

SOURCES OF IRISH LAW

The law in Ireland can be described as a body of rules imposed by the State upon its members, designed to regulate human conduct or behaviour within that State. Rules are introduced and maintained for the common good. The courts interpret these rules and determine whether or not they have been broken. The courts then pass sentence or punishment, or issue awards of compensation. In this way, a certain level of behaviour is maintained in society. The law is constantly changing in order to reflect an ever changing society and new rules are constantly introduced to reflect current values. Some fundamentals of law do not change, however, the interpretation of these fundamentals may change over time. The original sources of law date back many hundreds of years, and some new sources evolved over time. Sources are therefore either historical, i.e. inherited from our predecessors, or legal, i.e. introduced through legislation.

Sources of law in Ireland today can be broken down into 5 distinctive groups, notably:

1. Common Law
2. Judicial Precedent (a feature of Common Law)
3. The Irish Constitution (Bunreacht na hEireann)
4. Statutory Legislation
5. European Union Law

The first two are regarded as historical sources, while the other three are legal sources.

1. COMMON LAW

Historical Background

We have a common law system in Ireland which has been inherited from England. The common law system evolved in England since the Norman Conquest at the Battle of Hastings in 1066. The local customs, which existed prior to the Norman Conquest, were unified into one system of law controlled by the Crown. Since the king was the ultimate source of law at this stage in history, there being no elected Parliament to approve laws, the king's judges had immense power and authority to apply his law throughout the kingdom.

As the centuries passed and the English system developed, the judges retained a central role in the development of new legal rules. These rules became known collectively as the common law of England, and any system of law which is based to a large extent on the development of rules by judges is known as a common law

system. With the passage of time common law came to mean judge-made law as opposed to statute law (law enacted by parliament).

Development of the Common law in Ireland

Prior to the arrival of the Anglo-Normans in 1171, Ireland was governed largely by a system based primarily on custom, known as the Brehon law. It was local in nature and administered by judicial figures known as Brehons, the equivalent of travelling justices.

From the arrival of the Anglo-Normans in 1171 until 1601, there was a conflict in Ireland between the common law system brought in by the Anglo-Normans and the Brehon Law. However, in 1601 the Irish Chieftains were defeated in the Battle of Kinsale, which resulted in the flight of the Earls, and the Brehon Law was rendered almost extinct. With the establishment of the Act of Union 1800, all the laws for Ireland emanated from Westminster in London, the Brehon Law was eliminated and the common law system was fully established. The common law system still exists today as many of the rules of society established by judges still exist, such as murder or theft. Also, the system of judicial precedent, as described below, was established in the common law system, thereby making the common law an integral part of our judicial system.

Equity:

Over the years, the common law system became rigid, harsh and inflexible and the only remedy was damages. As a result, the practice grew whereby dissatisfied litigants would petition the king to exercise his prerogative power in their favour. The king's Chancellor heard these petitions.

The Chancellor was only concerned with establishing the truth and to impose a just solution. Ultimately, the Chancellor's department began to deal with so many of these 'appeals' from the common law courts that it developed into a separate court of law, which became known as the Court of Chancery, where rules of equity were applied. The system of 'equity' could be broadly defined as 'fine tuning' the common law system, whereby it administers justice in a more flexible manner. The common

law system relates to the decisions of judges and certainty was achieved by the application of uniform rules, but this certainty was achieved at the cost of any flexibility. The system of equity could therefore be said to alleviate some injustices inherent in the common law system, caused by its rigid nature.

Maxims of Equity

The Court of Chancery began to develop precedent and generated maxims of equity, such as:

- ‘Those who come to equity must come with clean hands’ – this means that the person making the accusation should not himself be guilty of any misconduct. This maxim resulted in apportionment of blame – for example, contributory negligence.
- ‘Equity looks to the intent rather than the form’ – this means that equity takes into account whether an act was intentional. This was a very important breakthrough as prior to the introduction of this maxim, the intention of the accused was not taken into account.

Hence, while at common law a party who proved that a legal rule had been broken was automatically entitled to a remedy, regardless of his or her own conduct in the matter; the Court of Chancery on the other hand exercised discretion in granting its remedies. It was more interested in achieving fairness or ‘natural justice’. In the first place, the plaintiff must show that he or she had no part in the offence that the defendant is accused of, and also must show that it was deliberate and not accidental. An example would be where a party was in breach of a contract due to circumstances outside their control.

Consequently, a remedy might be refused where the party seeking the remedy had either acted unfairly or refused to act fairly. Also, the system of equity meant that litigants could seek a remedy in a case where no legal rule was broken, but where damage was caused in some moral sense, thus ensuring that a remedy was available for any ‘wrong’ committed, not necessarily a rule of law. The Court of Chancery thus became very popular and while it was introduced in order to supplement the common

law system, it soon began to compete with it. This resulted in many disputes between the two courts.

Equity improved the common law and therefore the king decided that where there was a conflict between the common law and equity, then equity would prevail. Reforms were introduced into Ireland by the Judicature (Ireland) Act 1877 which confirmed that, in the case of conflict between equity and the common law, equity would prevail. This Act merged the administration of common law and equity to create a unified court system. In essence, equity ensures that justice prevails over rigid rules of law.

In summary, the vast body of common law that prevails in Ireland today was not created by legislation, but was developed through the centuries by judges applying the customary law to new situations. Precedent, as described below, is the most outstanding feature of common law and is regarded as being a unique source of law in its own right.

2. JUDICIAL PRECEDENT

As the system of equity developed over the years, it adopted the doctrine of precedent and the rules of equity became fixed. The court system was reorganised by the Judicature (Ireland) Act 1877 and the two courts, i.e. the Court of King's Bench and the Court of Chancery were merged into one court known as the High Court of Justice.

Judicial precedent is considered to be the main feature of the common law. Precedent means the application of a principle of law as laid down by a higher court on a previous occasion in a case which is similar to the case before the court. The reliance on precedent has been the strength and hallmark of the common law. Most of the common law has been enacted, not by legislation, but developed over time by judges applying previous decisions (precedent) to new situations.

The application of precedent in law is known as the doctrine of STARE DECISIS ("let the decision stand"). Binding precedents are those of higher courts. Persuasive precedents are those of equal or lesser courts or decisions of foreign superior courts in the common law tradition.

Not all of the decision of the higher court is binding. Only the grounds of the decision known as the *RATIO DECIDENDI* (“reason for the decision”). The remainder of the decision, known as *OBITER DICTUM* (“by the way”) is said to be anything said which is not considered to be directly relevant or essential to the decision. An obiter, while not binding, may be persuasive.

Authoritative precedent is one which an inferior or lower court must follow.

Persuasive precedent is one which a court may follow.

A superior court may overrule or replace a precedent set in a lower court. The old precedent is then void of authority.

Where differences are shown between prior decisions and a case at hand, the prior case is said to be distinguished.

The highest court in the land is the Supreme Court and binds all courts. Since 1965, the Supreme Court has freed itself from the necessity to follow its own precedent at all costs, and this was established in the following landmark cases:

- *The State (Quinn) v Ryan (1965) IR 110*
- *Attorney General v Ryan’s Car Hire Ltd (1965) IR 642*

3. THE IRISH CONSTITUTION

The Constitution, *Bunreacht na hEireann*, came into effect on 29th December 1937. It replaced the Constitution of the Irish Free State of 1922 (*Saorstat Eireann*), which was enacted after the establishment of the Irish Free State following the Anglo-Irish Treaty of December 1921. Until our entry into the European Economic Community in 1973, the 1937 Constitution was the primary and overriding source of law in Ireland. When enacted in 1937, it marked a new political beginning in Ireland. It was enacted by the People, it established the State and the organs of Government, it contained a statement of individual rights, it declared its objectives to be the attainment of stated social aspirations and it provided a special method of amendment.

The Irish Constitution regulates the structure and function of the principal organs of government and regulates the relationship of these organs to each other and to the citizen. It is the legal framework upon which legal rules and interpretations are hung

– i.e. the Constitution itself does not contain all the rules and regulations of Irish society, but provides the basis for such rules and regulations to be enacted. Thus, the body of law that has grown from the Irish Constitution can be referred to as our Constitutional Law.

The Constitution establishes the Nation, State, President, Oireachtas, Government and the Courts. It deals with the Attorney General, Council of State and the Comptroller and Auditor General. It guarantees certain fundamental rights, for example, personal rights in Article 40, rights relating to the family in Article 41, education in Article 42, private property in Article 43 and religion in Article 44.

The Constitution was written and created for the people of Ireland and belongs to the people of Ireland. To ensure that this is upheld by those in power at any time, the Irish Constitution can only be changed by a majority of votes in a referendum and any legislation which is held repugnant to (i.e. conflicts with any article) the Constitution is invalid. Thus, an amendment of the Constitution was necessary before becoming members of the European Union, so that laws enacted outside the State could have application within the State.

Every proposal to amend the Constitution must be initiated in Dail Eireann and be passed, or deemed to have been passed, by both Houses of the Oireachtas. Every proposal submitted to the People in a referendum is approved if a majority of the votes are cast in favour. There have been various proposals to amend the Constitution, some have been rejected and many have been approved.

The Supreme Court decided in *McKenna v Ireland (1966)* that once a Bill to amend the Constitution had been submitted to the People, the People were entitled to reach their decision in a free and democratic manner and the use by the Government of public money to fund a campaign designed to influence the voters was an interference with the democratic process. To further this principle of equality, the Referendum Act 1998, as amended, established the matter of the referendum as simply and effectively as possible, while ensuring that the arguments of those against the terms of the referendum and those in favour are put forward in a manner that is fair to all interests concerned.

The Irish Constitution, enacted and amended as it is by the Irish people, is intended to reflect the broad values of Irish society. As those values change over time, this in effect prompts changes in the Constitution.

The Separation of Powers:

This doctrine advocates the distribution of the powers of government among different institutions of the State. In *In Re Haughey [1971] IR* O'Dalaigh C.J. stated: “The Constitution of Ireland is founded on the doctrine of the tripartite division of the powers of government – legislative, executive and judicial”.

The *legislative* power to make laws is vested in the Oireachtas. The *executive* power entrusted with carrying the laws into effect is vested in the Government. The *judicial* power of applying the law to disputes is vested in the Courts.

This separation of powers, enshrined in the Constitution, ensures that no one organ of Government has total power to legislate. There have been many challenges to this doctrine over the years, when it appeared that one institution may have been encroaching in the domain of another, such as;

Encroachment by Legislature in the Judicial Domain – *Buckley v Attorney General (1950)*.

Encroachment by Executive in the Judicial Domain – *Murphy v Dublin Corporation (1972)*

Encroachment by the Legislature in the Executive Domain – *Attorney General v Tribunal of Inquiry into Beef Industry (1993)*

Supremacy of Constitutional Law

The supremacy of the Irish Constitution has been greatly diminished by our entry into and membership of the European Union. It is still supreme in some respects, in that no legislation can be enacted that is found to be unconstitutional, and also the power to

legislate on behalf of Irish citizens must be granted by the People themselves, therefore a referendum must be held to amend the Constitution each time this power is to be extended outside the provisions of the Constitution. A majority vote by the People in 1973 enabled the State to become a member of the European Economic Community (now the European Union), and subsequent referenda over the years also gave the State permission to extend the power to legislate to the various Institutions of the EU. Membership of the EU also implies acceptance of the provisions of the treaties and empowers EU Institutions to enact legislation which must be applied in Irish courts. In cases of conflict between our domestic law and EU law, EU law prevails. Therefore the Irish Constitution is no longer supreme in every respect.

4. STATUTORY LEGISLATION

The Parliament of Ireland made statutes until the Act of Union 1800. Between 1800 and 1922 all legislation emanated from Westminster. The Irish Free State was founded in 1922 following the Anglo-Irish Treaty signed in December 1921 and from then until 1937, the Oireachtas of Saorstát Éireann passed legislation. Legislation prior to 1922 continues in force by virtue of Article 50 of the 1937 Constitution, to the extent that it is not inconsistent with the provisions of the 1937 Constitution.

Article 15.2.1 vests legislative power in the Oireachtas. Legislation is passed by both Houses of the Oireachtas, Dáil Éireann and Seanad Éireann, and is signed into law by the President. Legislation may be superior or subordinate.

Superior Legislation:

Superior legislation is law enacted by the legislature. These are known as Acts of the Oireachtas. A proposal submitted for the purpose of being passed into law is known as a Bill, which must go through five stages in the Oireachtas:

1. First stage - the relevant Minister obtains the permission of the House to circulate the Bill.
2. Second stage – the general provisions of the Bill are debated.

3. Third stage – is the *committee stage* in which the details of the Bill are debated section by section and amendment to its provisions can be taken.
4. Fourth stage – is the *report stage* and its purpose is to review the work which has been conducted at the committee stage.
5. Fifth stage – is the *final stage* and primarily a formal matter of reading the amended Bill.

The Taoiseach now presents the Bill to the President for signature as passed by both Houses of the Oireachtas. It is then promulgated by the President who publishes a notice in *Iris Oifigiuil* (official publication) stating that the Bill has become law.

If there is any question relating to the constitutionality of any proposed legislation, the President may decline to sign a Bill. In such cases, the President will consult with the Council of State and in turn refer it to the Supreme Court under Article 26 of the Constitution for a decision on its constitutionality. This is an example of the separation of powers described under the Irish Constitution above.

Statutory Interpretation:

Acts of the Oireachtas are subject to scrutiny by the Courts and may be found to be repugnant to the Constitution. In their interpretation of legislation, judges have established certain rules to assist them:

- (a) **The Literal Rule:** a judge must give to words their literal or usual meaning unless the Act defines or restricts the meaning to be taken. The meaning is to be derived from the context in which they appear.

The authoritative statement of the literal approach is that of Henchy J. in:

Inspector of Taxes v Kiernan [1981] IR 117

The Supreme Court was required to consider whether the expression ‘cattle’ in the Income Tax Act 1967 included pigs.

Held – to the ordinary person, cattle, sheep and pigs are distinct forms of livestock

Thus, the term ‘cattle’ does not include pigs.

A more recent case which illustrates the use of the literal rule is:

Burke v Aer Lingus (1997)

The passenger was injured on a shuttle bus taking her from the aircraft to the terminal building. It was held that the meaning of ‘embarking’ and ‘disembarking’ have a wider connotation which includes some activity by the passenger prior to entering or leaving the aircraft. Hence ‘disembarking’ does not have to be strictly interpreted as leaving the aircraft.

- (b) **The Golden Rule**: where the literal interpretation would lead to an absurd result, the golden rule is applied. If a statute permits two or more possible meanings, application of the golden rule allows the absurd to be discarded.
- (c) **The Mischief Rule**: where an Act is passed to remedy a mischief, the court must adopt the interpretation which will have the effect of remedying the mischief in question.

Case: Nestor v Murphy (1979)

The defendants, a husband and wife, had entered a contract whereby they agreed to sell the joint tenancy in their family home to the plaintiff. They failed to complete the sale and the plaintiff claimed an order directing the specific performance of the contract. The defendants contended that the contract for sale was rendered void by the provisions of the Family ***Home Protection Act (1976)*** whereby the written consent of the defendant wife was required prior to the execution of the contract of sale.

Held: The purpose of the legislation was to protect the non-owning spouse by preventing the other spouse from disposing of the family home without his or her prior written consent. Since the defendants in this case were joint tenants of the property, the legislation was held not to apply.

Subordinate Legislation:

The Oireachtas, or National Parliament, consists of the President and two houses – Dail Eireann (House of Representation) and Seanad Eireann (Senate).

The Oireachtas has delegated power to government ministers, local authorities and other bodies to legislate for specified purposes only. Delegated legislation is

implemented by statutory instruments, orders, regulations and by-laws. Subordinate legislation is also scrutinised by the Seanad Select Committee on Statutory Instruments.

Delegated legislation saves the Oireachtas from having to debate local matters. It allows the Government, or minister, to act quickly in emergency situations. It gives greater flexibility, because it can be amended quickly and easily when it becomes outdated, unlike a Statute which can only be repealed or amended by a subsequent statute.

The statutory instruments, orders, regulations and by-laws of delegated legislation have the same force of law as statutes passed by the Oireachtas.

5. EUROPEAN UNION LAW

Ireland became a member of the European Economic Community on 1st January 1973, following a referendum which was held in May 1972. The reason a referendum was necessary is because the EEC (now the EU) is possessed of law-making institutions, while the Constitution states that the Oireachtas is the sole legislature for the State. Therefore the People had to agree to allow another body to legislate on their behalf.

Since becoming a member, the Irish Constitution has no longer been supreme in all respects. The third amendment to the Constitution in 1973 allows European law to be incorporated into the domestic law of Ireland, and European Union law is now also a primary source of law in Ireland, in addition to the sources above. Almost 40 years membership of the EU has resulted in a vast body of European Union law that is applicable in our courts - this is officially known as 'Acquis communautaire' and this term refers to the existing body of EU law, all cases and legislation, both primary and secondary. EU law is now a subject in its own right, and is covered in detail later in the course. The following is a very brief outline.

As for Statutory Legislation, EU law comes in two forms; primary and secondary.

Primary Legislation

The primary source of EU law is the treaties. While there are other sources of law, this source is paramount in every respect. In instances of conflict, the treaties prevail.

The principal treaties of the European Union are:

- The Treaty of Paris 1951 – establishing the European Coal & Steel Community.
- The Treaty of Rome 1957 – establishing the European Economic Community.
- The Single European Act 1986
- The Maastricht Treaty on European Union 1992
- The Amsterdam Treaty 1997
- The Nice Treaty 2002
- The Lisbon Treaty 2009

Ratification of the treaties by the State means that the provisions become automatically embraced in the law of the State, i.e. once ratified they have immediate and direct effect. In Ireland, because of the Irish Constitution which determined who could legislate on behalf of Irish citizens, it was necessary to hold a referendum of the people in order to allow the State to permit an external body to legislate. The Irish Constitution was amended in 1973 in order to allow membership of the EEC in the first instance, and has subsequently been amended on several other occasions in order to accept the provisions of new treaties. In each case, the referendum of the people must return a majority vote in favour of the amendment in order for a treaty to be accepted into Irish law. If the majority vote in favour (i.e. a ‘yes’ vote), then the provisions of the treaty immediately become effective in Irish courts. If there is no majority, then the provisions of that particular treaty will not apply. This ensures that the rights which Irish citizens enjoy under the Irish Constitution are preserved.

A treaty will only be passed when the majority of the people accept it, as was the case with the most recent Lisbon Treaty which failed to get the approval of the people in the first referendum, and therefore it could not be ratified by the State at that time. This treaty was ratified following a second referendum, however, the initial rejection resulted in some changes being made to make it more attractive to Irish citizens.

Rejection of the treaty the first time around also resulted in a lengthy delay between the time the treaty was presented for approval and its final approval and application.

Secondary legislation – consists of regulations, directives and decisions, and also recommendations and opinions. Regulations, directives and decisions are binding on member states, however, recommendations and opinions are merely persuasive – i.e. they do not apply directly in Irish courts, but may be applied by individual member states if they so choose.

In addition to treaty provisions and secondary legislation, there is also a body of EU law to be found in cases, where precedents are continually set and which must be followed in Irish courts. Two of the earlier most important cases are as follows:

- ***Van Gend En Loos v Nederland Administratie der Belastingen (1963)*** – established the supremacy and direct effect of EU law
- ***Costa v ENEL (1964)***

Both of these cases established the supremacy and direct effect of EU law. The ECJ held that EC (EU) law took precedence over inconsistent national law, even laws that were introduced after the signing of the Treaty.

The court stated:

‘By contrast with ordinary international treaties, the EC Treaty has created its own legal system which on entry into force.....become an integral part of the legal systems of the member states and which their courts are bound to apply..... the member states have limited their sovereign rights.... and have thus created a body of law which binds their nationals and themselves’

As treaties are not introduced very often, it is secondary legislation that is the most common source of legislation in the European Union, particularly in the regulation of everyday business. The vast majority of new legislation introduced in the past thirty to forty years is as a direct result of our membership of the Union.

THE LEGAL PROFESSION AND LAW OFFICERS

Personnel engaged directly in the Irish legal system are categorised into two groups; (a) the legal profession, and (b) law officers.

The Legal Profession:

The legal profession in Ireland, as in England and Northern Ireland, is divided into two branches, solicitors and barristers, the latter usually known collectively as “the Bar”. There are a number of distinctions between the branches of the profession. The main one is that in the vast majority of cases, a person with a legal problem must first consult a solicitor for legal advice. A barrister is not permitted to take instructions directly from a member of the public, except in a small number of specific instances.

Solicitors:

The Law Society of Ireland is the body which has control over the education of students wishing to become solicitors while also having important disciplinary powers over those who qualify as solicitors. Before becoming a solicitor, persons must serve a period of apprenticeship to an established solicitor. In addition to serving such an apprenticeship, persons must also complete the courses of study organised by the Law Society at its headquarters in Blackhall Place, Dublin. There are now entrance examinations to gain admission to such courses.

Solicitors may be involved in contentious or non-contentious legal work. Non-contentious legal work would involve, for example, legal problems associated with the sale of a house (conveyancing) or the drafting of a will. It would not involve litigation (going to court). Contentious work would involve going to court and either appearing personally in the District Court or “briefing” (preparing a case) a barrister in the higher courts.

Barristers:

The barristers’ branch of the profession is generally known collectively as “The Bar”. Individually, they may be referred to as barristers or counsel. The Honourable Society of King’s Inns in Dublin is the institution which provides post graduate legal training for those who wish to practice at the Bar. Again, there are now entrance examinations to gain admittance to King’s Inns. Disciplinary matters are regulated by the Bar Council of Ireland. When a person graduates from the King’s Inns, he/she is then required to “devil” (apprentice) with a barrister for a period of one year in Dublin and one further year if a person wants to go to another circuit.

A distinction exists within the Bar between junior counsel and senior counsel. The initial call to the Bar is to the ranks of junior counsel, sometimes referred to as the outer Bar. The general rule is that a barrister will practice for a number of years as a junior counsel before considering whether to become a senior counsel. The move

from junior counsel to senior counsel is also referred to as ‘taking silk’. Senior counsel are also collectively known as the inner bar.

In general, the functions of a barrister include the drafting and preparation of pleadings (legal court documents) as well as conducting cases in court. However, they first have to be ‘briefed’ by a solicitor.

The Law Officers:

The present law officers in the State are the Attorney General and the Director of Public Prosecutions. Judges are also referred to as law officers.

The Attorney General:

Article 30 of the Constitution of Ireland provides that the Attorney General is ‘the adviser of the Government in matters of law and legal opinion’. Article 30 also provides that the Attorney General is appointed by the President of Ireland on the nomination of the Taoiseach. The AG must retire from office on the resignation of the Taoiseach. The AG is, by convention, a practising member of the Bar and a senior counsel.

As legal adviser to the government, the AG (or, more accurately, the staff of the AG’s office) scrutinises all draft legislation which any Government Department proposes to bring before the Oireachtas. The AG also advises the Government in an international context, for example in relation to the ratification of international agreements. The AG is always the principle defendant in cases challenging the constitutionality of legislation.

The Director of Public Prosecutions:

Prior to 1976, all serious criminal offences were prosecuted in the name of the Attorney General. However in 1976, Section 2 of the Prosecution of Offences Act 1974 came in to effect setting up the office of the Director of Public Prosecutions. The reason for setting up the office of the DPP was that it was felt that it was necessary to have an officer independent of an appearance of political connections to discharge these functions.

Although the DPP is appointed by the Government, the office is that of a civil servant, so that the DPP does not resign when a Government falls, unlike the position of the Attorney General. Section 2(5) of the 1974 Act also provides that the DPP ‘shall be independent in the performance of his functions’. The Attorney General retains some functions in relation to certain criminal matters having an international dimension.

Judges:

Article 35.1 of the Constitution provides:

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

A judge can be defined as a person vested with authority to decide questions in dispute between parties and to award the appropriate remedy. Together with judicial functions a judge may also be entrusted with administrative functions. The Irish Constitution provides a number of ways in which the independence of the judiciary can be ensured and the common law complements these.

While the formal appointment of judges is made by the President, this power is exercised 'only on the advice of the Government', so that, in fact the real power of appointment rests with the Government. Section 13 of the Courts and Court Officers Act 1995 provides for the appointment of a Judicial Appointments Advisory Board for the purposes of recommending certain persons for appointment as judges. There are minimum formal qualification requirements for appointment as a judge. Only practising barristers or solicitors of certain years standing are eligible to be appointed a judge. Once appointed, judges may only be removed from office for stated misbehaviour or incapacity.

Divisions of the Irish Legal System

The most fundamental distinction in the classification of law is that drawn between civil law and criminal law. The objectives of both, though broadly similar and closely connected, are clearly different.

The Irish legal system is broadly divided into (a) public law and (b) private law. Public law is concerned with the application of the law by the State in the general public and is administered through the Criminal Law system. Private law on the other hand is concerned with disputes between private individuals and is administered through the Civil Law system. Both systems have their own court structure.

Some of the many categories of civil law are:

- (a) Contract – this determines whether agreements made by persons have given rise to obligations which are enforceable by law.
- (b) Tort – this determines whether a wrong has been committed by one person against another
- (c) Commercial Law – covers contractual matters relating to negotiable instruments, agency, sale of goods and hire purchase/leasing.
- (d) Employment Law – covers contractual relationships between the employer and the employee.

Civil proceedings are initiated by private individuals or companies.

Criminal proceedings are commenced by the State.

Principal Differences between Civil and Criminal Law:

1. Civil law deals with disputes between private individuals or companies. Criminal law on the other hand involves the prosecution of a person by the state (in the name of the DPP) on behalf of the people of Ireland for committing crimes against society.
2. In civil cases, the parties involved are the Plaintiff (person taking the action) and the Defendant (person defending the action). In criminal law, the parties

involved are the prosecution (DPP on behalf of the people of Ireland) and the Defendant/Accused.

3. In civil law, the burden of proof (person who has to prove the case) is on the Plaintiff, although it may shift on occasion. In criminal law, the burden of proof is always on the Prosecution (State) and never shifts over to the Defendant/Accused.
4. In civil law, the standard of proof (the degree to which a case has to be proved) is on “the balance of probabilities” (“tip the scales”, 51%). In criminal law, the standard of proof is “beyond reasonable doubt”. This is a much higher standard than in a civil case because of the possible consequences for an accused person i.e. loss of liberty. There is no judicial definition of “beyond reasonable doubt” as it was felt that it would only serve to confuse juries. However, it has been equated to virtual certainty. A reasonable doubt is something which would cause the ordinary person to pause when making an important decision such as buying a house or a new car. It is not a frivolous or fanciful doubt.
5. In civil law there are various remedies available to the successful litigant:
 - (a) Damages.
 - (b) Injunction.
 - (c) Specific Performance of a contract.
 - (d) Rescission of a contract (bringing it to an end).

In criminal law, a person found guilty of a crime may be penalised by:

- (a) Imprisonment.
- (b) Fine.
- (c) Community Service Order.
- (d) Binding over to the Peace.

The System of Courts

A court can be defined as a tribunal having power to adjudicate in a civil, criminal or military matter and must be distinguished from a courthouse which is merely the building within which justice is administered. A ‘court’ may be set up in any location if a need arises. The Irish Constitution provided for a hierarchical system of courts, however, this system was not established until the *Courts (Establishment and Constitution) Act 1961* was passed.

The judicial function is the third arm of government. This consists of the interpretation of the law and its application in the courts, by rule or discretion of judges. The Irish Constitution established courts of law or courts of justice to

exercise the judicial function. Under the doctrine of the separation of powers enshrined in the Constitution, the courts must be independent of the legislature and the executive and also be capable of exercising some control over the other organs of government. Under this doctrine the courts exercise a fundamental control over the legislature by being empowered to declare statutes invalid if they infringe any provision of the Constitution.

Justice shall be administered in courts established under the Constitution, Article 34, and must be administered in public. Courts are therefore open to the public and also open to the scrutiny of a free press, and are therefore less likely to abuse their powers. The open court system enables citizens to become aware of some aspects of the law, how it is applied and enforced and also the consequences of any infringement.

Superior and Inferior Courts

According to the Irish Constitution, there must be a Supreme Court and a High Court. These courts are known as superior courts. The Courts (Establishment and Constitution) Act 1961 formally established the hierarchical system of courts envisaged by the Constitution. These courts are collectively known as the ordinary courts, as distinct from special courts.

The courts conduct an investigation into the liability or non-liability of a defendant in a civil litigation, or a fair trial into the guilt or innocence of the accused in a criminal case.

Some courts deal with civil cases and others only with criminal cases; however, most can deal with both.

The present structure of the Irish courts was first established by the Courts of Justice Act 1924. It now derives its authority from Article 34 of the Irish Constitution.

The court structure is organised on a hierarchical basis – with the Supreme court at the top and the District Court at the bottom. The Small Claims Court was introduced to relieve the pressure on the District Court and is considered to be a subdivision of that court, dealing only with very limited and minor cases involving consumers only.

The District Court

This is the lowest court in our legal system and handles the highest volume of cases. The Court and Court Officers (Amendment) Act 2007 provides that the number of judges of the District Court, in addition to the President, shall not be more than sixty. For the exercise of its duties, the country is divided into twenty-three districts, each having a judge permanently assigned, with the exception of Dublin and Cork where the volume of cases requires the permanent assignment of a number of judges.

The civil jurisdiction of the District Court covers a wide range of matters. It provides a quicker forum for dealing with disputes of a local or relatively minor nature. In matters of contract and tort, the court has jurisdiction up to €15,000. It can grant dance hall and liquor licences, and can order eviction for non-payment of rent.

The criminal jurisdiction of the District Court covers summary offences, such as motor offences, and certain indictable offences. In either case, the offence must be minor in order to be processed in this court.

A summary offence does not entitle a defendant to a trial by jury. It carries a maximum penalty of twelve months' imprisonment and/or a fine. An example would be driving without insurance.

An indictable offence entitles a defendant to a trial by jury. If the offence is minor and the accused agrees to a summary trial, then the case can be heard in the District Court. In such cases, the maximum punishment is two years' imprisonment, i.e. two consecutive twelve month sentences, or twelve months' imprisonment and/or a fine. Serious assault is an example of an indictable offence.

Unsuccessful parties in a District Court case can appeal to the Circuit Court.

The Circuit Court

This is a unified court consisting of a President and not more than thirty-seven ordinary judges. The country is divided into eight circuits. One Circuit judge is permanently assigned to each circuit, except under the provisions of the Courts and Court Officers Act 1995 whereby ten judges can be assigned to Dublin and three to Cork.

Civil cases in the Circuit Court are tried by a judge sitting without a jury. The civil jurisdiction is limited to €75,000, unless all parties to an action consent, in which case jurisdiction is unlimited.

Appeals are heard from the District Court. The Circuit Court rehears the case and substitutes its own decision, if different. This is final and cannot be appealed.

A defendant in a Circuit Court case has a right of appeal to the High Court.

A Circuit Court judge may consult the Supreme Court on points of law.

The criminal jurisdiction of the Circuit Court covers indictable offences. In such cases, the court consists of a judge and jury. Where the accused is found guilty, the Circuit Court judge may impose a punishment up to the maximum amount permitted by statute or common law. In cases appealed from the District Court, the judge may only increase the punishment to the maximum allowed in the District Court.

The High Court

The jurisdiction of the High Court extends to all matters whether of law or fact, civil or criminal. It also has exclusive jurisdiction in constitutional challenges to statutes, in accordance with Article 34 of the Irish Constitution.

The High Court consists of a President, who is also a judge of the Supreme Court and a member of the Council of State, and not more than thirty-five ordinary judges. The President of the Circuit Court and the Chief Justice are *ex-officio* additional judges of the High Court. Normally, the High Court hears cases with the judge sitting alone, however, in certain cases three judges will sit together.

A jury may be used by the High Court in civil cases. In such cases, a vote of nine out of twelve jurors is sufficient to award a judgement. The High Court can award unlimited damages.

When the High Court is hearing a criminal case, it is known as the *Central Criminal Court*. It tries only serious crimes such as murder, attempted murder, conspiracy to murder or rape. It also tries cases which have been referred from the Circuit Court in order to avoid trial before a local jury.

The High Court must use a jury in criminal cases where a plea of 'not guilty' has been made by the accused.

The High Court has a jurisdiction to give a ruling on the law as it affects the facts as stated by the District Court. The High Court also possesses supervisory jurisdiction over the inferior courts, state bodies and individuals.

The Court of Criminal Appeal

This court hears appeals from the Circuit Court, Central Criminal Court or Special Criminal Court (a non-jury court which may be set up under part V of the Offences against the State Act 1939).

The Court consists of three judges, one from the Supreme Court, and two from the High Court. The Court's decision is by majority.

Leave of appeal to the Court of Criminal Appeal will usually be given only where there is a dispute on a point of law, but may also be given in exceptional circumstances where new evidence becomes available.

The Supreme Court

The Supreme Court is the highest in the hierarchical structure of the courts. It is the court of final resort for cases commenced in the High Court, in addition to those cases which have made their way upwards to the High Court or which were directly appealed on a point of law to the Supreme Court.

The decision of the Supreme Court is final. There is no rehearing of the case as the record of the trial court is used.

The Supreme Court consists of the Chief Justice and seven ordinary judges. The President of the High Court is ex-officio an additional judge. The Supreme Court may sit in two or more divisions and they may sit at the same time. Three judges will usually constitute a quorum, except in constitutional cases when five judges are required.

The Supreme Court has a consultative as well as an appellative jurisdiction. The President may consult it as to the constitutionality of a Bill which has been presented to the President for signature. The High Court and the Circuit Court may consult it by way of 'case stated'.

The European Court of Justice and the European Court of Human Rights are two of the extraterritorial courts whose decisions are binding when Ireland is a party to a dispute.

Other courts in the Irish legal system include administrative tribunals, such as the Employment Appeals Tribunal.

The European Court of Justice

Although based outside the State, the European Court of Justice nevertheless forms part of the Irish System of Courts. It has the task of interpreting the treaties and the laws governing the European Union. The court has been active in three main areas. The Commission, or a member State, may claim in proceedings that another member State has not observed the treaties. The court exercises control over institutions of the Union at the request of a member State or an individual. Courts and Tribunals of the member States may seek the Court's view by way of preliminary ruling on the interpretation of a Treaty.

The ECJ is not bound by the rule of *stare decisis* or precedent, as Irish courts are.

A **Court of First Instance** is attached to the Court of Justice with jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice on points of law only, in certain classes of action.

The Court of Auditors

The Court of Auditors carries out the audit by examining the accounts of all revenue and expenditure of the EU. The Court of Auditors must provide the Parliament and the Council with a statement of assurance as to the reliability of the accounts and the legality and regularity of the underlying transactions.

The hierarchical structure of the Irish courts is outlined below. For a more detailed analysis of the Irish courts system, please go to their website at www.courts.ie – some of the detail is likely to change, so it is a good idea to check in at this website from time to time. You will also find a brief history of the Irish court system there. The website is also useful if you want to find out if there are any legal actions ongoing or pending in relation to any company or individual. It can be a very useful site if you want to check out a debtor, customer, supplier etc.

You will also be able to find details of the various court sittings and the outcomes of cases.

All data relating to the courts in these notes is at a point in time and therefore subject to change. If you are pursuing a debt through the courts, you should always check with your legal adviser to establish which court will process the action.

CIVIL COURT STRUCTURE

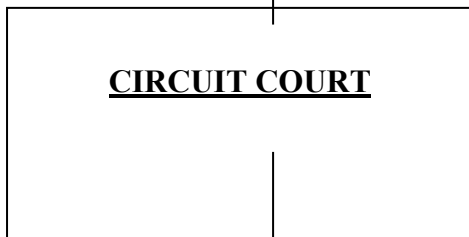
<p><u>SUPREME COURT</u></p>

This is the court of final appeal. There is no rehearing of the case as a transcript of the trial court hearing is used. The Supreme Court

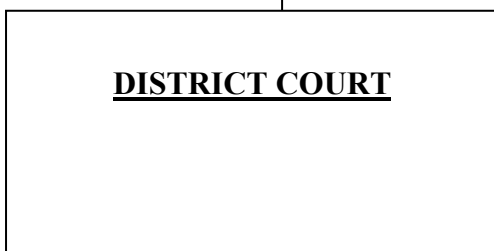
consists of the Chief Justice and 8 ordinary judges. Three judges will usually sit but, in constitutional cases, 5 judges constitute a court.



Court of original jurisdiction. i.e it is a court which can deal with all matters whether of law or fact. Unlimited jurisdiction. It has exclusive jurisdiction in constitutional challenges to statutes. The High Court consists of a President (who is an *ex-officio* member of the Supreme Court) and not more than 35 ordinary judges.



Unified Court with a President and not more than 37 judges. The country is divided into eight circuits. The civil jurisdiction is limited to claims of €75,000, but can be increased with agreement of all parties.



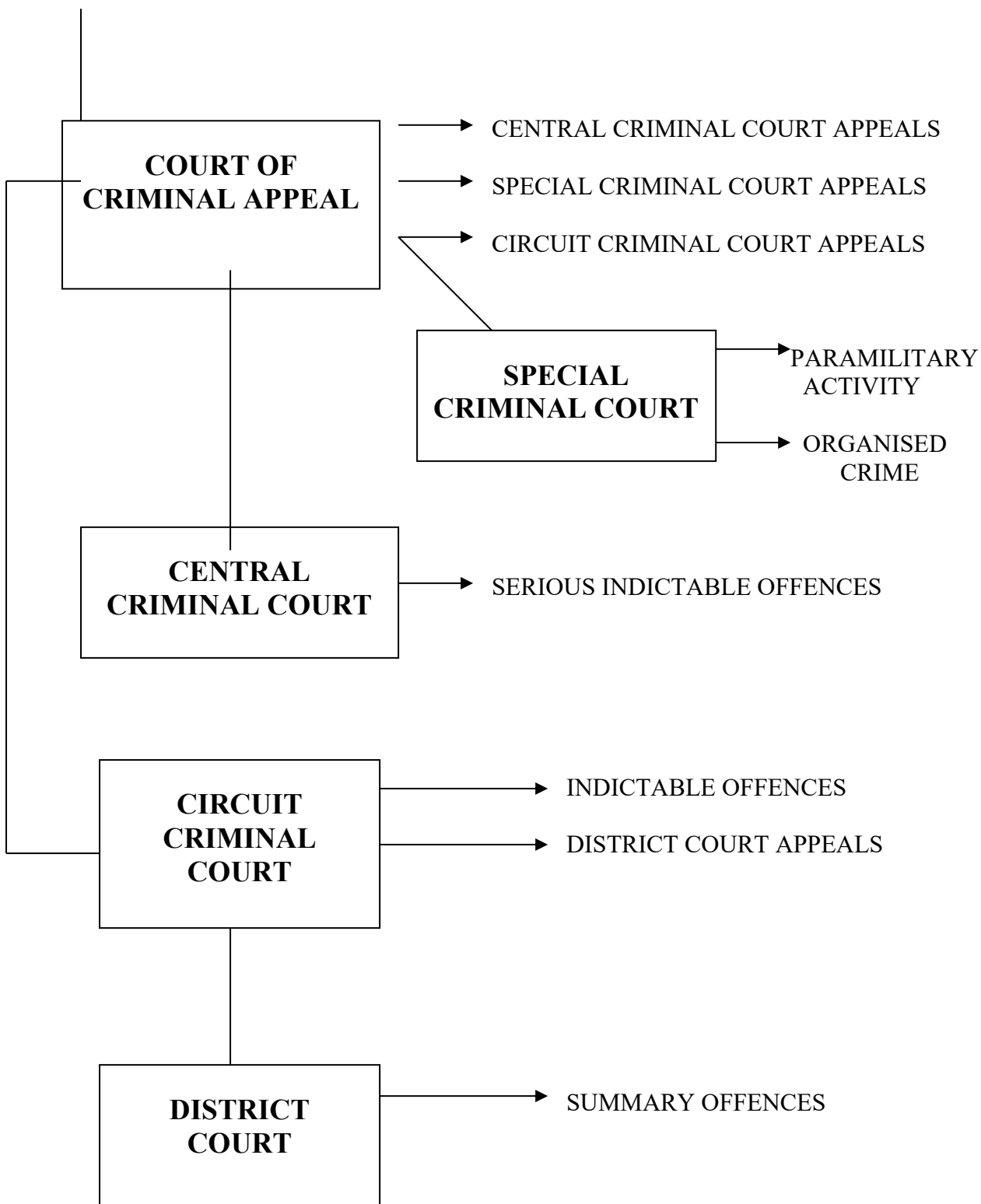
Unified court with a President and not more than 60 Judges. The country is divided into twenty-three Districts. The civil jurisdiction of the District Court is presently €15,000. Deals with, for example, landlord & Tenant issues and granting liquor licences, Summary offences.

The Small Claims Court processes claims Up to a value of €1,267, and is confined to Consumers.

CRIMINAL COURT STRUCTURE



LEGAL MATTERS OF EXTREME PUBLIC IMPORTANCE



Before going on to the second part – go to your workbook and see if you can answer the first set questions. If you can – go ahead. If you can't – go back and re-read the relevant section and make sure you can answer the questions before you continue. If you have any questions or need any further information, please contact your tutor.