordering

something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance.

Schemes are generally administrative in nature and generally consist of numerical material such as scales of fees and charges in a given area. So schemes relating to different charges are covered, such as telephone charges.

The Statutory Instruments Act, 1947 makes provision for the printing and publishing of certain statutory instruments, their deposit in certain libraries, and their publication in *Iris Oifigiuil*. Also with the development of the CD-ROM, which contains all Acts of the Oireachtas from 1922 to 1998, this information is also available on the Attorney General's website and this website now contains all the S.I.s from 1922. The Act also provides for the publication of statutory instruments, which is important for the rule of law.

1. Interpretation of Legislation. The task of interpreting legislation falls mainly on the courts but other bodies are involved such as civil servants, administrative agencies, tribunals, and so on. Most legislation is implemented with little difficulty, however, sometimes it is challenged and the following tools are employed by the courts.

Intention of the legislature. This is a difficult concept, as the Oireachtas contains a lot of people and to define their actual intent is impossible. Therefore, in effect, what it means is that the courts are required to act in a manner that does not usurp the legislative function.

See ***PJ v. JJ***, [1992] ILRM 273, where Barr J stated:

A court is entitled to interpret legislation so as to resolve any ambiguity or obvious error therein. However, where the statute is clear in its terms, the court has no power to extend its provisions to make good what is perceived to be a significant omission. If the court took that course it would entail going beyond statutory interpretation and into the realm of law making, a function which under the Constitution is reserved to the Oireachtas. Occasionally

circumstances arise where the court is powerless to avoid injustice. ...

The court cannot fill in or supply the omission through interpretation. Equally the court will not change obvious errors in the law – *The State (Murphy) v. Johnson*, [1983] IR 235. There is a strong presumption that the legislature does not make mistakes and where possible, statutory words must be construed so as to give a sensible meaning to them.

2. Rules of interpretation. There are a number of rules open to the court and they are the literal rule, the golden rule, and the mischief rule.

The literal rule. The court must attribute to a provision its literal meaning that has been described as the ordinary, commonplace, or grammatical sense in which the words are normally used. In *Rahill v. Brady*, [1971] IR 69 Budd J. expressed the rule as:

... the ordinary meaning of words should not be departed from unless adequate grounds can be found in the context in which the words are used to indicate that a literal interpretation would not give the real intention of the legislature.

In *Cork C. C. v. Whillock*, O'Flaherty J stated:

It is clear to me that the first rule of construction requires that a literal construction must be applied. If there is nothing to modify, alter, or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences.

Technical meanings. Where the words are terms of art they will bear the technical meaning not their ordinary meaning. Where a statute is directed at a class of people, the words are assigned the meaning understood by that class.

Where the literal approach leads to an absurdity the courts can use this approach that adopts the golden and mischief rules.

Golden rule. A court would invoke this rule where the application of the literal rule would have led to an absurdity or inconsistency. This rule means that the provision in question would be given a modified meaning or a different one to that urged by the literal rule. In the case of *The People (Attorney General) v. McGlynn*, [1967] IR 232, Budd J stated:

What has been described as the golden rule in the construction of statutes is that the words of the statute must *prima facie* be given their ordinary meaning. That literal construction has, however, but *prima facie* preference. As Lord Shaw said in *Shannon Realties v. St. Michel (Ville de)* at page 192 of the report:

'...where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system.'

Mischief rule. This allows the court to examine the pre-existing common law in order to determine the defect or mischief that the statute was designed to remedy. The statute was interpreted in a manner that was sufficient to deal with that defect. *Heydon's case* 1584 states:

And it was resolved by them that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:

1st What was the common law before the making of the Act,

2nd What was the mischief and defect for which the common law did not provide

3rd What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth, and

4th The true reason of the remedy

and then the office of all judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and the remedy, according to the true intent of the Act, *prop bono publico*.

3. Aids to Interpretation. There are a number of other presumptions to aid interpretation of legislation.

Presumption of constitutionality. It is presumed that all statutes enacted by the Oireachtas are constitutional until the contrary is established. This is based on the assumption that the Oireachtas intends to abide by the Constitution. See *Donegal Co-operative Livestock Mart Ltd. v. Attorney General*. This means that if there are two interpretations of a legislative enactment and one is constitutional and one is not, it will be presumed that the Constitutional version is the correct version.

Presumption of compatibility with EC law. It is accepted that EC legislation, such as regulations and directives, should be interpreted in such a way as is compatible with the provisions of the treaties. See *Dowling v. Ireland*, [1991] 2 IR 379.

Presumption of compatibility with international law. International law does not apply within the domestic legal system, it may, however, help with the assistance in interpretation. Equally, it is presumed that the Oireachtas intended to abide by its international legal obligations. See *Ó Domhnaill v. Merrick*, [1984] IR 151. The particular status of the ECHR, as an instrument of international law, has now to be reconsidered in light of the *ECHR Act, 2003*

that gives further effect to the ECHR in Irish law; this will be discussed as a separate topic later in the course.

Presumption that all words bear a meaning. In the case of *Cork Co. Co. v. Whillock*, [1993] 1 IR 231, Egan J. stated:

There is abundant authority for the presumption that words are not used in a statute without a meaning and are not tautologous or superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain.

Presumption that a statute should be given an "updated" meaning. This means that the legislation will be updated to modern meaning. There are a number of cases that have stated that the legislation should be updated, however, there are a number of concerns in this area. In *Keane v. An Bord Pleanala*, unreported 1995 Murphy J stated:

I have no difficulty in accepting the desirability and, in general, the necessity for giving to legislation an 'updating construction.' Where terminology used in legislation is wide enough to capture a subsequent invention, there is no reason to exclude it from the ambit of the legislation. But a distinction must be made between giving an updated construction to the general scheme of the legislation and altering the meaning of particular words used therein.

Further Reading

Byrne & McCutcheon, Chapters 13 & 14.

5. STATUTORY INTERPRETATION

When a statute (legislation) has been enacted, it may require interpretation by the courts. Their function is to discover the “intention of the legislature”. There are three basic rules of statutory interpretation:

- i. The Literal Rule
- ii. The Golden Rule
- iii. The Mischief Rule

The Literal Rule. Words must be given their ordinary, everyday meaning. If the application of the literal rule gives rise to an absurdity, the court may abandon it and apply one of the other rules. This will occur only where total absurdity would result (the fact that the literal meaning might give rise to an unfair, unjust, unreasonable, or inequitable result will not suffice). Only if the literal meaning will render the statute unworkable, meaningless, or grossly unreasonable may the court move on to another rule.

The Golden Rule. Where the literal meaning of a word would lead to an absurdity, the courts may ignore the Literal Rule and use this rule instead. The Golden Rule states that where there are two possible interpretations of a word or phrase, an absurd literal interpretation, and a reasonable interpretation, the latter must prevail.

The Mischief Rule. This is applied where neither the Literal nor the Golden Rule gives rise to an interpretation that is not absurd. It is also known as the Rule in Heydon’s Case. It allows the court to look at the position of the law before the statute was enacted in order to identify the problem that the statute was intended to solve. Doing this will show the purpose of the statute, and the ambiguous provision may be interpreted in the light of that purpose.

In Ireland the courts have avoided using the term “mischief rule” and prefer to take what is known as the schematic approach. The schematic approach entails

examining the general purpose of the statute. To do so, the court will look at the long title, the subject matter, and the pre-existing law that the statute was designed to change.

Once the statutory purpose has been identified, the provision will be interpreted in a manner consistent with that purpose that avoids the absurdity or ambiguity. The court may have to read words into the statute to do that. *cf. Nestor v. Murphy* [1979] IR 326

Other Aids to Interpretation

There are other aids to interpretation in addition to the three rules. Most statutes contain a definition section. There is also the **Interpretation Act 2005** that sets out definitions for various words. These definitions apply in every statute unless the statute in question expressly states otherwise. There are also presumptions and maxims of statutory interpretation.

Presumptions of Statutory Interpretation

- Presumption of Constitutionality
- Presumption of Compatibility with European Law
- Presumption of Compatibility with International Law
- Presumption that All Words bear a Meaning
- Presumption that a Statute should be given an Updated Meaning
- Presumption against Unclear Changes in the Law
- Presumption that Penal Statutes be interpreted strictly
- Presumption that Revenue Statutes be interpreted strictly
- Presumption in relation to Criminal Defences
- Presumption against Retrospective Effect
- Presumption against Extra-territorial Effect

Note, all presumptions are rebuttable.

Maxims of Statutory Interpretation

Expressio Unius est Exclusio Alterius: “To express one thing is to exclude another”

Ejusdem Generis: “Of the same kind or nature”

Noscitur a Sociis: “A thing is known by its associates”

Generalia Specialibus non Derogant: “Generalities do not derogate from specific provisions”

External Materials

The courts are permitted to look at other statutes that cover the same area as the statute they are attempting to interpret. Originally, this was the only type of external material at which the courts could look. Since the 1970s, the Irish courts have changed their minds. When trying to interpret the ***Succession Act, 1965***, the court examined Law Reform Commission reports and draft bills. They may also look at parliamentary debates on the particular provision they are interpreting.

Further Reading

Byrne & McCutcheon – ch 14

Glanville Williams – ch 7

Farrar & Dugdale – *Introduction to Legal Method* – pp 144-157

6. CASE LAW & CASE ANALYSIS

INTRODUCTION

Judicial decision-making involves the application of existing legal principles to particular factual situations. Precedent helps with consistency:

- Equal application of law
- Certainty of law

The system of *stare decisis* requires:

- hierarchy of courts
- accurate recording of prior decisions
- acceptance of the binding nature of precedence

The Courts must follow the prior decision of superior courts within the judicial hierarchy and must also follow decisions of courts of equal jurisdiction. Courts are not required to follow every relevant decision that preceded it; precedents are divided into *persuasive precedent* and *binding precedent*. The binding element of the judgement is the *ratio decidendi* and the persuasive element of a judgement is the *obiter dictum/obiter dicta*.

TERMINOLOGY

- Reversed decision: a decision in a lower court is replaced by that of a higher court usually via an appeal.
- *Res judicata*: a decision is final and no longer subject to the possibility of an appeal.

- To overrule: where a higher court decides that the lower court made an erroneous decision, this means the decision of the lower court is not to be followed in future; a rare event.
- To distinguish: where a later court decides that the previous case is not relevant to the case in front of it. Can be distinguished on the facts, legal issues. Cases are not deemed similar enough; also marginalises earlier decisions.
- *Per incuriam*: where a court reaches a decision in ignorance of a relevant statutory provision or binding authority. No valid proposition of law developed, later courts not bound.
- *Sub silentio*: Where it appears that a court decided a point without it being argued or mentioned in the judgement; later courts are not bound to follow it.

IRISH REPORTS

Access to reliable and accurately reported judicial decisions is crucial to the effective operation of a system of precedent, see the following:

- IR – Irish Reports
- ILRM – Irish Law Reports Monthly
- ITLR – Irish Times Law Reports, Monday's paper (in *Examiner* for brief period)
- ILTR – Irish Law Times Reports
- Ir. Jur. Rep. – Irish Jurist Reports

IRISH COURTS AND *STARE DECISIS*

The first element is that higher courts bind lower courts. The second element is that courts are bound by the decisions of courts of equal status.

Lower Courts – Supreme Court decisions are best **precedent**.

- Supreme Court will call lower courts to order – *McDonnell v. Byrne Engineering Co. Ltd.*¹
- In *The State (Harkin) v. O'Malley*² the Supreme Court held that the High Court was bound by an earlier Supreme Court decision and then overruled the decision on the grounds that it was decided erroneously and was a *per incuriam* decision
- Lower courts must follow decisions of a higher court even where it firmly believes them to be wrong. In *O'B v. Patwell*^β *****
- *Supreme Court* – Mid-sixties Supreme Court departed from the strict rule of *stare decisis*. In *The State (Quinn) v. Ryan*⁴ prosecutor challenged the constitutionality of section 29 of the Petty Sessions (Ireland) Act 1851. The Act had been challenged in two previous cases: that of *The State (Dowling) v. Kingston (No. 2)*⁵ and also in *The State (Duggan) v. Tapley*⁶. SC agreed that the provision was unconstitutional and declared its freedom to depart from a strict adherence to *stare decisis*. Walsh J. stated:

This is not to say, however, that the Court would depart from an earlier decision for any but the most compelling reasons. The advantages of *stare decisis* are many and obvious so long as it is remembered that it is a policy and not a binding, unalterable rule.

This approach was confirmed in *AG v. Ryan's Car Hire Ltd.*⁷ the Court didn't follow two of its own previous decisions, Kingsmill Moore stated:

In my opinion the rigid rule of *stare decisis* must in a Court of ultimate resort give place to a more elastic formula. Where such a Court is clearly

¹ *Irish Times* 4 October 1978

² [1978] I.R. 269.

³ [1994] 2 I.L.R.M. 465.

⁴ [1965] I.R. 110.

⁵ [1937] I.R. 669.

⁶ [1952] I.R. 62.

⁷ [1965] I.R. 642.

of the opinion that an earlier decision was erroneous it should be at liberty to refuse to follow it, at all events in exceptional cases.

Different approaches have been taken by the Supreme Court regarding departing from different decisions in *McNamara v. ESB*⁸ ***** also *Mogul of Ireland Ltd. v. Tipperary (North Riding) Co. Co.*⁹ Henchy J. stated:

A decision of the full Supreme Court... given in a fully-argued case and on a consideration of all the relevant materials, should not normally be overruled merely because a later Court inclines to a different conclusion. Of course, if possible, error should not be reinforced by repetition or affirmation, and the desirability of achieving certainty, stability, and predictability should yield to the demands of justice. However, a balance has to be struck between rigidity and vacillation, and to achieve that balance the later Court must, at least, be *clearly* of the opinion that the earlier decision was erroneous.

It is difficult to find the balance – see particularly the extradition cases in *Russell v. Fanning*¹⁰ a Supreme Court decision; two years later the court refused to follow the decision in *Finucane v. McMahon*.¹¹ The majority felt the earlier decision was wrongly decided. There was an internal dispute but the minority acceded to the position of the majority.

The High Court. There is little judicial opinion on the issue of *stare decisis* in the HC. There are a number of issues regarding the HC and *stare decisis* to be considered:

- The manner in which the court sits – 1 judge or 3.
- HC as appellate jurisdiction is unclear, should it bind all CC or just the circuit from which it is appealed.

⁸ [1975] I.R. **.

⁹ [1976] I.R. 260,

¹⁰ [1988] I.R.505.

¹¹ [1990] 1 I.R. 165.

- HC departs from earlier decisions with considerable hesitation – *Walsh v. President of the CC & DPP*.

Court of Criminal Appeal will depart from its own previous decisions, see *The People (AG) v. Moore*, where it refused to follow its own earlier decision as set out in *The People (AG) v. O'Neill*.

The court looked at the position in the CCA in England, which has a similar structure to that in the Irish Courts, and viewed the case law that allows the English Court to depart from its own decisions. Davitt P went on to state in relation to the principle of *stare decisis*, that:

We are not unmindful of the principle of *stare decisis* and of the desirability of having uniformity in judicial decisions interpreting the law. We think, however, that the interests of justice will best be served by giving effect to our own opinions, even though they differ from some of those expressed in *O'Neill's Case....*

Pre-1961 Decisions. Present courts established in 1961 – Courts (Establishment and Constitution) Act.

Kingsmill Moore J held pre-61 decisions should not bind SC today – *AG v. Ryan's Car Hire Ltd.* [1965] IR 642.

Henchy J., in *Mogul of Ireland v. Tipperary (North Riding) Co. Co.* stated that decisions, whether pre- or post-1961, should not be overruled unless they were clearly shown to be erroneous.

Pre-1922 House of Lords. There are a number of cases suggesting we should be bound by these – *Minister for Finance and AG v. O'Brien*.

It is questionable whether this is the position today, especially with the flexible approach to *stare decisis* adopted by SC.

Inferior Courts. These decisions are of persuasive authority only.

SC's job is to provide authoritative rulings for all other courts. SC selects the most appropriate authority if there are conflicting decisions.

Foreign Decisions. Foreign courts offer persuasive precedent. Foreign cases are often quoted in Irish cases particularly where there is no Irish authority on the issue.

Secondary Sources. Where there is an absence of authority the courts may have recourse to academic writings.

Ratio Decidendi & Obiter Dictum. Courts are only bound by the *ratio decidendi* of the case, which is the reason for the decision. When deciding a case judges will set out the reasons in support of certain argument and the reason for drawing their conclusions, this is the *ratio decidendi*. The courts do not have a heading called *ratio*, it is concealed within the reasoning. An *obiter dictum* is a proposition of law that is within the judgement but is not binding.

Ratio decidendi. The court makes decisions based on the facts before them, the principle is to apply the legal principle beyond its own facts. Courts must look for similarities and dissimilarities between cases, when a court is examining an earlier decision they will look to the judgement as to the rule being invoked, they are looking for the characteristics that are shared by the facts of the previous case.

E.g. John, a pedestrian, was walking home and he was crossing a pedestrian crossing when he was hit by Mary's car.

Mary, a cyclist, was cycling home. On her route she had to cross a railway line, when crossing, a train hit her.

The *ratio decidendi*, may be based on arguments put forward in a case. In *Brendan Dunne Ltd. v. FitzPatrick*, [1958] IR 29, the judge gave two reasons for the decision, both are part of the *ratio decidendi*.

Multiple Judgements – ratio decidendi. SC could have seven different judgements as in *Sinnott*; finding the ratio may be more difficult. A number of solutions are suggested:

- Majority judgement where one judgement is concurred with then that will contain the *ratio*.
- Majority judgement where the majority of judgements agree on the reasoning put forward then that will contain the *ratio*.
- Agreement as to outcome but with different reasons causes difficulties:
 - 1) *ratio* could consist of the sum of the reasons put forward
 - 2) *ratio* that attracts the majority of decisions
 - 3) The decision consists of a number of *rationes decidendi* and then attempt to get the one that most closely represents the majority
 - 4) Dissenting judgements are important in many instances to have proved influential in later cases
 - 5) Dissenting judgements may also influence what is the majority decision
 - 6) When a court divides evenly, the decision of the lower court stands

Obiter Dictum. This is a statement of law that is not binding. Statements made *obiter*, have persuasive precedent. Relevance depends on:

- The court it was delivered in
- The reputation of the judge
- How it was dealt with in different cases

- Its relevance to the case in question

Recommended Reading

Byrne & McCutcheon, *The Irish Legal System* (4th edition), Chapter 12.

A.T.H. Smith, *Glanville Williams: Learning the Law* (12th edition), Chapter 6.