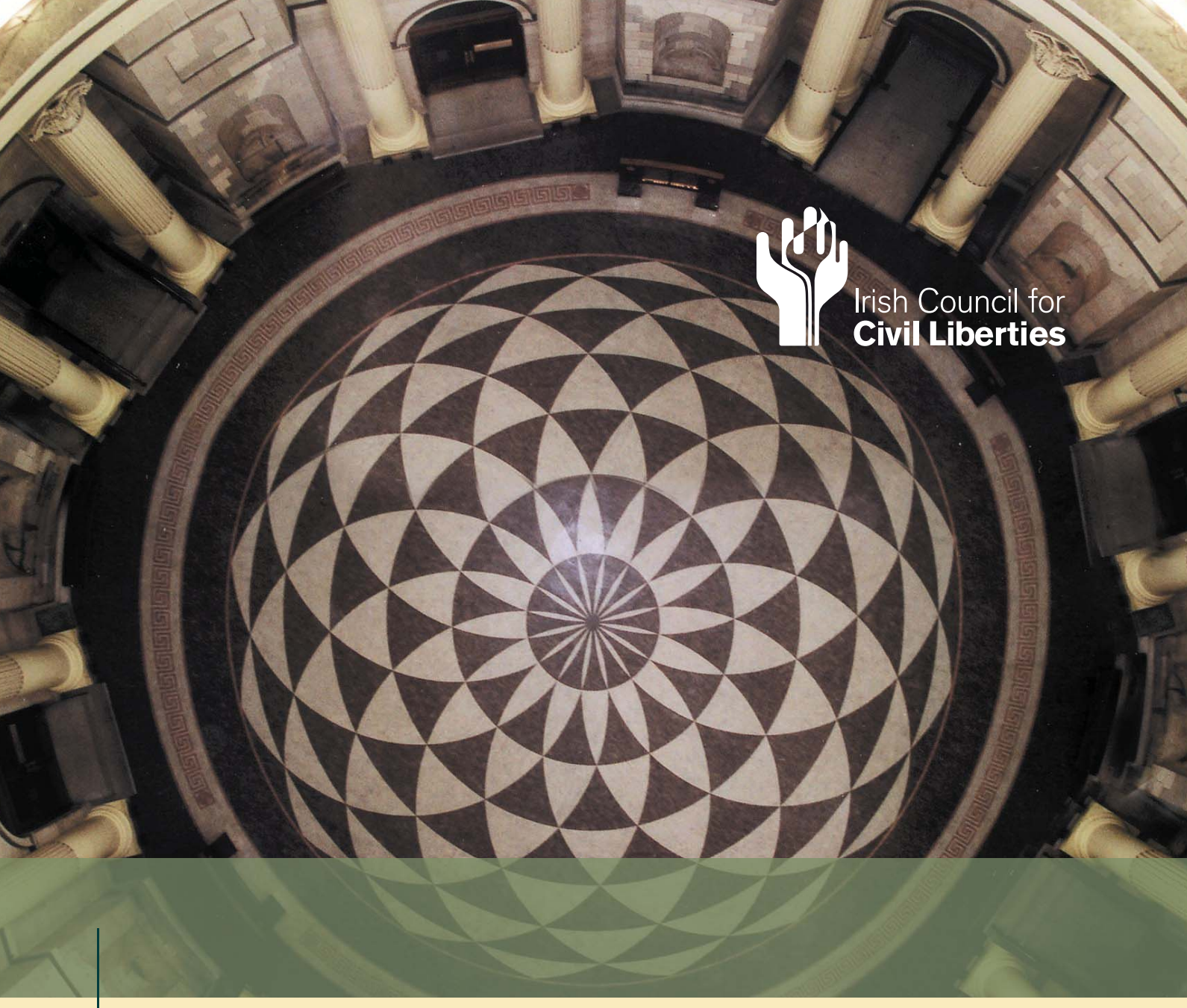

JUSTICE MATTERS

Independence, Accountability and the Irish Judiciary

TANYA WARD

The Irish Council for Civil Liberties (ICCL) is Ireland's leading independent human rights watchdog, which monitors, educates and campaigns in order to secure full enjoyment of human rights for everyone.

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About the ICCL

The Irish Council for Civil Liberties (ICCL) is Ireland's leading independent human rights watchdog, which monitors, educates and campaigns in order to secure full enjoyment of human rights for everyone.

We believe in a society which protects and promotes human rights, justice and equality.

ICCL - Irish Council for Civil Liberties, 9-13 Blackhall Place, Dublin 7

WHAT WE DO

The ICCL campaigns in three key areas: **Monitoring Human Rights, Promoting Justice and Securing Equality**, through:

- Advocating positive changes in the area of human rights;
- Monitoring government policy and legislation to make sure that it complies with international standards;
- Conducting original research and publishing reports on issues as diverse as equality for all families, Garda reform and judicial accountability;
- Running campaigns to raise public and political awareness of human rights, justice and equality issues;
- Working closely with other key stakeholders in the human rights, justice and equality sectors.

The priorities under each area:

MONITORING HUMAN RIGHTS

The ICCL campaigns to strengthen:

- the implementation of international human rights obligations in Irish law;
- the practice of rights through participative democracy;
- individual autonomy from disproportionate interference by the state.

PROMOTING JUSTICE

The ICCL campaigns for:

- effective, accountability structures for the Gardaí that have the trust of the public, and effective, proportionate police powers;
- effective penal policy not focused on incarceration, particularly in the area of youth justice;
- independence and accountability for the judiciary, specifically in the area of equality, racism and human rights.

SECURING EQUALITY

The ICCL campaigns to secure:

- equality proofing of law and policy;
- effective advocacy for marginalised communities;
- recognition for all of equal rights in personal and family relationships.

About the ICCL *(continued)*

Founded in 1976 by, among others Mary Robinson, former President of Ireland and UN High Commissioner for Human Rights and Professor Kader Asmal, an anti-apartheid campaigner and former South African Government Minister, the ICCL has always adopted a rights-based approach to its work.

From its early campaigns for Garda reform, through its advocacy of equal rights, to its ongoing efforts to ensure the full implementation in Ireland of international human rights standards, the ICCL has tirelessly lobbied the State to respect the inherent dignity of the individual.

ICCL has played a leading role in some of the most successful developments in human rights in Ireland, these include:

MONITORING HUMAN RIGHTS

- Ireland incorporating the European Convention on Human Rights (ECHR) with the ECHR Act 2003;
- Establishment of the Irish Human Rights Commission (2000);
- The Freedom of Information Act, 1997;
- Promoting human rights elements of the Good Friday (Belfast) Agreement, 1998.

PROMOTING JUSTICE

- Contributing to the Garda Human Rights Audit;
- Establishment and membership of the Garda Strategic Human Rights Advisory Committee;
- Establishment of an independent Garda Ombudsman Commission (2007);
- Producing a guide to the ECHR for all serving Garda members (2006).

SECURING EQUALITY

- Introduction of multi ground equality legislation;
- Removal of the Constitutional ban on divorce (1995);
- Promoting equality for gay women and men which contributed to decriminalising homosexuality (1993);
- Placing issues including mental health, refugee rights and immigration on the political agenda.

Acknowledgements

This project could not have been undertaken without the support and assistance of the Courts Service and the ICCL would like to extend its gratitude to its staff, and in particular, to: Mr Brendan Ryan, Director of Corporate Services; Ms Elisha Darcy and Ms Catriona Gilheaney. The ICCL would also like to thank all those who met with the researcher and agreed to be interviewed, including sitting and retired members of the Irish judiciary.

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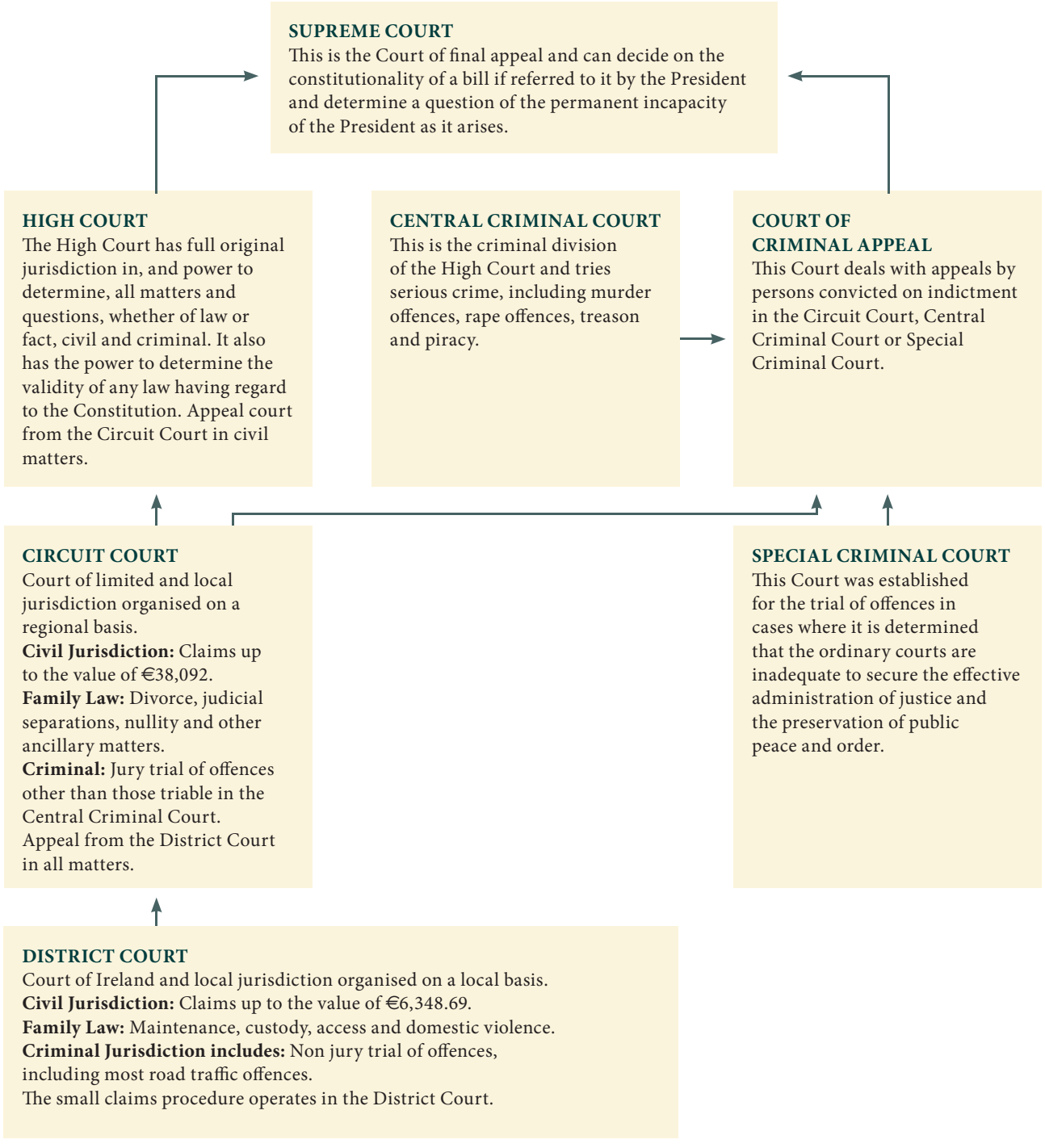
FIGURE 1: STRUCTURE AND JURISDICTION OF THE COURTS[1]



1. Table reproduced from the Court Services Annual Report 2001, at p. 17 with permission.

01

INTRODUCTION

Scales of Justice, the Four Courts.
Source: Irish Times ©

1.1 INTRODUCTION

Human rights cannot be protected without an independent judiciary functioning under the rule of law.[2] Broadly speaking judicial independence requires that judges be protected from governmental and other pressures so they can try cases fairly and impartially.[3] Liberal democracies subscribe to constitutional principles which require that political power be bound by legally enforceable restrictions, human rights guarantees and the allocation of state functions to distinct bodies.[4] An independent judiciary charged with upholding rights through a system of judicial review is crucial for the proper functioning of our democracy.[5] However, judicial independence does not just happen and requires institutional and individual protections in the form of constitutional mandates, legislative provisions and administrative structures.[6]

The purpose of this report is to examine international human rights standards on judicial independence and assess the adequacy of Irish law and policy in light of this international framework. The right of access to a competent, independent and impartial court/tribunal is a fundamental human right and is found in several legally enforceable human rights treaties applicable to Ireland including: the International Covenant on Civil and Political Right (ICCPR) the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the European Convention on Human Rights (ECHR).

Standards on judicial independence are also found in soft law (non-legal standards that are not legally enforceable), for example, the *United Nations Basic Principles on the Independence of the Judiciary* and the *Bangalore Principles on Judicial* Conduct. The UN principles were formulated in 1985 for states to secure and promote judicial independence through the framework of their national legislation and refer to: independence; freedom of expression and association; qualifications, selection and training; conditions of service, tenure, discipline, suspension and removal.[7]

2. Apple, J. G. (1998) 'The Role of Judicial Independence and Judicial Leadership in the Protection of Human Rights' in Cotran, E. and Sherif, A.O. (eds) *The Role of the Judiciary in the Protection of Human Rights*, CIMEL Book Series No. 5/SOAS, at p. 198.
3. Stevens, R. (1994) *The Judiciary in England and Wales*, Justice: London, at p. 4.
4. Lane, J.E (1996) *Constitutions and Political Theory*, Manchester University Press.
5. Refer to Box 2 – What is Judicial Review? in Section 2.
6. Apple, *ibid*, p. 201.
7. Office of the High Commissioner for Human Rights "Basic Principles on the Independence of the Judiciary", adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Refer to Appendix 1.

In turn, the 2002 Bangalore Principles complement the UN standards and are designed to provide guidance to judges and a framework for regulating judicial conduct.[8]

Inspired by the American Constitution, the Irish Constitution of 1937 predates the international human rights movement which emerged after the Second World War. The Irish Constitution is based on the classic separation of powers model,[9] which regards judicial independence as central to the administration of justice. However, almost no published research exists examining whether Irish law and policy in this area complies with relevant international human rights standards. This is despite recent reforms such as the establishment of the Courts Service in November 1999 and several reviews on judicial conduct and ethics.[10]

Scholarship on the judiciary mainly centres on Irish constitutional standards concerning independence,[11] judicial interpretation and the vindication of Irish constitutional rights.[12] This is not surprising given that the Constitution incorporates a catalogue of fundamental rights and freedoms, including unenumerated rights identified by the judiciary, and is the most important legal document guaranteeing human rights in this jurisdiction. The emphasis on constitutional standards is also in part due to the fact that Ireland has a dualist legal system,[13] and therefore, international human rights norms are only justiciable if they have constitutional status or have been incorporated through ordinary domestic legislation.

There are two important developments which also make this research topic extremely worthwhile. Firstly, pursuant to the European Convention on Human Rights (ECHR) Act 2003, the ECHR is now part of Irish domestic law. An interpretative model was adopted, which obliges courts to interpret statutory provisions or rules of law in a manner which is compatible with Convention rights.[14] Secondly, the Irish Government is currently preparing a Judicial Council Bill in order to implement recommendations from the Report of the Committee on Judicial Conduct and Ethics.[15] It is envisioned that the Bill will for example: establish a Judicial Council (involving judges and non-lawyers) to devise a Code of Ethics for judges; handle complaints against judges; manage judicial training and share information on sentencing.[16]

8. The Bangalore Principles of Judicial Conduct are a product of several years work by the Judicial Group for the Strengthening of Judicial Integrity (JGSJI) comprising ten Chief Justices from Asia and Africa. The Bangalore Principles were endorsed by the UN Commission on Human Rights in 2003. Refer to Appendix 2.
9. The separation of powers is discussed in more detail in Section 2.2.
10. All-Party Oireachtas Committee on the Constitution (1999) Fourth Progress Report: The Courts and the Judiciary, Government Stationery Office: Dublin; Committee on Judicial Conduct and Ethics Report (2000) Report of the Committee on Judicial Conduct and Ethics, Government Stationery Office: Dublin.
11. See for example, Byrne, R. and McCutcheon, J. P. (1996) *The Irish Legal System*, Butterworths: Dublin, third edition, at p. 122; Hogan, G.W. and Whyte, G.F. (2003) *JM Kelly: The Irish Constitution*, Lexis Nexus/Butterworths: Dublin, at p. 993; Casey, J. (2000) Constitutional Law in *Ireland*, Sweet & Maxwell: Dublin, at p. 221-314.
12. Hogan, G. (1990) "Ryan's Case Re-Evaluated", *Irish Jurist*, Vol. xxvxxvii, at p. 95; Connolly, A. (ed) (1993) *Gender and the Law in Ireland*, Oaktree Press: Dublin; Humphreys, R. (1993) "Interpreting Natural Rights"; Hogan, G. (1997) "The Constitution, Property Rights and Proportionality", *Irish Jurist*, Vol. xxxii, at 373; Keane, R. (1998) "The Role of the Judiciary in the Protection of Human Rights: The Irish Experience"; Murphy, T. and Twomey, T. (eds) (1998) *Ireland's Evolving Constitution*, 1937-1997: *Collected Essays*, Hart Publishing: Oxford; McDermott, P. A. (2000) "The Separation of Powers and the Doctrine of Non-Justiciability", *Irish Jurist*, Vol., xxxv, at p. 280; Hogan, G. (2001) "Directive Principles, Socio-Economic Rights and the Constitution", *Irish Jurist*, Vol. xxxvi, at p. 174; Morgan, D. G. (2001) *A Judgment Too Far? Judicial Activism and the Constitution*, Cork University Press; Whyte, G. (2001) *Social Inclusion and the Legal System Public Interest Law in Ireland*, Institute of Public Administration: Dublin; DeBlacam, M. (2002) "Children, constitutional rights and the separation of powers" *Irish Jurist* xxxvii, at p. 113-42; Quinlivan, S. and Keys, M. (2002) "Official Indifference and Persistent Procrastination: An Analysis of Sinnott", *Judicial Studies Institute Journal*, Vol. 2, No. 2, at 163; Hogan, G.W. and Whyte, G.F. *ibid*.
13. Article 29.6 of the Constitution provides: "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."
14. Section 2(1) European Convention on Human Rights Act, 2003.
15. Committee on Judicial Conduct and Ethics Report (2000) *Report of the Committee on Judicial Conduct and Ethics Report*, Government Stationery Office: Dublin.
16. Information source, Brian Ingoldsby, Principal Office, Civil Law Reform Section, Department of Justice, Equality and Law Reform, telephone conversation 9 May 2005.

BOX 1: WHAT IS THE FUNCTION OF A JUDGE?

A judge is "a state official with power to adjudicate on disputes and other matters brought before the courts for decision".* In common law countries such as Ireland, judges usually operate within the adversarial system of justice. They are tasked with issuing final judgments and granting remedies (damages, injunctions and other legal orders) at the end of a case. In criminal cases, judges generally do not decide on questions of innocence or guilt, this is preserved for a jury of laypersons. Instead, judges provide guidance to the jury on questions of law and ensure that the rights of all parties are respected. Judges are also responsible for handing down sentences to individuals who have been found guilty of a crime. Lastly, judges can be asked to conduct independent investigations and chair tribunals of inquiry.

* Martin, E. A. and Law, J. (2006) *Oxford Dictionary of Law*, Oxford University Press, at p. 295.

1.2 AIMS AND OBJECTIVES OF STUDY

The main objective of this report is to assess the extent to which the Irish judiciary complies with international human rights standards and principles on independence under the following headings. These headings are based on international human rights standards on judicial independence:

- Functional/structural independence;
- Independence in decision-making;
- Judicial impartiality;
- Jurisdictional competence;
- The right and duty to ensure fair court proceedings and deliver reasoned decisions;
- Adequate resourcing and administration of the courts;
- Judicial appointments;
- Conditions of service and tenure;
- Adequate remuneration;
- Freedom of expression and association;
- Competence and diligence and;
- Judicial accountability.

1.3 METHODOLOGY

The methodology for this research relied on a combination of desk research and qualitative methods. Relevant literature and materials from the UN, the Council of Europe and other international sources were reviewed.

In September 2005 a study visit was organised to learn more about recent changes in relation to the Human Rights Act 1998 and matters pertaining to judicial studies and new procedures for appointments in the UK.[17] Between September 2005 and January 2006 meetings took place with representatives from Irish government departments, legal entities and statutory bodies, non-governmental organisations (NGOs) and key individuals to gain an insight into relevant issues for this study.[18]

A special effort was made to consult with members of the Irish judiciary given the subject matter of the report. A structured interview was devised to understand their experiences of life on the Bench and gather their perspectives on how international human rights standards unfold in court.[19] The interview template was initially piloted in November 2005 with a retired judge who was a member of the Superior Courts and in January 2006, with the assistance of the Judicial Studies Institute, this author wrote to 130 judges asking them to participate in the study. Irish judges sitting on international courts were also contacted.

In terms of responses, two judges refused to participate in the study. One cited judicial independence as a factor and the other explained that he already had negative experiences with researchers. Another judge responded to the interview questions in writing and seventeen other judges agreed to be interviewed but only sixteen interviews took place between January 2006 and January 2007.[20] This is a positive outcome given that judges have declined in the past to take part in research projects conducted by non-governmental organisations because of issues around judicial independence.[21]

Of the fourteen interviews which occurred with judges currently on the Bench, six were with justices of the Superior Courts and five were with justices of the Circuit Court and another with a judge of an international court. A further interview took place with another retired judge of the Superior Courts and two more with District Court judges. Interviews were only recorded with permission and judges were advised that their comments would remain confidential and any comments cited in the report would be non-attributable. Further, of all the interviews that took place, two occurred with women.

For the purpose of the present report, the interviews with judges are numbered depending on the date of interview and also to distinguish judicial responses.[22]

Finally, not all data obtained from these interviews is reflected in the present document. A second research paper will look at how international human rights standards are utilised before the Irish courts.

17. Refer to Appendix 3 for full list of consultation meetings.
18. Refer to Appendix 3 for full list of consultation meetings.
19. Interview questions related to: 1. Background, training and legal education; 2. judicial supports; 3. the role of the judiciary and judicial interpretation; 4. engagement with the public and 5. complaints mechanism and removals.
20. Five interviews did not take place as the research process was stalled from February to April 2006 due a fire which occurred in the ICCL's offices on 27 January 2006. When some judges were contacted again in April/May 2006 they either did not respond or were too busy to meet.
21. Referring to judicial independence, judges of the Superior Courts refused to participate in the production of a report by the Working Party on the Legal and Judicial Process (1996) *Report of the Working Party on the Legal and Judicial Process for Victims of Sexual and Other Crimes of Violence Against Women and Children*, National Women's Council of Ireland: Dublin.
22. Refer to Appendix 4.

1.4 REPORT OUTLINE

Section 2 introduces the concept of judicial independence and impartiality and examines international human rights standards on the topic, as well as non-legal principles emanating from the UN and other international bodies.

Section 3 determines whether Irish legal and other provisions comply with international standards guaranteeing functional independence/structural independence and independence in decision-making. Jurisdictional competence of the Irish courts is also considered together with the right and duty of judges to ensure fair court proceedings and deliver reasoned decisions.

Section 4 studies international standards on personal independence for judges and looks at Irish law and practice regarding: judicial appointments; conditions of service and tenure; remuneration; freedom of expression and association; competence, diligence and judicial studies and judicial accountability.

Section 5 focuses on judicial impartiality and determines whether Irish law and practice complies with international standards under the following headings: disqualification; the appointments process; personal and corporate bias; the allocation of cases to judges; the management of fair court proceedings and training and awareness.

Section 6 assesses whether the Irish courts have adequate resources to enable judges to act independently and properly perform their functions. This section considers administrative independence and to what degree the administrative structures of the Irish courts system operate independently.

Section 7 provides a summary of the report's recommendations.

02

INTERNATIONAL HUMAN RIGHTS STANDARDS ON JUDICIAL INDEPENDENCE AND IMPARTIALITY

2.1 INTRODUCTION

This section examines international human rights standards and principles on judicial independence. Human rights law supplies important standards of treatment, which governments agree to apply to all people within their territories. Committees monitoring these conventions, for example, the UN Human Rights Committee,[1] have developed a body of doctrine that can be used as an aid for the interpretation of domestic statutes, and as a guide for law reform and policy making. As regards the ECHR, its standards and jurisprudence from the European Court of Human Rights are binding internationally, and domestically, due to section 2(1) of the ECHR Act 2003 which requires Irish courts when interpreting and applying any statutory provision or rule of law, to do so "in a manner compatible with the State's obligations under the Convention provisions". Section 4 also requires judges to take notice of Convention provisions and jurisprudence from the European Court of Human Rights[2] and the European Commission[3] of Human Rights, together with any decision from the Committee of Ministers.[4]

The following sections introduce the concept of judicial independence and describe the sources of international standards and principles on judicial independence and impartiality.

2.2 WHAT IS JUDICIAL INDEPENDENCE?

As a concept, judicial independence is closely associated with the emergence of liberal ideology and legal positivism[5] in the eighteenth century. Theorists such as Locke, Montesquieu and Blackstone wrote about the importance of a separate judiciary, independent from other branches of government in order to protect individual liberties and prevent the abuse of state power – the separation of powers model.[6] Their ideas, particularly Blackstone's, went on to influence the drafters of the US Constitution, which incorporates a separation of powers model by establishing an independent federal judiciary and separating the legislative branch's law-making function[7] from the law-applying role of the judicial branch.[8]

There are three different aspects to judicial independence: functional independence, personal independence and court administration.[9]

Functional independence (or constitutional independence) refers to structural guarantees such as the doctrine of the separation of powers, and other institutional rules protecting judges from elected officials or powerful economic actors who might seek to manipulate legal proceedings to their advantage.[10] In a constitutional democracy, this means that laws should comply with written constitutions, and courts must have the key responsibility for deciding which laws survive this test through judicial review.[11]

Personal independence refers to individual protections in the form of constitutional and legislative provisions protecting judges from reprisals and enabling them to make possibly unpopular decisions. These provisions relate to: appointment, promotion, remuneration, incompatibilities in relation to other activities, duration of term of office, irremovability and the exercise of disciplinary powers.

1. The Human Rights Committee is comprised of international experts and meets several times a year. The Human Rights Committee monitors the conduct of state parties under the International Covenant on Civil and Political Rights (ICCPR) and can issue opinions on communications filed by individuals alleging violations of their rights under the Optional Protocol to the ICCPR. www.ohchr.org/english/bodies/hrc/index.htm
2. Section 4(a), ECHR Act 2003.
3. Section 4(b), ECHR Act 2003.
4. Section 4(c), ECHR Act 2003.
5. Devlin explains that legal positivism is driven by a quest for conceptual clarity and order and aspires to be a scientific account of the law. Devlin, R.F. (2001) "Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education", *Queens Law Journal, 27 Queen's L.J.*, at p.161.
6. American Bar Association (1997) *An Independent Judiciary a Report of the Commission on the Separation of Powers and Judicial Independence*, American Bar Association www.abanet.org; O'Connor, S. D. (2003) "The Importance of Judicial Independence", presentation to Arab Judicial Forum, Manama, Bahrain.
7. Article 2, US Constitution.
8. Article 3, US Constitution.
9. These headings are based on those used in United Nations (2003) *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers – Professional Training Series No. 9*, UN: New York and Geneva.
10. Ferejohn, J. (1998) "Dynamics of Judicial Independence: Independence Judges, Dependent Judiciary", paper delivered to a Symposium on Judicial Independence and Accountability, organised by USC Law School, http://www.usc.edu/dept/law/symposia/judicial/pdf/ferejohn.pdf
11. *Ibid*.

Court administration or administrative independence concerns the management of the court system. In order to guarantee an independent judiciary, judges must be able to manage the courts, because if any party to a case (including the State) controls the administrative aspects of adjudication, judicial independence can be undermined.[12] The leading Canadian case in this area is *Valente v The Queen*[13] in which Justice Gerald Le Dain identified three facets of judicial administration that he held must be under the judiciary's control, namely: the assignment of judges to cases, the sittings of courts and the writing of court hearing lists.

Although judicial independence has been given much consideration by scholars over the years, the United Nations (UN) and the Council of Europe (COE) initiated a period of focused work in the 1980s. This was partly in response to work carried out by the International Commission of Jurists (ICJ)[14] , which set up the Centre for the Independence of Judges and Lawyers (CIJL) in Geneva in 1978. The CIJL was instrumental in the development of the UN Principles on the Independence of the Judiciary, adopted by the General Assembly in 1985.[15]

However, it is also important to remember that the constitutionalisation of rights and the establishment of judicial review is a common feature in almost all new written constitutions since World War II. Hischl calls this sweeping worldwide convergence to constitutionalism "juristocracy" and believes that "an adversarial American-style discourse has become a dominant form of political discourse in these countries".[16] The UN, in particular, has played a prominent role in promoting the idea of a constitutionally protected independent judiciary over the last two decades.[17] For the UN, judicial independence is essential for safeguarding human rights and promotes standards on judicial independence in its work in transitional democracies around rebuilding judicial systems.[18]

Finally, the UN is not the only institution working with transitional type democracies in this field. At a regional level, the Council of Europe[19] and the European Union[20] have both been involved in assisting former Soviet bloc countries to adopt an independent judicial system as part of a transition to a western model of democracy and market economy.

12. Russell, P. H. (2001) "Toward a General Theory of Judicial Independence" in Russell. P.H. and O'Brien, D. M. (eds) *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World*, Virginia University Press: Charlottesville and London, at p. 20.
13. 1985, 2 S.C.R. at 673.
14. http://www.icj.org/
15. *Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by United Nations General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.*
16. Hirschl, R. (2004) *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Harvard University Press: Cambridge/ Massachusetts and London, at p. 1.
17. Keith, L.C., at p196. The UN's activities in this area have not always been successful. Murati writes about the United Nations Interim Administration in Kosovo (UNMIK) and describes how it issued a package of Regulations designed to recreate an independent judiciary and enhance its legal system. However, Murati explains that in practice the Regulations were difficult to apply and confused the UNMIK and Kosovoan authorities/judges because they were a 'quick solution' and imposed on existing law. See Murati, G. (2005) "The Independence of the Judiciary and Its Role in the Protection of Human Rights under UN Administration Using the Case of Kosovo" http://www.esil-sedi.org/english/pdf/Murati.PDF
18. UN Background Note: *Independence of the Judiciary: A Human Rights Priority* www.un.org/rights/dpil1837e.htm
19. The COE has promoted judicial independence predominantly through its Directorate General of Legal Affairs and the Venice Commission. www.coe.int
20. Refer to the EU Monitoring and Accession Programme at www.eumap.org and The EU Access Monitoring Programme/Open Society Institute (2001) *Monitoring the EU Accession Process: Judicial Independence*, Open Society Institute: New York and Budapest.

2.3 WHAT IS JUDICIAL IMPARTIALITY?

Impartiality is essential for maintaining the rule of law and ensuring that everyone is subject to the same general rules. It embodies the ideal that judges base their decisions on objective criteria rather than on select viewpoints, ideological perspectives or prejudice.[21] Judicial bias, then, leads to subjective decisions and undermines the right to a fair trial.

According to Griffith, bias among the judiciary can occur in two forms: personally and corporately.[22] Personal bias happens when a judge permits his or her personal prejudice to influence his/her judgement and the final outcome of a case. Heywood further develops the concept of personal bias and distinguishes between external and internal bias:

> External bias is derived from the influence that political bodies, such as parties, the assembly and government, are able to exert on the judiciary. Internal bias stems from the prejudices and sympathies of judges themselves, particularly from those that intrude into the process of judicial decision-making.[23]

Internal bias not only occurs when judges preside over a matter in which they have a personal interest or involvement, which is contrary to the basic principle of justice - *nemo judex in causa sua*,[24] it can also happen when judges are selected for appointment on the basis of their political views. Again, the US is the obvious example here. The Human Rights Campaign Foundation cite a study of over 4,000 cases decided by the federal courts showing the ideology of the president who appointed the judge to be a good indicator of how he/she will decide the case, particularly in cases on abortion and affirmative action.[25] It has been suggested that personal bias of this nature can be overcome by making sure that courts are ideologically balanced to ensure that bias of a particular kind is evenly spread and through equal protection clauses in law.[26]

Corporate bias refers to the fact that because of their background, judges tend to have a particular outlook on life and a similar value system, which might lead them to decide certain types of cases in a biased way.

> These judges have by their education and training and the pursuit of their profession as barristers, required a strikingly homogenous collection of attitudes, beliefs and principles, which to them represent the public interest.[27]

The concept of corporate bias is discussed further in section 5.

21. Prejudice in this context refers to preconceived ideas or holding biased views against social groups.
22. Griffith, J. A. G. (2001) *The Politics of the Judiciary*, Fontana Press: London. Refer to Chapter 9 on the political role of judges.
23. Heywood, A. (2002) *Politics*, Palgrave Macmillan: London.
24. This is Latin for 'no man can be a judge in his own case' and is closely linked to other principles of justice such as *audi alteram partem* which is Latin for 'hearing the other side'. Refer to the Oxford Dictionary of Law (2006), at p. 354 and p. 46 respectively.
25. Human Rights Campaign Foundation (2004) *Justice for All? The Importance of a Fair and Balanced Judiciary for the GLBT Community*, Human Rights Campaign Foundation: Washington DC, at p. 25.
26. *Ibid*, at p. 33.
27. Griffith, *supra*, at p. 295.

2.4 INTERNATIONAL HUMAN RIGHTS LAW STANDARDS ON JUDICIAL INDEPENDENCE

2.4.1 UN INSTRUMENTS

Standards on judicial independence and impartiality are not mentioned in the Charter[28] establishing the UN. However, the overall concept of 'justice' in the Charter incorporates respect for human rights and is conditional upon judicial independence and impartiality.[29] Several articles in the Universal Declaration on Human Rights (UDHR)[30] either directly or indirectly emphasise the importance of judicial independence.[31] Article 10 of the UDHR provides a right to "a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". In fact, the principle of an independent and impartial judiciary is generally considered to form part of international customary law and is located in several human rights treaties applicable to Ireland, including the ICCPR and the ECHR. For example, Article 14 of the ICCPR provides that:

UN General Assembly.
Source: Getty Images ©

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, *everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (emphasis added).*

The UN Human Rights Committee has unambiguously held that the "right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception".[32] The Human Rights Committee generally relies on a functional notion of judicial independence.

> States parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their term of office; the conditions governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.[33]

The Human Rights Committee defines impartiality as the absence of personal bias and makes clear that court procedures should allow for disqualification if a judge can be shown to be personally biased.

> The impartiality of the court and the publicity of proceedings are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1. "Impartiality" of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider ex officio these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14.[34]

28. www.un.org/aboutun/charter
29. Dung, L. T. (2003) *Judicial Independence in Transitional Countries*, United Nations Development Programme: Oslo Governance Centre http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN018253.pdf
30. www.un.org/Overview/rights.html
31. For example, Article 7 guarantees "equality before the law" and Article 8, the "right to an effective remedy".
32. *M.Gonzales del Río v Peru* Communication No. 263/1987: Peru 28/10/92.
33. Para 3, General Comment No. 13: Equality before the courts and the right to a fair trial and public hearing by an independent court established by law (Art. 14): 13/04/84.
34. Communication No. 387/1989 *Karttunen v Finland*, Decision of 17 November 1992, CCPR/C/46/D/387/1989, para 7.2.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) also provide important standards relating to judicial impartiality. Article 2(c) of CEDAW requires states parties to pursue appropriate measures to:

> […] establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.

States parties are also required to ensure equality between women and men before the law.[35]

Article 5(a) of ICERD also includes a similar provision guaranteeing everyone equality before the law and notably "in the enjoyment of the right to equal treatment before tribunals and all other organs administering justice". Further, Article 6 includes the right to an effective remedy through competent national tribunals against any acts of racial discrimination which violate human rights provisions in ICERD.

2.4.2 EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

Article 6 of the ECHR guarantees a right to a fair trial before an independent and impartial court.

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Judicial independence has been interpreted by the Strasbourg Court to mean that courts must be independent of the Executive and the parties to a case.[36] The model of judicial independence that is applied is institutional and functional.[37] When determining whether a court or tribunal meets the requirements of independence, the European Court examines the overall manner of judicial appointments, the duration of terms of office,[38] the existence of guarantees against outside pressures[39] and the overall 'appearance of independence'.[40] The latter points are discussed in more detail in section 3.

It must also be noted here that the European Court has ruled that Article 6(1) does not apply to disputes by servants of the state over their conditions of service. For example, in *Massa v Italy*, the Court stated that "disputes relating to the recruitment, careers and termination of service of civil servants are as a general rule outside the scope of article 6(1)".[41] According to the Court, this is because each country's public sector posts:

35. Article 15.
36. *Ringeissen v Austria* (1979-80) 1 EHRR 455 at para 95.
37. Starmer, K. (2000) *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights*, Legal Action Group: London, at p. 261.
38. *Le Compte, Van Leuven and De Meyere v Belgium* (1982) 4 EHRR 1.
39. *Piersack v Belgium* (1983) 5 EHRR 169 at para 27.
40. *Campbell and Fell v UK* (1985) 7 EHRR at para 78.
41. *Massa v Italy,* (1993) Series A, no. 265-B, at para. 26.

> […] involve responsibilities in the general interest of participation in the exercise of powers conferred by public law. The holders of such posts thus wield a portion of the State's sovereign power. The State therefore has a legitimate interest in requiring of these servants a special bond of loyalty and trust. [42]

As servants of the State, judges fall within this 'exemption'. In *Pellegrin v France*, the Court further clarified that:

> […] the only disputes excluded from the scope of Article 6(1) of the Convention are those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depository of public authority responsible for protecting the general interests of the State or other public authorities.[43]

However, disputes relating to pensions do come within the scope of 6(1).

> Disputes concerning pensions all come within the ambit of Article 6(1) because on retirement employees break the special bond between themselves and the authorities; they, and a fortiori those entitled through them, then find themselves in a situation exactly comparable to that of employees under private law in that the special relationship of trust and loyalty binding them to the State has ceased to exist and the employee can no longer wield a portion of the State's sovereign power.[44]

The European Court of Human Rights has defined impartiality as "an absence of prejudice or bias".[45] When deciding on accusations of impartiality, the Court applies a test which is both subjective and objective:

> Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under 6(1) of the Convention, be tested in a variety of ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.[46]

For subjective impartiality to be established, the Court requires actual proof of personal bias. It has stated that "personal impartiality of a judge is presumed until there is a proof to the contrary". [47] In *Salaman v the United Kingdom*, the Court had to consider whether a judge's membership of the Freemasons affected his ability to preside impartially over a case. The applicant was challenging the codicil of a will made by a fellow Freemason, which left property, originally willed to the applicant, to another Freemason. The applicant raised concerns about the Freemasons, suggesting that they were a secretive society with a potentially corrupting influence. The Court decided that the judge's membership of the Freemasons was insufficient to suggest some sort of bias, particularly since all parties involved belonged to the Freemasons. Moreover, the Court indicated that there was nothing to suggest that the judge's possible obligations to the Freemasons took precedence over his role as a judge.

42. *Pellegrin v France* (1999), 28541/95, at para. 65.
43. *Ibid*, at para. 66.
44. *Ibid*.
45. *Piersack v Belgium* (1983) 5 EHRR 169 at para 30.
46. *Ibid*.
47. *Hauschildt v Denmark* (1990) 12 EHRR 266 at para 47.

However, in *Lavents v Latvia,*[48] a judge was criticised for commenting to the press about a case before it ended. The judge indicated that the applicant may be convicted, or partially convicted, but left out the possibility of a total acquittal and thus displayed prejudgment which demonstrated his own personal bias.

The objective test of impartiality is less strict and easier to satisfy and is shaped by the maxim mentioned above, that justice must not only be done, it must be seen to be done.

> […] under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public, and, above all, as far as criminal proceedings are concerned, in the accused. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is determinant is whether this fear can be held to be objectively justified.[49]

In cases where parties might have legitimate reasons to fear partiality, the Court has stated that the judge must withdraw,[50] or at least consider the issue when it comes to the position of defendants in criminal cases.[51] Much of the case law on impartiality refers to situations where judges might be involved in earlier decisions on substantive issues in criminal proceedings.[52] For example, in *Hauschildt v Denmark*, the Court found that there had been a violation of Article 6(1) because the presiding judge had taken decisions on pre-trial detention and when deciding on remand had referred to a "particularly strong suspicion" of the defendant's guilt. Again, in *De Hann v the Netherlands*, the judge presiding over an appeals tribunal was called upon to decide on an objection to a decision which he had earlier delivered. The Court found a violation of Article 6 and decided that the applicant's concerns regarding the objective impartiality of the presiding judge were justified.

In *Salov v Ukraine*,[53] the Court examined the broader context and ruled that the applicant's doubts as to the impartiality of a district court judge deciding on his case were objectively justified, because Ukraine's legislative and financial arrangements did not protect judges from external pressures.

48. *Lavents v Latvia* [2002] ECHR 786.
49. *Fey v Austria* (1993) ECHR 4 at para 30.
50. *Piersack v Belgium* (1983) 5 EHRR 169 at para 30; *Hauschildt v Denmark* (1990) 12 EHRR 266 at para 48; *Sigurdsson v Iceland* (2003) 39731/98 ECHR.
51. *Hauschildt v Denmark* (1990) 12 EHRR 266 at para 47.
52. *Hauschildt v Denmark* (1990) 12 EHRR 266; *Ferrantelli and Santangelo v Italy* (1996) 23 EHRR 288; *Oberschlick (No. 1) v Austria* (1991) 19 EHRR; *De Haan v the Netherlands* (1997) App No. 84/1996/673/895; *Wettstein v Switzerland* (2000) App. No. 33958/96; *Kyprianou v Cyprus* (2005), App No. 73797/01.
53. *Salov v Ukraine* (2005) ECHR 580.

2.5 SOURCES OF INTERNATIONAL NON-LEGAL PRINCIPLES ON JUDICIAL INDEPENDENCE

Adopted in 1985, the UN Basic Principles on the Independence of the Judiciary[54] outline standards for Member States to incorporate in the framework of their national legislation and practices. The Principles, which are not legally binding, were adopted following a period of investigation initiated by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. The Sub-Commission sought permission from the UN's Economic and Social Council to appoint an expert for the preparation of several reports on the independence and impartiality of the judiciary, jurors, assessors and lawyers.[55] The expert's findings ultimately led to the drafting of the UN Basic Principles and include universally accepted standards designed to promote functional independence/impartiality (structural guarantees, institutional rules) and personal independence (appointment, conditions of tenure, irremovability and exercise of disciplinary powers). Also, the Economic and Social Council adopted *Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary.*[56] This document requires UN Member States to respect and integrate the Basic Principles into their justice systems,[57] as well as publicise them to all acting judges.[58]

In the case of Ireland, it appears that while there is no formal record in the Department of Foreign Affairs, it is likely that the Department forwarded on the Basic Principles to officials at the Department of Justice, Equality and Law Reform who in turn would be responsible for disseminating them.[59]

In 1994, the UN appointed a Special Rapporteur on the Independence of Judges and Lawyers on foot of calls from the UN Commission on Human Rights, which was concerned about the increase of attacks on lawyers and judges.[60] The role of the Special Rapporteur involves "investigatory, advisory, legislative and promotional activities". [61] In this regard, the Special Rapporteur publicises UN international human rights standards, together with the Basic Principles on the Independence of the Judiciary.

BOX 2: UN SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS*

The mandate of the Special Rapporteur is: (a) to inquire into any substantial allegations transmitted to him and to report his conclusions thereon; (b) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they were requested by the State concerned and (c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

Since August 2003, Mr Leandro Despouy has been the Special Rapporteur. In discharging his functions, the Special Rapporteur acts on individual complaints, conducts country visits and writes annual reports for the UN Human Rights Council.

* Source:
www.ohchr.org/english/issues/judiciary/index.htm

54. *Op. cit* at p.15.
55. Cumaraswamy, P. (1995) Report of the Special Rapporteur, Mr Param Cumaraswamy, submitted in accordance with Commission on Human Rights resolution 1994/41, UN doc, E/CN.4/1995/39, 6 February 1995 at p. 6-7.
56. Resolution 1989/60, 15th plenary meeting, 24 May 1989.
57. Procedure 1 - "All States shall adopt and implement in their justice systems the Basic Principles on the Independence of the judiciary in accordance with their constitutional process and domestic practice".
58. Procedure 4 - "States shall ensure that the Basic Principles are widely publicized in at least the main or official language or languages of the respective country. Judges, lawyers, members of the executive, the legislature, and the public in general, shall be informed in the most appropriate manner of the content and the importance of the Basic Principles so that they may promote their application within the framework of the justice system. In particular, States shall make the text of the Basic Principles available to all members of the judiciary."
59. Source – Gavin Daly, Department of Foreign Affairs, telephone conversation on 13 December 2006
60. UN Commission on Human Rights Resolution 1994/41 of 4 March 1994.
61. Prefontaine, D. C. and Lee, J. (1998) 'The Rule of Law and the Independence of the Judiciary', paper presented for the World Conference on the Universal Declaration of Human Rights, Montreal, 7, 8, 9, December 1998 at p.6. Refer to Box 2 for further details on the function of the Special Rapporteur.

Outlining a framework for regulating judicial conduct, the UN Human Rights Commission[62] has also endorsed the 2002 Bangalore Principles of Judicial Conduct. The Bangalore Principles[63] were initially approved by a roundtable of Chief Justices held in The Hague in November 2002, and complement the UN Basic Principles which do not deal with judicial conduct and complaints in any great detail.

Further, the UN Basic Principles and Bangalore Principles are not the only source of non-legal standards on judicial independence. Prior to their production, a Committee of Jurists and the International Commission of Jurists prepared the Syracuse Draft Principles on Independence of the Judiciary in 1981, and the International Bar Association (IBA)[64] drafted Minimum Standards on Judicial Independence in 1982. In 1998 judges from European countries along with two judges' international associations adopted the European Charter on the Statute of Judges. The following year the International Association of Judges[65] adopted a Universal Charter of the Judge. Finally, the COE's Committee of Ministers issued a recommendation[66] on independence, efficiency and the role of judges, and although it is not legally binding, the European Court of Human Rights has used it as a guide for interpreting Article 6 of the ECHR.[67]

62. See UN Commission on Human Rights, Resolution 2003/43.
63. The Bangalore Principles of Judicial Conduct are a product of several years work by the Judicial Group for the Strengthening of Judicial Integrity (JGSJI), comprising ten Chief Justices from Asia and Africa.
64. www.ibanet.org
65. www.iaj-uim.org/
66. COE Committee of Ministers, Recommendation No. R (94) 12, adopted on 13 October 1994 at 518th meeting of the Ministers' Deputies.
67. In several dissenting judgments, reference is made to the Recommendation, for example, Judge Martens in *Saunders v United Kingdom* and Judge Ress in *Sigurdsson v Iceland*, cited in Kuijer, M. (2004) T*he Blindfold of Lady Justice, Independence and Impartiality in Light of the Requirements of Article 6*, Kluwer Law Publications: The Hague.

03

FUNCTIONAL INDEPENDENCE AND THE IRISH JUDICIARY

3.1 INTRODUCTION

This section introduces international standards on functional or structural independence for the judiciary and examines to what degree Irish law, policy and practice complies.

Section 3.2 looks the separation of powers and judicial review, in particular, at the system of 'checks and balances' which ensures that each branch of government restrains the other branch from abuse. The Constitution provides that in the administration of justice, criminal matters are exclusively a judicial function, while other limited functions can be exercised by other persons or bodies. However, what is clearly noticeable of late is that the legislature/executive has been slowly chipping away at the judiciary's role in criminal matters by shifting power to the Gardaí or the executive. Alongside these changes, there has been a significant increase in separate determination bodies with quasi judicial functions, which has not always been a positive development for the rights of individuals. Further, the section considers whether the Irish courts have struck the right balance between vigilance and deference on the question for socio-economic rights.

Section 3.3 considers the issue of independence in decision-making, specifically whether there are special protections to protect the judiciary from inappropriate or unwarranted interferences (section 3.3.1) and if the executive/legislature, together with other authorities respects decisions and judgments of the courts. Section 3.3.2 looks at whether Government Ministers, who are in a very different situation to other commentators, make statements adversely affecting the independence of judges and section 3.3.2 determines if judicial decisions are subject to revision. Moreover, section 3.4 makes clear that independence in decision-making entails the exclusive authority to determine jurisdictional competence on matters of a judicial nature and suggests that the imposition of time-limits on judicial review for immigration-related decisions is an infringement on the jurisdiction of the High Court.

Finally, this report considers the right and duty of judges to ensure fair court proceedings and deliver reasoned decisions and the failure of the District Court to provide reasons in all circumstances.

3.2 SEPARATION OF POWERS AND JUDICIAL REVIEW

In broad terms, functional or structural independence means that the judiciary must be independent of other branches of government, namely, the executive and the legislature. According to Principle 1 of the UN Basic Principles on judicial independence[1]:

> The independence of the judiciary should be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

The COE Committee of Ministers Recommendation No. R (94) 12 provides that, in securing judicial independence, Member States should insert specific rules in constitutions or other domestic laws.[2]

BOX 3: WHAT IS JUDICIAL REVIEW?

The power of judicial review was first exercised in the landmark US case, *Marbury v Madison* (1803). Judicial review enables a court to "exercise supervision over public authorities in accordance with the doctrine of *ultra vires* (beyond the law)."* Judicial review is the judiciary's principal means of reviewing law or an official act of a government/public authority employee for constitutionality or for violations of basic justice principles.

* Martin, E.A. and Law, J. (2006) Oxford Dictionary of Law, *Oxford University Press*, at p. 298.

1. Hereinafter referred to as the "UN Basic Principles".
2. Principle 1.2 "The independence of judges shall be guaranteed pursuant to the provisions of the [European] Convention [on Human Rights] and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law".

Naas Courthouse
Source: Irish Times ©

The "separation of powers is a distinctively constitutional tool"[3] and many countries have adopted it as a constitutional guarantee of judicial independence.[4] In its formal sense, the separation of powers is designed to ensure that the principal powers of the State are not concentrated in any one branch of government. A system of 'checks and balances' ensures that each branch of government restrains the other branch from abuse. Judicial review (see Box 3) of legislative and executive action is probably the most common form of check. This is not to suggest that the separation of powers is fixed or rigid. According to Pieterse, "a central feature of the doctrine is that its boundaries are mostly flexible and underdetermined" and that "deviations from the 'pure' notion of separation of powers for administrative expedience are common".[5] This is certainly valid in the case of Ireland.

The Irish Constitution adopts a classic separation of powers model. Article 6 reads:

> 1. All the powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State, and in final appeal, to decide all questions of national policy, according to the requirements of the common good.
> 2. These powers of government are exercisable only by or on the authority of the organs of the State established by this Constitution.

Later constitutional provisions provide more detail on the relationship between the different organs of state and how power is balanced. Article 28.1 provides that the Government shall consist of not less than seven and no more than fifteen members, appointed by the President of Ireland. The Government (the Taoiseach and Cabinet) is authorised to exercise executive power subject to provisions of the Constitution (Article 28.2) and is answerable to Dáil Éireann (Article 28.4.1°). The executive power of the State in connection with international relations is also exercised by the Government (Article 29.4.1°).

Article 15.2.1° vests the "sole and exclusive power of making laws for the State" in the Oireachtas (Irish Parliament) and in practice means that the Irish executive cannot claim any inherent law-making power. However, owing to the fusion of the legislature and executive, the separation of both branches is diluted considerably.[6] When elected, members of political parties sit in the Dáil and are appointed to different posts in government if their party is part of the majority. As a result, it is very rare for a government bill to be amended substantially or to fail, and rarer still for a private member's bill to succeed. Indeed, a recent audit of Irish democratic structures found that "Ireland rates alongside Britain and Greece as one of the most executive-dominated parliaments in Europe."[7] For instance, it found that the governing party or parties of the day exert tight discipline over parliamentarians and opposition parties have limited possibilities to influence government policy and legislation.

3.Barber, N.W. (2001) "Prelude to the Separation of Powers", *60 Cambridge LJ 59*, at p. 71.
4. Morgan, D. G. (1997) *Separation of Powers in the Irish Constitution*, Round Hall/Sweet & Maxwell: Dublin; Morgan, D. G. (2001) *A Judgment Too Far? Judicial Activism and the Constitution*, Cork University Press.
5. Pieterse, M. (2004) "Coming to Terms with Judicial Enforcement of Socio-Economic Rights", 20 *South African Journal of Human Rights*, at p. 386.
6. Morgan, D. G. (2001) *A Judgment Too Far – Judicial Activism and the Constitution*, University College Cork Press.
7. TASC (2007) *Power to the People? Assessing Democracy in Ireland* (Executive Summary), TASC: Dublin, at p. 7. www.democracycommission.ie

3.2.1 JUDICIAL POWER

Judicial power in the Constitution is based on several different articles, namely, Articles 34, 37.1, 38, 34.3.2 and 15.4.1. For example, Article 34 states that:

> Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.

The power to review legislation comes from Article 34.3.2 which gives the High Court jurisdiction to "question the validity of any law having regard to the provisions of the Constitution".[8] Article 15.4.1 also forbids the Oireachtas from enacting any law repugnant to the Constitution.

In the administration of justice, "criminal matters" are exclusively a judicial function, while other "limited functions" can be exercised by other persons or bodies. Moreover, Article 38 stipulates that no one shall be tried on any criminal charge save in due course of law. The Constitution does not define criminal matters, but because of expansive judicial interpretation, it is clear that it includes trial, conviction and sentencing.[9] For the most part, the courts have strongly guarded this terrain from extraneous influence, particularly because of Article 37.1, Article 38 and Article 40.4 on the right to personal liberty.[10] However, what is clearly noticeable of late is that the legislature/executive has been slowly chipping away at the judiciary's role in criminal matters by shifting power to the Gardaí or executive. Walsh believes that "judicial authorisation and control is being displaced rapidly by police discretion which is expanding and becoming increasingly remote from judicial or independent supervision".[11] Examples of this include the introduction of fixed penalty notice provision for road traffic offences[12] or public order offences[13] which mean that justice is effectively administered in specific areas by the Gardaí and not the courts. This has been accompanied by an expansion of powers in other areas including, providing for long periods of detention for arrested persons[14] and allowing Chief Superintendents to issue search warrants in relation to scheduled offences under the Offences Against the State Act, 1939.[15]

In civil matters, the Oireachtas has more scope to limit the reach of the judiciary by virtue of Article 37.1. Thus limited functions and powers of a judicial nature may be given to other bodies or persons outside the court system. Indeed, the Oireachtas has hived off various areas of law to separate determination bodies such as the Equality Tribunal, the Labour Court, the Censorship Board and the Refugee Appeals Tribunal, to name but a few. According to Casey, the courts have rarely questioned this phenomenon, preferring instead to rely on a historical notion of what a court does even though these bodies at times consider very complex legal questions.[16] Morgan also believes that while it has closely defended its right to administer justice, over the last ten years the judiciary appears to be showing more respect to the "constitutional space reserve for other political organs".[17]

8. Jurisdictional competence is dealt with in more detail in Section 3.4.
9. For instance, in *Re Haughey* [1971], Ó Dalaigh CJ explained:
The Constitution vests the judicial power of government solely in the courts and reserves exclusively to the Courts the power to try persons on criminal charges. Trial, conviction and sentence are indivisible parts of the exercise of this power.
10. Article 40.4º provides that no citizen shall be deprived of his/her liberty save in accordance with the law.
11. Walsh, D. (2006) "Police Powers under the Criminal Justice Act 2006: The triumph of executive convenience over judicial checks and balances", paper delivered to the Criminal Law Conference 2006, organized by Thompson/Roundhall in the Royal College of Surgeons on 25 November 2006, at p. 2.
12. See the Road Traffic Acts.
13. Section 184, Criminal Justice Act 2006.
14. Several statutes provide for increased powers of detention upon arrest. Under the Criminal Justice Act 1984, as amended by the Criminal Justice Act 2006, the Gardaí can detain an individual up to 24 hours without any judicial oversight. Persons arrested under the Offences Against the State Act can be detained for 48 hours without seeing a judge and persons detained under the Criminal Justice (Drug Trafficking) Act, 1996 allow the Gardaí to detain an individual up to 48 hours without judicial oversight.
15. Section 39 of the Offences Against the State Act 1939.
16. Casey, J. (2000) *Constitutional Law in Ireland*, Sweet & Maxwell: London. In *McDonald V Bord na cCon* [1965] IR 217, Kenny J attempted to distinguish the boundaries between judicial and non-judicial powers and identified the following as judicial in character;
    i) a dispute or controversy as to the existence of legal rights or a violation of the law;
    ii) the determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
    iii) the final determination (subject to appeal) of legal rights and liabilities or the imposition of penalties;
    iv) the enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State which is called in by the court to enforce its judgment;
    iv) the making of an order by the court which as a matter of history is an order characteristic of courts in this country.
17. Morgan, D, G (2004) ""Judicial-O-Centric" Separation of Powers on the Wane?", *Irish Jurist*, at p. 143.

BOX 4: THE CASE OF THE REFUGEE APPEALS TRIBUNAL (RAT)

The Refugee Appeals Tribunal was established as an independent body to process asylum appeals from the Office of the Refugee Applications Commissioner (ORAC).

For many years, the Tribunal refused to publish its own decisions and when this practice was challenged before the High Court, McMenamin J held that it did not accord with "the principles of natural and constitutional justice, fairness of procedure or equality of arms". *

The Tribunal has also been accused of bias against asylum applicants. Tribunal members have been appointed at the discretion of the Minister for Justice, Equality and Law Reform. The only professional requirement for the post is that they must be a practicing lawyer of five years standing and they have no security of tenure once appointed. With no regulations on the allocation of cases to Tribunal, and members paid by the number of cases they process, statistics obtained by media sources revealed that one member, Mr Jim Nicholson earned 10 per cent of the total earned by 33 members.**

This led to the suspicion that work was being allocated with the rate of affirmation of ORAC decisions. *** Two Tribunal members subsequently wrote to the Minister to express their concern about the management of the Tribunal by the interim chair - Mr John Ryan. However, he was still reappointed by the Minster following an open advertisement for the position. These Tribunal members later resigned.

Finally, Mr Nicholson is now the subject of a legal challenge. He is accused of alleged bias against asylum applicants based on evidence collated by the Refugee Legal Service apparently demonstrating that Mr Nicholson rejects 95 per cent of cases before him.****

* McGarry, P. (31 March 2006) "Refugee Appeals Tribunal to publish important decisions", Irish Times.
** Coulter, C. (2005) "Looking for fairness and consistency in a secretive refugee appeals system", Irish Times.
***Coulter, C. (20 September 2006) "Strife proceeded refugee body's demise", Irish Times.
**** Coulter, C. (31 March 2006) "Bias claim against member of refugee appeal tribunal", Irish Times.

The allocation of certain activities to other bodies has not always been a positive development for the rights of individuals. Consider the experience of the Refugee Appeals Tribunal (see Box 4) which has been plagued by allegations of non-transparency, unfairness and bias. This may be partly due to the fact that as an institution, it lacks the basic hallmarks of independence (security of tenure for members, a transparent appointments system, rules on case allocation etc.). This is not to suggest that the creation of separate administrative bodies to resolve specific issues is not worthwhile. By way of example, the establishment of the Equality Tribunal to investigate alleged cases of discrimination is a major achievement for the legislature and executive. While its Director reports directly to the Minister for Justice, Equality and Law Reform, Equality Officers (deciding officers) are full-time and appointed subject to the Civil Service Commissioners Act, 1956 and the Civil Service Regulation Acts, 1956-1996.[18] The Equality Tribunal also operates in a transparent manner, as all of its decisions are available to the public.[19]

The Constitution Review Group[20] considered whether the administration of justice should be confined to the courts. It noted that administrative tribunals are staffed by individuals with specialist expertise and are "cheaper, speedier and more flexible than the courts". [21] The Group deliberated on whether persons exercising judicial power in these bodies should enjoy a guarantee of independence in the performance of their functions but decided that this was "not feasible". Instead, it was recommended that the question should be kept under review. [22]

18. Section 75(2), Employment Equality Act, 1998.
19. The Equality Tribunal system compares favourably with those in place for equality laws claims in other European jurisdictions, see generally PLS Ramboll (2002) *Specialised Bodies to Promote Equality and/or Combat Discrimination*, www.//europa.eu.int/comm/employment_social/fundamental_rights/prog/studies_en.htm
20. The Constitution Review Group was set up "to review the Constitution, and in the light of this review, to establish those areas where constitutional change may be desirable or necessary, with a view to assisting the All-Party Oireachtas Committee on the Constitution, to be established by the Oireachtas, in its work." Source: All Party Oireachtas Committee on the Constitution - www.constitution.ie/constitutional-reviews/crg.asp
21. Constitution Review Group (1996) *Report of the Constitution Review Group*, Government Stationery Office, at p. 150.
22. *Ibid*, at p. 155.

Along with the administration of justice, the nature of executive power has changed significantly. Carolan believes that the system of public governance that exists no longer fits into the classical notion of the separation powers:

> One of the key changes in recent decades has been the emergence of an administrative state in which extensive public powers are entrusted to a broad array of bureaucratic bodies […] The breath and diversity of the modern system of bureaucratic government defies the simple categorical approach to official actors involved in a three-way conception of the separation of powers.[23]

Carolan cites the multiplicity of government actors[24], the widespread privatisation of government functions and the statutory delegation of considerable power and latitude to administrative officials as evidence of this. He believes that the traditional model of checks and balances was not designed with a system of administrative government in mind and raises questions of accountability and legitimacy.[25] Moreover, while a range of bodies[26] have been established to hear complaints concerning the administration of public services, their remit is quite restricted in many instances[27] and they vary widely in function.[28] Further, there are many bodies which are not subject to these accountability mechanisms. For instance, while the Ombudsman was set up to examine complaints about the administrative actions of government departments, the Health Service Executive, local authorities and An Post, its remit does not extend to about 450 newly created single purpose agencies.[29]

Alongside these changes in the nature of executive power, it appears that the judiciary is taking an extremely deferential line in some areas particularly those said to implicate "distributive justice".[30] The rationale underpinning relevant judgments is that courts are not the appropriate institution to make decisions on such matters, rather this task is one that should be undertaken by the legislature and executive. The Irish Human Rights Commission (IHRC) believes that the resistance of the courts to intervene in such cases appears "to be grounded in a rigid view of the separation of powers doctrine and an ideological resistance to the constitutional recognition of economic, social and cultural rights as enforceable rights".[31] Indeed, Whyte points out that the Constitution does not preclude and actually supports judicial involvement in issues of distributive justice. [32]

23. Carolan. E. (2007) "Separation of Powers and Administrative Government", paper delivered as part of *The Constitution at 70* conference organised by the Centre for Democracy and Law and the School of Law, Trinity College Dublin, on 9 June.
24. Here Carolan cites statistics from a TASC report demonstrating that there are over 500 public/private bodies accounting for almost one-third of all public expenditure. See Clancy, P. and Murphy, G. (2006) *Outsourcing Government – Public Bodies and Accountability*, TASC: Dublin.
25. On the UK context, see Daintith, T. and Page, A. (1999) *The Executive in the Constitution: Structure, Autonomy and Internal Control*, Oxford University Press.
26. For example, the Ombudsman, the Ombudsman for Children, the Garda Síochána.
27. Section 11 of the Ombudsman for Children's Act, 2002, prevents the Ombudsman for Children accepting complaints made by children relating to decisions about asylum, immigration, naturalisation or citizenship status or decisions taken in the running of prisons or other detentions centres.
28. Clancy and Murphy, *ibid* at p. 12.
29. Downes, J. (27.06.07) "Ombudsman says agencies escape scrutiny", *Irish Times*.
30. *O'Reilly v Limerick Corporation*, [1989] ILRM 181; *MhicMhathuna v Ireland* [1995] 1 IR 484; [1995] 1 ILRM 69; DB *(A Minor, suing by his Mother and Next Friend) v. The Minister for Justice, the Minister for Health, the Minister for Education, Ireland and the Attorney General and the Eastern Health Board*, [1999] 1 IR 409; *TD v Minister for Education [2001] 4 IR 259 and Sinnott v Minister for Education* [2001] IESC 63. See DeBlacam, M. (2002) "Children, constitutional rights and the separation of powers", *Irish Jurist xxxvii*, 113-42; McDermott, P. A. (2000) "The Separation of Powers and the Doctrine of Non-Justiciability", *Irish Jurist xxxv*, 280-304; O'Mahony, C. (2002) "Education, Remedies and the Separation of Powers", *Dublin University Law Journal* 24, 57-95; Ruane, B. (2002) "The Separation of Powers and the Granting of Mandatory Orders to Enforce Constitutional Rights", *Bar Review* 7(4), 416-21.
31. IHRC (2005) *Making Economic, Social and Cultural Rights Effective: An IHRC Discussion Document*, IHRC: Dublin, at p. 117.
32. Whyte, G. (2002) Social Inclusion and the Legal System – Public Interest Law in Ireland, Institute of Public Administration: Dublin, at p. 13. See also Murphy, T. (1998) "Economic Inequality and the Constitution", in Murphy and Twomey, eds., *Ireland's Evolving Constitution 1937-1997: Collected Essays*, Oxford: Hart, pp. 163-81; Quinn, G. (2000) "Rethinking the Nature of Economic, Social and Cultural Rights in the Irish Legal Order" in C. Costello, ed., *Fundamental Social Rights: Current European Legal Protection and the Challenge of the EU Charter on Fundamental Rights*, Dublin: European Movement, 35-54.

Sinnott protestors outside the Four Courts.
Source: Irish Times ©

Langwallner is of the view that the courts' approach undermines the "system of judicial review and constitutes a failure to engage in the protection of the rights of the individual".[33] Relying on jurisprudence from India[34] and South Africa[35], where socio-economic rights are justiciable, Langwallner indicates that these courts largely only interfere with such matters where decisions are irrational or where there has been a sustained violation of individual rights. In these instances, judicial intervention takes the shape of declaratory relief or mandatory orders. Drawing on public law developments in other jurisdictions Walsh suggests that "while economic inequalities cannot and should not be altered by judicial fiat, institutional competency difficulties can arguably be met at the level of remedies".[36] The central idea is that courts are well placed to set out general standards and duties, while leaving the precise means of compliance to the public body concerned and other affected parties.

The question here is why have Irish courts not adopted a similar approach and are the courts striking the right balance between vigilance and deference in this context notwithstanding the absence of a written catalogue of socio-economic rights? Griffith believes that the principal function of the judiciary is to "support the institutions of government as established by law",[37] that in both democratic and totalitarian societies "the judiciary has naturally served the prevailing political and economic forces. Politically judges are parasitic". Griffith's views finds echo with the school of legal realism[38] and other critical strands of legal scholarship which contend, among other things, that law and the courts tend to function as an instrument for preserving the status quo and preserving majoritarian concerns. [39]

In section 4.2 of this report, it is argued that there is a lack of transparency in the judicial appointments process and that recent reforms still allow for party political affiliation to play a part in selection. As regards understanding what effect this has had on the development of jurisprudence, this question is relatively under-researched. Furthermore no comprehensive study of the ideological leanings of the Irish judiciary has been undertaken.

It is recommended that the separation of powers be fully examined by a committee established by the Government or by the Law Reform Commission with a view to strengthening accountability and independence in decision-making.

33. Langwallner, D. (2007) "Separation of Powers, Judicial Deference and the Failure to Protect the Rights of the Individual", paper delivered as part of *The Constitution at 70* conference organised by the Centre for Democracy and Law and the School of Law, Trinity College Dublin, on 9 June.
34. See Hunt, P. (1996) *Reclaiming Social Rights*, Ashgate: Dartmouth, Chapter 4.
35. See further Kende, M. (2003) "The South African Constitutional Court's Embrace of Socio-economic Rights: A Comparative Perspective", *Chapman Law Review 6,* 137-159 and Pieterse, M. (2004) "Coming to Terms with Judicial Enforcement of Socio-Economic Rights", *South African Journal on Human Rights* 20, 383-417.
36. Walsh, J. (2006) 'Unfamiliar Inequalities', *Northern Ireland Legal Quarterly* 57(1), 156-185, at p. 177.
37. Griffith, J.A.G (1999) *The Politics of the Judiciary*, Fontana: London.
38. See generally Singer, J.W. (1988) "Legal Realism Now", *California Law Review* 76, 465-544.
39. Examples of this rich vein of critical legal scholarship can be sourced in the following collections: Banakar, R. and Travers, M. (eds) (2002) *Introduction to Law and Social Theory*, Hart; Oxford; Bartlett, Kathleen T. and Kennedy, R. (1991) *Feminist Legal Theory: Readings in Law and Gender*, Westview Press: Boulder, San Francisco; Bottomley, A. and Conaghan, J. (eds) (1993) *Feminist Theory and Legal Strategy*, Blackwell: Oxford; Delgado, R. and J. Stefancic (2000) *Critical Race Theory: The Cutting Edge*, Temple University Press; Kairys, D. (ed) (1998) *The Politics of the Law: A Progressive Critique,* Basic Books: New York; Knop, K. (ed)(2004) Gender and Human Rights, Oxford University Press; Murphy, T. (ed) *Western Jurisprudence* Thomson Roundhall: Dublin; Stychin, C. and Herman, D. (eds) *Sexuality in the Legal Arena*, Athlone Press: London.

3.3 INDEPENDENCE IN DECISION-MAKING

The IBA Minimum Standards states that judges should enjoy *substantive independence*, which means "in the discharge of his/her judicial function a judge is subject to nothing but the law and the commands of his/her conscience."[40] The UN Basic Principles develop this further and specify that there should be no "inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by courts be subject to revision" and that this principle "is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law".[41] In effect, this principle suggests that the executive and the legislature, together with other authorities, must respect decisions and judgments, particularly on constitutional standards, delivered by the judiciary, even when they do not agree with them, as all institutions have a duty to prevent any erosion of the judiciary's decision-making authority.[42] So for example, government ministers must not make statements adversely affecting the independence of the judiciary[43] or introduce legislation retroactively reversing a specific court decision[44] and courts must have the power to give binding decisions that cannot be altered by non-judicial authorities.[45] However, the executive may issue guidelines to the judiciary on the general performance of their functions so long as they do not instruct them on how specific cases are to be decided.[46]

Nonetheless, infringements of this nature regularly occur. For example, in the *Terri Schiavo* case,[47] not only did the US Florida Governor and legislature attempt to reverse a court decision, a senior politician made public statements against the judiciary. The *ratio decidendi* of the case was about the constitutional right of a woman in a vegetative state (as asserted by her husband) to have her medical treatment withdrawn. Florida Governor Jeb Bush requested that the Florida legislature grant him the authority to re-insert a feeding tube, thus, ignoring six years of court decisions. 'Terri's Law' was subsequently introduced and the Florida Supreme Court ruled that it was an improper intrusion by the Governor and the legislature into the lower court's decisions. This finding was upheld by the Supreme Court which refused to hear an appeal. Moreover, the Court's decision was then derided by Tom DeLay who was the House Majority Leader of the US House of Representatives. DeLay publicly declared after the court decision that he wanted to "look at an arrogant, out-of-control, unaccountable judiciary that thumbed their nose at Congress and the President."[48]

The following sections examine what legal rules exist to protect the judicial process in Ireland against inappropriate or unwarranted interference.

40. IBA Minimum Standards of Judicial Independence, adopted in 1982, Principle 1(c).
41. Principle 4, UN Basic Principles.
42. United Nations (2003) *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers – Professional Training Series No. 9,* UN: New York and Geneva, p. 121.
43. Principle 16, IBA Minimum Standards.
44. Principle 19, IBA Minimum Standards.
45. *Findlay v the UK*, (1997) at para. 77.
46. *Campbell v Fell v UK* (1985) 7 EHRR at para 79; *Sovtransavto Holding v Ukraine* (2003) 48553/99 ECHR 476.
47. *Jeb Bush, Governor of Florida et al., vs. Michael Schiavo, as Guardian of the person of Theresa Maria Schiavo*, Supreme Court of Florida, No. Sc04-925.
48. Allen, M. (2 April 2005) "DeLay Wants Panel to Review the Role of the Courts", *Washington Post*, www.washingtonpost.com/wp-dyn/articles/articles/A1973-2005Aprl.html.

3.3.1 ARE JUDGES SUBJECT TO ANY EXTERNAL PRESSURE WHEN ADJUDICATING?

Police protection outside the Special Criminal Court.
Source: Irish Times ©

Several provisions within the Constitution are designed to ensure that judges are not subject to inappropriate or unwarranted interferences.

Article 35.2 states that "All judges shall be independent in the exercise of their judicial functions and subject only to the Constitution and the law". In essence, this means that judges are only required to interpret the Constitution and laws enacted by the Parliament. Article 34.5.1° requires newly appointed judges to make and subscribe to a declaration which obliges judges to exercise their power without bias (see Box 5).

BOX 5: JUDICIAL DECLARATION*

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

*Article 34.5.1° of the Irish Constitution.

As regards judges exercising their powers under the Constitution and law, other articles protect them against reprisals from government. For example, Article 35.4 forbids the removal of a judge except for stated misbehaviour and Article 35.5 provides that remuneration of a judge shall not be reduced during his/her continuance in office. However, the current system is subject to a number of structural weaknesses. For example, security of tenure for Circuit Court justices and District Court judges is only provided for through ordinary legislation.[49]

In relation to other protections, section 7 of the Offences Against the State Act 1939 makes it an offence for any person to obstruct by violent means or intimidation the judiciary in performing its functions. Moreover, when the Special Criminal Court is in session, it is subject to police protection due to the types of cases it handles.

Once the judicial process is underway, it is inviolable. This principle was established by the courts after the first and only attempted interference by the Oireachtas while judicial proceedings were in train. *Buckley v Attorney General* [50] concerned a dispute over funds raised by Sinn Fein before its fragmentation in 1940s. When the case was pending before the High Court, the Oireachtas passed the Sinn Fein Funds Act 1947, section 10 of which provided that on the passing of the Act, all further proceedings should by stayed and that the High Court "if an application in that behalf [were] made ex parte by or on behalf of the Attorney General [should] make ex parte by or on behalf of the Attorney General, [should] make an order dismissing the pending action without costs".[51] However, Gavan Duffy J held that this development was unconstitutional:

> I am not today concerned with the merits of the plaintiff's claim, but with their right to have it tried by a judge of the High Court… I assume the Sinn Fein Funds Act, 1947… to have been passed by the legislature for excellent reasons… but I cannot lose sight of the constitutional separation of powers. This Court cannot, in deference to an Act of the Oireachtas, abdicate its proper jurisdiction to administer justice in a cause whereof it is duly seized. This Court is established to administer justice and therefore it cannot dismiss the pending action without hearing the plaintiffs… Moreover, this action is not stayed unless and until it is stayed by a judicial order of the High Court of Justice; the payment out of the funds in Court requires a judicial order of this Court, and under the Constitution no other organ of the State is competent to determine how the High Court of Justice shall dispose of the issues raised by the pleadings in this action.[52]

49. Refer to Section 4.3 on Security of Tenure.
50. *Buckley v Attorney General* [1950] IR 67.
51. Cited in Hogan and Whyte, at p. 664.
52. *Ibid.*

When the case was appealed by the Attorney General, the Supreme Court concurred with the High Court. In a judgment delivered by Byrne J, the Supreme Court held:

> Article 6 provides that all powers of government, legislative, executive and judicial, derive, under God, from the people, and it further provides that these powers of government are exercisable only by or on the authority of the organ of State established by the Constitution. The manifest objective of this Article was to recognise and ordain that, in this State, all powers of government should be exercised in accordance with the well-known principle of the distribution of powers between the legislative, executive and judicial organs of the State and to require that these powers should not be exercised otherwise… The effect of this Article and of Articles 34 to 37, inclusive, is to vest in the courts the exclusive right to determine justiciable controversies between citizens or between citizen or citizens, as the case may be, and the State. In bringing these proceedings the plaintiffs were exercising a constitutional right and they were, and are, entitled to have the matter in dispute determined by the judicial organ of the State. The substantial effect of the Act is that the dispute is determined by the Oireachtas and the Court is required and directed by the Oireachtas to dismiss the plaintiffs' claim without any hearing and without forming any opinion as to the rights of the respective parties to the dispute. In our opinion this is clearly repugnant to the provisions of the Constitution, as being an unwarrantable interference by the Oireachtas with the operations of the courts in a purely judicial domain.

The other way the Courts can protect their judicial function from prejudicial or adverse behaviour is through the law of contempt. According to McDermott, the courts have made some attempts to distinguish between criminal contempt[53] and civil contempt.[54] The law of contempt also prevents media outlets from publishing scurrilous personal statements about a judge's conduct in a case.[55] Due to the fact that the law on contempt is largely judge-made, difficulties have arisen over a lack of clarity in certain areas.[56] McDermott believes that a failure to legislate in this area may impose an undue burden on the judiciary in determining what to do when contempt arises in court and recommends that this gap be dealt with in a Contempt of Court Act.[57] This area was substantively examined by the Law Reform Commission which made a series of recommendations to address gaps in the law, including (to name a few): clarifying the jurisdiction in criminal and civil contempt for the District and Circuit Courts; defining the common law offence of "scandalising the court" in statute (and) to involve "imputing corrupt conduct to a judge or court" and "publishing to the public a false account of legal proceedings"; "persons should only be found guilty of the offence where there is a substantial risk that the administration of justice, the judiciary or any other particular judge or judges will be brought into disrepute" and create other offences for interfering with the administration of justice.[58]

To conclude, the protections as outlined above appear on the whole to be sufficient to protect the judiciary from external pressure when adjudicating. This author has not uncovered any circumstances where judges have been subjected to external pressure directly from politicians and it is notable that other research in this area has not unearthed any evidence suggesting that politicians or other actors have attempted to interfere with their decision-making.[59] However, there are gaps in the laws of contempt which ought to be addressed.

53. This includes contempt in the face of the court, acts calculated to prejudice the due administration of justice, disobedience to a writ of habeas corpus by the person to whom it is directed. Criminal contempt carries a punitive sanction of an unlimited fine and/or imprisonment. McDermott, P.A. (2004) "Contempt of Court and the Need for Legislation", *Judicial Studies Institute Journal*, Vol. 4: 1, at p. 190.
54. This consists of civil disobedience to an order of the court. The sanction is coercive and consists of a period imprisonment until the order is complied with or waived by the judge. McDermott, *ibid*.
55. Refer to *RE: Kennedy and McCann* [1976] IR 382.
56. The law on contempt is too complex to discuss in any great detail here. Refer to the Law Reform Commission (1991) *Consultation Paper on Contempt of Court*, Law Reform Commission: Dublin and Law Reform Commission (1994) *Report on Contempt of Court*, Law Reform Commission: Dublin.
57. McDermott, *ibid*.
58. Refer to the Law Reform Commission (1994), *ibid*, at p. 65 for a summary of its recommendations.
59. Blathna Ruane's PhD study on Judicial Independence from 1922-1987, cited in Morgan (2001), *ibid*.

3.3.2 DO GOVERNMENT MINISTERS MAKE STATEMENTS ADVERSELY AFFECTING THE INDEPENDENCE OF JUDGES?

Ensuring that government ministers do not make statements adversely affecting the independence of judges is seen as integral part of protecting the independence in decision making.[60] However, at the same time, politicians and other members of the polity should be able to legitimately critique the judiciary, so long as it does not undermine the course of justice.[61] In *State (DPP) v Walsh*, O'Higgins distinguished between scandalising the court and legitimate criticism:

> […] where what is said or done is of such a nature as to be calculated to endanger public confidence in the court which is attacked and, thereby, to obstruct and interfere with the administration of justice. It is not committed by mere criticism of judges as judges, or by the expression of disagreement – even emphatic disagreement – with what has been decided by a court. The right of citizens to express freely, subject to public order, convictions and opinions is wide enough to comprehend such criticism or expressed disagreement [...] Such concepts occurs where wild and baseless allegations of corruption or malpractice are made against a court so as to hold the judges' […] to the odium of the people as actors playing a sinister part in a caricature of justice.[62]

There are few examples of government ministers or local politicians making adverse statements affecting the independence of the judiciary, and in some instances where this has amounted to scandalising the court, the issue has been dealt with through law of contempt.[63] However, this does not mean that politicians have not been openly critical of judicial decisions. The most well-known example is perhaps the opinion aired by former Senator, Mr Des Hanafin following the Supreme Court's decision in the X case.[64]

BOX 6: STANDING ORDER 57 - DEBATE MATTERS *SUB JUDICE*

Subject always to the right of Dáil Éireann to legislate on any matter (and any guidelines drawn up by the Committee on Procedure and Privileges from time to time), and unless otherwise precluded under Standing Orders, a member shall not be prevented from raising in the Dáil any matter of general public importance, even where court proceedings have been initiated: Provided that –

(1) the matter raised shall be clearly related to public policy;
(2) a matter may not be raised where it relates to a case where notice has been served and which is to be heard before a jury or is then being heard before a jury;
(3) a matter shall not be raised in such an overt manner so that it appears to be an attempt by the Dáil to encroach on the functions of the Courts or a Judicial Tribunal;
(4) members may only raise matters in substantive manner (i.e. by way of a Parliamentary Question, matter raised under Standing Order 21, motion etc.) where due notice is requested; and
(5) when permission to raise a matter has been granted, there will continue to be an onus on members to avoid, if at all possible, comment which might in effect prejudice the outcome of proceedings.

Until 1993, the Dáil operated a self- imposed *sub judice* rule in order to avoid the risk of prejudicing judicial proceedings. This rule was relaxed following the adoption of Standing Order 57 (see Box 6) to achieve a better balance of the right and duty of the Dáil to debate matters of public interest.[65]

60. Principle 16, IBA Minimum Standards.
61. *Attorney General v O'Ryan and Boyd [1946] IR 70, Weeland v RTE [1987] 662 and Desmond v Glackin* (No.1) [1993] 3 IR 1.
62. The *State (DPP) v Walsh*, [1981] IR 412, at 421.
63. *Attorney General v O'Ryan and Boyd* [1946] IR 70.
64. The X case involved a challenge by a 14 year old girl who was suicidal as a result of rape, against an injunction sought by the Attorney General to prevent her from seeking an abortion in the UK. In quashing the order for injunctive relief, the Supreme Court ruled that an abortion was permissible when there was a "real and substantial risk to the life of the mother". AG v X [1992] IESC 1; [1992] 1 IR 1. Upon this decision, Senator Hanafin publicly said that: "[…] it is wholly unacceptable and indeed a deep affront to the people of Ireland that four judges who are preserved by the constitution from accountability can radically alter the constitution and place in peril the most vulnerable section of our society". Source: Irish Times, 6 March 1992, cited in Gallagher, M. "The constitution and the judiciary", in Coakley, J. and Gallagher, M. (eds) *Politics in the Republic of Ireland*, Routledge: Dublin, at p. 93.
65. Law Reform Commission (1994), *ibid*, at p. 43.

Standing Order 57 only applies to debate within the Dáil and the Ceann Comhairle (Dáil Chair) examines all motions and questions to ensure that they comply with it. Standing Order 59 deals with "utterances in the nature of being defamatory" and applies where defamatory statements are made about individual judges. So for example, in circumstances where a defamatory statement is made, the Ceann Comhairle can direct the utterance to be withdrawn without qualification, and if it is not withdraw, treat it as disorder.

As for conduct outside the Oireachtas, there is nothing specific in the various Codes of Conduct barring public representatives or office holders from making adverse comments about the judiciary or courts.[66]

Sentencing practices under the Misuse of Drugs Act 1977 as amended by the Criminal Justice Act, 1999 have recently received much criticism from many quarters, particularly from politicians. The most sustained criticism has come from the former Tánaiste and Minister for Justice, Equality and Law Reform, Mr Michael McDowell. However, this is not in itself a problem as public criticism of the courts is compatible with and advances democratic values. The real issue at stake is whether the former Minister for Justice and other politicians are seeking to influence how the courts sentence offenders, which would be an infringement on their judicial independence.

Following a number of high profile shootings in December 2006 and faced with heavy criticism from opposition parties in the Dáil, the former Minister suggested 23 members of a notorious criminal gang had been granted bail by the judiciary. He also criticised the judiciary for not enforcing more mandatory sentences and stated that: "The judicial arm of the state must also play its part in the suppression of gangland violence."[67] The former Minister then appeared on a national television programme and spoke about the same issues.[68] He suggested that the number of people sentenced to more than ten years increased "after a good deal of specifying by me and others and the media" and criticised other judges for not doing the same.

Comments made by the former Minister have not gone unnoticed by the judiciary. In a recent appeal on a mandatory sentence, Hardiman J took the opportunity to respond to the Minister and criticism from other quarters.

> Since these comments have been given wide and excited coverage in the media, it is perhaps appropriate in giving the judgment of the Court in a case arising so soon after these repeated comments were made, to say that in deciding the case the Court pays the comments in question no attention whatsoever.
>
> The duty of judges is to decide individual cases impartially in accordance with the Constitution and the laws, and without regard to expressions of opinion from any source other than the Director of Public Prosecutions, as prosecutor, and from the applicant, as the person on whom the sentence was imposed.[69]

In addition, Hardiman J referred to research that had been conducted on behalf of the Department of Justice, Equality and Law Reform in 2005 on sentencing under section 15(A) of the Misuse of Drugs Act.[70] The researcher, Patrick McEvoy, considered 55 cases and found that the judges were reluctant to impose mandatory sentences. This appears to be due to the fact that most of those convicted pleaded guilty and/or assisted the Gardaí with their investigations. However, McEvoy also found that even when mandatory sentences were not imposed, the sentences are still quite severe falling between six and eight years. Hardiman J also pointed out that the Director of Public Prosecutions had a right to apply for a review of a sentence if he believed that it was unduly lenient and indicated that between 2002 and 2005, 65% of those appeals had been successful.

The former Minister's comments have been criticised by a retired member of the judiciary[71] and according to media reports, the Chief Justice, wrote to the Minister inquiring about the purported 23 cases where judges have let alleged gangland members out on bail.[72]

66. For example, the Code of Conduct for Office Holders as drawn up by the Government pursuant to section 10(2) of the Standards in Public Office Act, 2001; the Code of Conduct for Members of Dáil Éireann and Other than Office Holders (2002) and the Code of Conduct for Members of Seanad Éireann (2002).
67. Dáil debates, Vol. 595, No. 2, December 14 2006.
68. RTE (15 December 2006) *The Late Late Show*, www.rte.ie
69. *DPP v Andrew Dermody* [2006] IECCA 164, at p 5.
70. http://www.iprt.ie/files/ireland/dojelr_research_on_drug_sentencing.pdf
71. On 22 December 2006, retired Justice Mr Justice Fergus Flood criticised the Minister over his remarks and said that the judiciary must have the right to consider each individual case as appropriate. Source: RTE (22 December 2006) "Flood criticises McDowell on sentence remarks" www.rte.ie It was reported on 3 January 2007 that Supreme Court Justice, Joseph Finnegan, said that "public disquiet about inconsistent sentencing is without basis". Source: "Judges' database to tackle lenient sentencing" (03 January 2007), *Irish Examiner*.
72. Source: "Top judge awaiting McDowell's gangland bail names" (January 2007), *Irish Independent*.

Hardiman J and other judges' comments on this issue can be understood as an assertion of judicial independence. Certainly, it would be extremely worrying if the judiciary stayed silent as it would lead the general public and others to believe that it was possible to influence how they enforce the law. The constitutional judicial declaration provides that the only obligation on the judiciary is to uphold the Constitution and laws of the country and they should not be swayed by extraneous considerations. The Code of Ethics for Officers Holders and other members of the Oireachtas could clearly stipulate that elected representatives cannot seek to influence the judiciary in this way. In this author's view, this measure is necessary as attempts to influence the judiciary on the part of politicians and government ministers is qualitatively different from similar remarks made by academics, non-governmental organisations (NGOs) and other media commentators, given the Government's role appointing judges.

3.3.3 ARE JUDICIAL DECISIONS SUBJECT TO REVISION?

There are a number of guarantees in the Constitution which protect judicial decisions from revision. Article 34.4° provides that:

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

Article 34.4.6° also specifies that the decision of the Supreme Court is "final and conclusive" in all cases. Essentially, this ensures that the legislature, the executive and other parties must accept a decision of the Supreme Court on a constitutional question. The only way to reverse or alter the Supreme Court's interpretation of the Constitution is by referendum.[73]

While the Oireachtas is prevented from altering or reversing the findings of a court,[74] there is nothing to stop the Oireachtas from changing the law retrospectively so long as it does not trench the rights of parties to that litigation.[75] However, what is most important here is that judgments of the Supreme Court are not subject to revision and therefore Irish law complies with international human rights standards in this area.

3.4 JURISDICTIONAL COMPETENCE

Independence in decision-making entails the exclusive authority to determine jurisdictional competence on matters of a judicial nature.[76] In practice, this implies that the judiciary should be authorised to deal with all matters of a judicial nature and, in the event of a dispute, the judiciary should have exclusive authority to decide whether a matter submitted to it falls under its jurisdiction.[77] The European Convention on Human Rights incorporates similar rules on the question of judicial authority. Article 32 makes it clear that the European Court of Human Rights' jurisdiction extends to all matters concerning interpretation and application of the Convention, and in the event of a dispute on jurisdiction the Court has full authority to determine the matter.

3.4.1 JURISDICTIONAL COMPETENCE IN THE IRISH COURTS

The Constitution provides for a hierarchical system of courts, which has many of the characteristics of the system in force both prior to 1921 and under the 1922 Saorstát Éireann Constitution. Article 34 states that there must be a court of final appeal (the Supreme Court) and a court of first instance (to include the High Court) and courts of limited/local jurisdiction. Moreover, Article 36 (iii) empowers the State to regulate by law the constitution and organisation of the courts, as well as the distribution of jurisdiction and business among the said courts and judges. Further, Article 38.2 provides that minor offences may be tried in courts of summary jurisdiction and Article 38.3.1 allows the State to establish special courts for trial of offences where it has been determined that ordinary courts are inadequate to secure the administration of justice and preservation of peace.

The system of courts envisaged in the Constitution was not formally established until the Courts (Establishment and Constitution) Act 1961. Figure 1 at the beginning of this report outlines the current structure and jurisdiction of the court system, together with routes of appeal.

What follows is not an exhaustive examination of jurisdictional competence, rather this author has attempted to demonstrate areas where the Oireachtas may have infringed the jurisdictional competence of the High Court.

73. For example, this occurred following the Sixteenth Amendment to the Constitution on bail in 1996.
74. *Howard v Commissioner for Public Works* (No 3) [1994] 3 IR 394.
75. Hogan and Whyte, *ibid*, at p. 663. This approach was confirmed in *Pine Valley Developments Ltd v Minister for the Environment* [1987] IR 23, [1987] ILRM 747.
76. UN Basic Principles: "3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law."
77. Dung, L. T., *supra*, at p. 12.

3.4 2 JURISDICTION OF THE HIGH COURT

Article 34.3.1 of the Constitution provides that the courts of first instance must include a High Court "invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal". Article 34.3.2 also invests the High Court with the power to determine the validity of any law having regard to the Constitution. Under Article 40.4, the High Court must also hear complaints concerning the detention of any person.

Apart from the circumstances outlined in Box 7, the High Court determines its jurisdiction on a case by case basis and will interfere with lower court jurisdiction if there is a serious danger that justice would not be done.[78] Then again, the High Court also has inherent power to decline jurisdiction,[79] and in practice, is slow to encroach on the administrative sphere. Though the court will consider the fairness of an administrative decision, it will not replace such a decision with its own.[81] Nonetheless, Hogan and Whyte suggest that the Irish courts are reluctant to allow a legislative provision to oust their jurisdiction. In *Murren v Brennan*, Gavan Duffy J proclaimed that:

> While a court of law would be slow to interfere with any decision clearly entrusted by statute to a Minister of State, the phrase "whose decision shall be final" … cannot exclude the constitutional jurisdiction of the High Court in a case deemed by the High Court to warrant interference. [82]

The courts will submit to some restriction of their jurisdiction by way of fixed time limits on applying for leave for judicial review. According to the Law Reform Commission, time limits are an essential feature of judicial review and necessary to ensure that public bodies are not "held hostage to an interminable threat of legal challenge."[83] At the same time, the Law Reform Commission recognizes that time limits should provide individuals with a "reasonable opportunity… to call into question public decisions". [84]

BOX 7: JURISDICTION OF THE HIGH COURT

When exercising its first instance criminal jurisdiction, the High Court is known as the Central Criminal Court. Section 25(2) of the Courts (Supplemental Provisions) Act 1961 provides that the High Court has exclusive jurisdiction to deal with the following 'reserved offences': treason; an offence under sections 2 and 3 of the Treason Act 1939 , i.e., encouragement or misprision of treason; offences under sections 6, 7 and 8 of the Offences against the State Act 1939 i.e. offences relating to the usurpation of the functions of government, obstruction of government and/or the President; murder, attempted murder and conspiracy to commit murder and piracy. In addition, since 1961, the High Court has had exclusive jurisdiction over offences relating to the: Geneva Conventions Act 1962; the Genocide Act 1973; rape, aggravated sexual assault and attempted aggravated sexual assault, as defined in the Criminal Law (Rape) (Amendment) Act 1990 and offences under the Criminal Justice (United Nations Against Torture) Act 2000.

Section 5(2)(a) of the Illegal Immigrants (Trafficking) Act 1999 currently imposes a 14 day limit (not working days) on persons intending to challenge the validity of an immigration or refugee related decision.[85] The High Court can extend this limit if there are good and sufficient reasons. This provision imposes a heavy burden on potential litigants who have to secure the services of a legal team and launch judicial review proceedings within this timeframe. In Re 26 *and the Illegal Immigrants (Trafficking) Bill 1999* [86] , the Supreme Court decided that section 5 was not repugnant to the Constitution and did not indirectly discriminate against non-Irish citizens as comparable time limits also apply to persons/companies challenging the validity of planning decisions.

78. *O'R v O'R* [1985] IR 367.
79. Refer to Gannon J in *R v R* [1984] IR 296.
80. Refer to section 3.2.1 for a discussion on the administrative sphere.
81. Refer to O'Flaherty J in *Attorney General v Hamilton* (No 1) [1993] 2 IR 250.
82. *Murren v Brennan* [1942] IR 466.
83. Law Reform Commission, *ibid*, at p. 35.
84. *Ibid*.
85. Order 84, rule 2(1) of the Rules of the Superior Courts Act 1986 covers time-limits for other litigation. It provides that judicial review actions should be issued promptly within three months of an actual decision being taken or six months where the relief sought is certiorari, unless the court considers there is good reason for extending the time limit.
86. *Article 26 and the Illegal Immigrants (Trafficking) Bill 1999*, [2000] IESC 19.

The Law Reform Commission considered the issue of time limits in its *Report on Judicial Review Procedure.*[87] In particular, it noted that the "time limit imposed regarding immigration is more onerous" given the personal circumstances of non-Irish citizens challenging decisions.[88] It also took the view that judicial review proceedings should not constitute a mechanism whereby "a failed immigration applicant" might try to delay the immigration process.[89] Taking account of the State's obligation to manage migration and the individual rights of foreign nationals, the LRC recommended that Illegal Immigrants (Trafficking) Act 2000 be amended so as to increase the fixed time limit on applications for judicial review to 28 days, with judicial discretion to extend where good and sufficient reasons are established.[90]

In 2005, the UN Committee Against Racism also expressed concern that a 14-day time limit had been introduced for immigration related decisions, and recommended that this restriction should be resolved in the forthcoming legislation on immigration.[91] However, it appears that the Government has ignored both the Law Reform Commission and UN Committee Against Racism in this regard. It recently introduced the Immigration, Residence and Protection Bill 2007 on 25 May 2007 to reinstate and modify all existing immigration and refugee law. Section 99(2) of the Bill deals with special procedures for judicial review and retains the 14-day time limit.

In this author's view, the current time limit for immigration related decisions is an infringement on jurisdictional competence of the High Court and should be extended accordingly.

3.4.3 JURISDICTION OF THE SUPREME COURT

The Supreme Court is made up of the Chief Justice and seven ordinary judges. The President of the High Court is also an *ex officio* member and when one ordinary judge of the Supreme Court is President of the High Court, the number of ordinary judges is increased by one.

Under Article 12 of the Constitution, the Supreme Court has original jurisdiction to determine if the President of Ireland has become permanently incapacitated. Article 26 also permits the President to refer Bills to the Supreme Court to determine whether such a Bill or specified provision is repugnant to the Constitution. In addition, Article 40.4.3˚ requires the Supreme Court to consider cases submitted to it by the High Court, where the court is satisfied that a person is detained in accordance with the law, but that such law is invalid having regard to provisions of the Constitution.[92]

As the court of final appeal, the Supreme Court has jurisdiction over appeals from the High Court and the Court of Criminal Appeal, "with such exceptions and subject to such regulations as may be prescribed by law" (Article 34.4.3˚). Thus, the jurisdiction of the Supreme Court can be restricted in certain circumstances by the Oireachtas and the general rule in regulating the Supreme Court's appellate jurisdiction is that the language used in such a statute must be "clear and unambiguous".[93]

Hogan and Whyte indicate that there is an increasing tendency to curtail the Supreme Court's appellate jurisdiction by the Oireachtas and they identify three broad categories of restriction.[94] They refer to the first category as 'exception' i.e. circumstances where there is no possibility of appeal.[95] The second category is conditional appeal i.e., circumstances where an applicant has to obtain leave to appeal from the High Court.[96]

87. Law Reform Commission (2004) Report on Judicial Review Procedure, Law Reform Commission: Dublin. www.lawreform.ie
88. *Ibid*, at p. 35.
89. *Ibid*, at p. 48. In this instance, the Law Reform Commission drew on the Attorney General's submissions in *Re 26 and the Illegal Immigrants (Trafficking)* Bill 1999
90. *Ibid*, para 2.35, at p. 49. The Law Reform Commission did not make any recommendations on changing time limits on planning applications as it found that section 50(4) of the Planning and Development Act 2000 was working well in practice. See p. 45.
91. See 24, CERD/C/IRL/CO/2, 10 March 2005.
92. The Supreme Court has also declared its appellate jurisdiction in a range of other circumstances. Refer to Hogan and Whyte, *ibid*, p.930-938.
93. Hogan and Whyte, *ibid*, at p. 955. *In People (AG) v Conmey* [1975] IR 341, at 360, Walsh J.
94. Hogan and Whyte, *ibid*, at p. 953.
95. Section 42(8) of the Freedom of Information Act 1997 provides that: "The decision of the High Court on appeal or reference under this section shall be final and conclusive.
96. For example, section 3 of the Illegal Immigrants (Trafficking) Act 2000 stipulates: (a) The determination of the High Court of an application for leave to apply for judicial review as aforesaid of an application for such judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decisions involve a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court. (b) This subsection shall not apply to a determination of the High Court in so far as it involves a question as to the validity of any law, having regard to the provisions of the Constitution..

A third category is where the Supreme Court's appellate jurisdiction is curtailed or confined by reducing the scope of the appeal to a specified point of law.[97] For instance, section 96(7) of the Patents Act 1991 provides that: "An appeal to the Supreme Court from a decision of the [High] Court under this section shall lie only on a question of law" or section 16(12) of the European Arrest Warrant Act 2003 which states that: "An appeal against an order under this section or decision not to make such an order may be brought in the Supreme Court on a point of law only".

It is argued in this report, that the above restrictions on the Supreme Court's appellate jurisdiction are not incompatible with Principle 3 of UN Basic Principles so long as the High Court has full jurisdiction and power to determine all legal questions. Instead, a meaningful right to appeal to a higher court or authority is an integral part of due process and the right of access to the courts. In order to preclude any potential for injustice, the Law Reform Commission recommends that where an applicant has been refused leave for judicial review in the High Court and/or a certificate of appeal, a facility should be available whereby a single judge of the Supreme Court can review the matter.[98] In the interests of justice and right of access to the courts, this recommendation is endorsed in the present report.

The Supreme Court.
Source: Irish Times ©

3.5 THE RIGHT AND DUTY TO ENSURE FAIR COURT PROCEEDINGS AND DELIVER REASONED DECISIONS

Principle 6 of the UN Basic Principles: "entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected".[99] Judges therefore play a central role in upholding the law, and vindicating rights and fairly managing court proceedings.

The Human Rights Committee receives a significant number of individual communications alleging violations of Article 14 (right to a fair trial) of the ICCPR, particularly in regard to procedural irregularities and fairness in judicial proceedings.[100] However, the Committee also affords a 'margin of appreciation' to national courts and believes that they are best placed to evaluate facts and evidence in cases, unless it can be proven that a court clearly acted arbitrarily, resulting in a "denial of justice".[101] One communication meeting this standard is that of Anthony Fernando who sued his employers after suffering injuries in the workplace. Fernando lodged a successive number of motions with the Sri Lankan Supreme Court alleging violations of his constitutional rights. During his last hearing the Supreme Court summarily convicted him of contempt of court and imposed a one-year prison term of "rigorous imprisonment" for raising his voice in court and making no apology. Notably, the Human Rights Committee decided not to consider whether there was a violation of Article 14, instead the Committee concluded that the Court was in violation of Article 9(1) of the ICCPR.[102]

> No reasoned explanation has been provided by the State party as to why such a severe and summary penalty was warranted, in the exercise of a court's power to maintain orderly proceedings. Article 9, paragraph 1, of the Covenant forbids any "arbitrary" deprivation of liberty. The imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within the prohibition. The fact the act constituting a violation of article 9, paragraph 1 is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State party as a whole. [103]

97. Hogan and Whyte, *ibid*, at p. 954.
98. Law Reform Commission, *ibid*, para 1.91 at p. 34.
99. The European Statute of the Judge also includes a similar provision. General principle 1.5 states that "Judges must show in discharging their duties, availability, respect for individual rights and in preserving the secrecy of information which is entrusted to them in the course of proceedings".
100. Steiner, H. J. (2000) "Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?" in Alston, P. and Crawford, J. (eds) The Future of UN Human Rights Treaty Monitoring, Cambridge University Press, at p. 25.
101. Simms v Jamaica, Communication No. 541/1993, UN doc. CCPR/C/53/D/541/1993; Communication No 646/1995: Australia 25/11/98, UN doc. CCPR/C/64/D/646/1995; Communication No. 947/2000: Australia. 27/10/2000, UN doc. CCPR/C/70/D/947/2000; Communication No. 920/2000: Australia 13/05/2004, UN doc. CCPR/C/80/D/920/2000; Communication No. 1037/2001: Poland, 04/08/2005, UN doc. CCPR/C/84/D/1037/2001.
102. "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".
103. Communication No. 1189/2003: Sri Lanka 10/05/2005, UN doc. CCPR/C/83/D/1189/2003, at 9.2.

The obligation to deliver a reasoned decision in civil and criminal proceedings is implicit in the requirement of a fair hearing under Article 6 of the ECHR.[104] However, if a court only gives some reasons, the *prima facie* requirements of Article 6 are still satisfied.[105] In *Higgins and Others* [106], the European Court of Human Rights determined that the obligation to provide a reasoned decision "cannot be understood as requiring a detailed answer to every argument". The duty to give reasons "must be determined in the light of the circumstances of the case". Nonetheless, in order to ensure that an accused person's rights are properly safeguarded in criminal proceedings, detailed reasoned decisions are necessary to allow an accused person to appeal.[107] If an applicant can show that fundamental issues relating to his/her defence were ignored this would be sufficient to establish that he/she did not have a fair hearing by a judge.

In Irish law the basic principles of constitutional justice[108], *audi alteram partem* (to hear both sides) and *nemo judex in causa sua* [109] (no one may be a judge in their own cause) apply to all judicial proceedings. In brief, these principles have developed in such a way as to impose a duty on judges and other decision-makers to be fair in conducting a hearing. Other aspects of a fair hearing involve allowing proper and uninhibited scope to each party to make his/her case, affording equal treatment, refraining from the taking of unfair advantage and the avoidance of excessive intervention on the part of the decision-maker.[110]

In the context of criminal and civil proceedings, fair procedures require judges to give some reasons for their decisions. In *O'Mahony v Ballagh*, a District Court judge failed to give reasons for rejecting an application for non-suit. As a result, the Supreme Court ruled that the judge had breached constitutional fair procedures. Murray J explained:

> Every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which is the argument he is accepting and which he is rejecting, and as far as practicable in the time available, his reasons for so doing. [111]

This standard would appear to be lower than that set by the European Court of Human Rights under Article 6 which requires judges to provide some reasons.

It is not possible to cover every aspect of fair procedures and constitutional justice rather the current section will refer to law pertinent to the present study.

The following section considers the District Court's failure to provide reasons in all circumstances.

104. *Van de Hurk v. Netherlands*,(1994) A/288 18 EHRR 481, para. 61. See also Ruiz-Jorija v Spain, (1994) 19 EHRR 553; and *Hior Balini v Spain* (1994) 19 EHRR 566.
105. Ovey, C. and White, R. (2006) *Jacobs & White The European Convention on Human Rights*, Oxford University Press, at p. 179.
106. *Higgins and Others v. France* [1998] ECHR 8.
107. App. 1035/61, X *v. Federal Republic of Germany*, Decision of 17 June 1963 (1963) 6 Yearbook 180, at 192.
108. With the development of constitutional principles, fairness is now referred to as 'fair procedures', and in some instances, 'constitutional justice'. Refer to Costello P in *McCormack v Garda Síochána Complaints Board* [1997] 2 IR 489 at 400-500.
109. The development of case law under this principle is discussed in more detail in Section 5 on Judicial Impartiality.
110. Robinson, D. (2004) "Due Process and the Right to a Fair Trial", *Human Rights Law*, Oxford University Press/Law Society of Ireland: Dublin, at p. 129.
111. *O'Mahony v Ballagh* [2002] 2 IR 410 at 416, per Murphy J.

3.5.1 FAILURE TO PROVIDE REASONED DECISIONS IN THE DISTRICT COURT

The District Court is the busiest court in the nation and is the main interface between the general public and judicial system. On average, the District Court deals with 400,000 cases a year and there are currently 55 judges[112] sitting in the District Court in different districts throughout the country. However, in reality we know very little about the operation of the District Court due to the fact that full and detailed statistics on its work are not available.

The jurisdiction of the District Court includes summary offences. Walsh describes summary trial of offences in the District Court as "speedy and informal" in comparison with trial on indictment.[113] In 2005, the District Court dealt with 302,124 summary cases and 41,374 indictable cases.[114] Evidently, the District Court processes an enormous number of cases of a summary nature.

Despite the obligation to give some reasons for decisions under the ECHR, District Court judges do not give reasons in all circumstances. This is in breach of the right to a fair hearing under Article 6 of the ECHR. For example, in a study published by the Irish Penal Reform Trust (IPRT), it was discovered that judges only gave reasons for imposing a custodial sentence in 42% of cases, with the result that many offenders left the courtroom without understanding the factors motivating a judge's decision.[115]

Taking account of *O'Mahony v Ballagh* and jurisprudence from the European Court of Human Rights on Article 6(1), the Law Reform Commission made the following recommendation in 2002:

> In the light of the severity of the consequences of a custodial sentence on a defendant, the Commission proposes that there should be a duty on a District Judge to give reasons where imposing a custodial sentence rather than a fine for a minor offence. This, it is envisaged, would ensure that a District Court Judge briefly records the carefully thought out reasons before imposing a custodial sentence.[116]

When the Working Group on the Jurisdiction of the Courts contemplated this recommendation in 2003, it was rejected.

> The Working Group notes the undoubted obligation of all courts, including the District Court to give clear and adequate reasons for their decisions. It has considered the recommendation of the Law Reform Commission, in its Report on Penalties for Minor Offences, to the recording in writing by District Judges of reasons for decisions involving a custodial sentence. The Working Group has been informed that the implementation of this obligation to give reasons for custodial decisions is not possible within the parameters of the existing workload of the District Court. It would necessitate the provision of recording equipment in all courts. In the view of the Working Group, that would be desirable for many reasons. The information available to the Working Group does not suggest, however, that this is likely to occur in the immediately foreseeable future. As an alternative, additional judicial resources would be necessary, if every custodial sentence had to be justified by reasons to the level required by the recommendation of the Law Reform Commission.[117]

Clearly, the Working Group acknowledges that there is an obligation on the courts to provide reasoned decisions which is hampered by a lack of resources. Apart from the resourcing issue, another justification for not providing reasons at District Court level is that when appeals take place at the Circuit Court, the entire case is reheard again. Be that as it may, it is unacceptable that some offenders leave court without understanding why they have been deprived of their liberty. As a matter of priority, the Courts Service should introduce digital recording in all District Court venues.[118] The Government should also increase the number of judges sitting on the District Court. These measures ought to allow the courts to fulfil their obligations under Article 6(1).

112. On 3 May 2007, the Government announced that it was increasing the number of District Court to 61. Source: Wall, M. 'Government appoints largest number of judges', *Irish Times*.
113. Walsh, D. (2000) *Criminal Procedures*, Thomson/Roundhall: Dublin, at p. 671.
114. Courts Service (2005) *Annual Report*, at p. 22.
115. This study was carried out between June and July 2003. Two IPRT researchers observed proceedings in Courts 44 and 46 of the Dublin Metropolitan District Court. www.iprt.ie
116. Law Reform Commission (2002) *Consultation Paper on Penalties for Minor Offences*, Law Reform Commission, at para 6.26.
117. Working Group on the Jurisdiction of the Courts (2003) *The Criminal Jurisdiction of the Courts, the Courts Service*, at p. 14.
118. Some initial activities have been carried out by a Digital Recording Committee within the Court Service..

3.6 RECOMMENDATIONS

Separation of Powers

- It is recommended that the separation of powers be fully examined by a committee established by the Government or by the Law Reform Commission with a view to strengthening accountability and independence in decision-making.

Law on Contempt

- In line with recommendations from the Law Reform Commission, it is recommended that the Government bring forward legislation on contempt of court to clarify and update this area of law.

External Influences on Judicial Conduct

- Consideration should be given to amending the Code of Ethics for politicians to specifically preclude them from making direct statements outside of the Oireachtas that might appear to undermine the independence of the judiciary.

Time Limits for Judicial Review on Immigration Decisions

- Time limits for applying for judicial review on immigration decisions should be extended via the forthcoming Immigration, Residence and Protection Bill in line with recommendations from the Law Reform Commission and the UN Committee Against Racism.

Appellate Jurisdiction of the Supreme Court

- In the interests of justice and right of access to the courts, where an applicant has been refused leave to in the High Court and/or a certificate of appeal, a facility should be available whereby a single judge of the Supreme Court can review the matter.

Failure to Provide Reasoned Decisions

- The Government should make funding available to allow the Courts Service to introduce digital recording in all District Court venues.

- The number of District Court judges should be substantially increased with a view to reducing court lists and enabling judges to provide reasoned decisions.