

PROPOSAL FOR A COURT OF APPEAL

THE HON. MRS. JUSTICE SUSAN DENHAM*

I. WORK OF HIGH COURT

The Celtic Tiger is roaring through the courts. The workload of the High Court has grown extensively in recent decades. In 1961 there was a President and seven ordinary judges. From the 1970's the volume of cases increased with Ireland's economic and social development. This volume has grown exceptionally in the last 10 years, both in the civil and criminal jurisdictions. The High Court now consists of the President and 33 ordinary judges. Yet it appears that this number is not yet sufficient to efficiently process the number of cases presenting.

The lists of the High Court have grown, both in case numbers and in categories. I keep on my desk two old Legal Diaries, one from Thursday the 18th of July, 1957, and one from Wednesday the 14th of January, 1959.

It is interesting to note the volume of work in those bygone days. On the 18th of July 1957 the President of the High Court sat to hear Wards of Court cases. Nothing else is listed between that Thursday and the following Monday. On Monday the 22nd of July there are 3 non-jury matters, Mr. Justice O'Dálaigh has a jury action, Mr. Justice McLoughlin has a case in Court 2, Mr. Justice Teevan has a jury trial at hearing.

Move on to Wednesday the 14th of January, 1959. There are five Circuit Court appeals listed before Mr. Justice McLoughlin; the President, Mr. Justice Haugh and Mr. Justice Murnaghan (a Divisional Court) were listed to hear two cases stated. It was another country!

Today it is radically different. This may be illustrated simply by the list of the lists in the High Court. See our current Legal Diary where the High Court has the following lists: Personal Injuries (Dublin), Personal Injuries (Provincial), Bail,

* Judge of the Supreme Court. This article is based on the text of an address delivered at the Annual Conference of the Supreme and High Courts, organised under the auspices of the Judicial Studies Institute, on May 19 2006.

Bankruptcy, Chancery, Chancery Summons, Commercial, Common Law Motions (1 & 2), Circuit appeals (Dublin), Circuit Appeals (Provincial), Examiner's Court List, Examiner's Office List, Family Law, Garda Compensation, Judicial Review, Jury, Non-Jury, Probate, Proceeds of Crime Act, Rulings, Master of the High Court, Taxing Master, Wards of Court, Asylum, Admiralty, Solicitors Act, Medical Council, Nursing Council, Dental Council and the Central Criminal Court.

However, it is not just the volume which has developed. The complexity of the cases has also increased. Thus intricate matters of European Law, State Regulation, immigration law, and extradition both within the European Union and elsewhere, illustrate the changing scene. The nature and volume of work in the Supreme Court and High Court is now at unprecedented levels of volume and complexity.

II. APPEALS TO SUPREME COURT

Appeals from this growing case load in the High Court lie as of right in most instances to the Supreme Court. Consequently the number of appeals in the Supreme Court is expanding. The number of appeals lodged in the Supreme Court in 2002 increased by 15% compared to 2001, while the number of appeals disposed of (including those withdrawn by consent) increased by 30%. The figures tell the tale¹:

	Appeals lodged	Appeals dealt with
2001	361	243
2002	415	324
2003	440	304
2004	531	722
		(432 of these were disposed of in a review of uncertified appeals list).

¹ *Annual Report*, Courts Service, 2002, p. 64.

III. OTHER SUPREME COURTS

Compare these figures with statistics in other Supreme Courts. The House of Lords in London determines about 85 appeals a year.² In Washington the Supreme Court delivers formal written opinions in approximately 85 to 91 cases a year.³

The difference in caseload reflects the presence of Courts of Appeal and a filtering system of appeals in both those jurisdictions. In Ireland the Supreme Court is not only a Constitutional Court, but a Court of Appeal in civil matters, a Court of Appeal in administrative matters and an ultimate Court of Appeal in criminal matters, together with other responsibilities, such as hearing an Article 26 Reference from the President.

The work of a Supreme Court – a constitutional court for a State – is very similar no matter how large the State. It determines the constitutional issues of its time. Thus we have issues of fundamental rights – fair procedures, due process, rights of free speech, assembly, association, property rights, arising globally. We see issues such as 'right to die', the 'rights of the unborn', stem cell research, *in vitro* fertilisation, coming before all Supreme Courts.

While some Supreme Courts have federal issues arising out of a federal nation, which of course we do not have, most Supreme Courts are engaged in similar fundamental issues arising in their State – whether it has 4 or 40 million people. Such jurisprudence requires time for careful thought and reflection.

IV. NUMBERS OF JUDGES

It appears that Ireland has too few judges. On a simple analysis per head of population Ireland has fewer judges than any other State of the European Union. The Irish population is 4,234,925,⁴ and we have 131 judges.

Recently we received two judges visiting Ireland from Norway. Norway's population is 4,610,820,⁵ very similar to that of Ireland. They could not believe we had only 131 judges.

² See http://www.parliament.uk/about_lords/about_lords.cfm.

³ See www.supremecourtus.gov.

⁴ See <http://www.cso.ie/census/documents/2006PreliminaryReport.pdf>.

⁵ See <https://www.cia.gov/cia/publications/factbook/geos/no.html#People>.

Norway has 679 judges.⁶ Also, there appears to be fewer matters before their courts as issues are determined elsewhere, for example in mediation and arbitration. Thus, most family matters are dealt with in mediation. Yet, they have 679 judges - 19 of whom are Supreme Court judges.⁷

However, developing an appropriate court system is not simply a question of increasing the number of judges. While we need to address the issue of judicial numbers, we should address also issues of management, case management and infrastructure. Today I will consider infrastructure. A specific aspect of our infrastructure is the appeal system, and a proposal to develop a Court of Appeal.

V. THE CONCEPT OF A COURT OF APPEAL

The concept of a Court of Appeal in Ireland is not new. It was considered during the time of Finlay C.J., and indeed I understand that a Bill was drafted. It was considered again in the mid 1990's. At that time it was thought that in the future the Court of Criminal Appeal should be amalgamated into the Supreme Court.⁸ Subsequently the number of judges in the Supreme Court was extended to eight, partly to enable this proposal. This amalgamation has not taken place. Ten years down the line it is clear that this is not the appropriate approach.

I propose that a permanent Court of Appeal be established, which would have both a Civil and Criminal Jurisdiction. It should be composed of permanent full time judges appointed to that court and include a President and ordinary Judges of the Court of Appeal. Such a court is usually found in other common law jurisdictions.

VI. OTHER JURISDICTIONS

⁶ See document entitled "Judicial Statistics", compiled by The Judicial Researchers Office.

⁷ See document entitled "Judicial Statistics", compiled by The Judicial Researchers Office.

⁸ Court and Court Officers Act, 1995 Section 4 (1).

We may see examples of Courts of Appeal in other jurisdictions. While no other State provides an exact model for us we may see concepts which are helpful.

A. New Zealand

New Zealand is perhaps our best comparator, although it has approached the matters of a Supreme Court and a Court of Appeal in a different way. First, a strong Court of Appeal was developed. The Supreme Court has only recently been established.

There is a three-tier court structure in New Zealand.⁹ The District Court is at the lowest level of jurisdiction and hears civil actions where the value of the claim is not more than \$200,000, and it has criminal jurisdiction to hear summary offences, indictable offences triable summarily, summary offences triable indictably, and the preliminary hearing of indictable offences. It also has three specialised divisions, the Family Court, the Disputes Tribunal and the Youth Court.

The High Court has almost unlimited original civil jurisdiction. On the criminal side, it hears trials of indictable offences, almost always before a jury of twelve persons.

The Court of Appeal hears appeals from all lower courts except the Environment Court (which has a limited right of appeal to the High Court). There is also a specialist Maori appellate court for the Maori Land Court, but the High Court may review decisions in that jurisdiction.

The Supreme Court of New Zealand came into being on the 1st of January, 2004. It is a new court of final appeal and replaces appeals to the Privy Council in London. The Supreme Court Act, 2003 states that its purpose is to establish “within New Zealand a new court of final appeal comprising New Zealand judges to recognise that New Zealand is an independent nation with its own history and traditions.”¹⁰

The Court of Appeal of New Zealand is situated in Wellington.¹¹ It is New Zealand’s principal intermediate appellate court. In practice most appeals are resolved at this intermediate appellate level, rather than by the Supreme Court. The Court of

⁹ <http://www.justice.govt.nz/courts/hierarchy.html>.

¹⁰ The Supreme Court Act, 2003 s.3(1)(a)(i).

¹¹ See <http://www.courtsofnz.govt.nz/about/appeal/history.html>.

Appeal has existed as a separate court since 1862, but until 1957 it was composed of judges of the Supreme Court (as the High Court was known then) sitting periodically in panels. In 1957 the Court of Appeal was reconstituted as a permanent court separate from the Supreme Court. The President and six other permanent appellate judges constitute the full-time working membership of the court. The court sits in panels of five judges and three judges depending on the nature and wider significance of a particular case. A considerable number of three judge cases are heard by divisional courts consisting of one permanent judge of the Court of Appeal and two High Court judges.

The Court of Appeal deals with civil and criminal matters – appeals from proceedings heard in the High Court and indictable criminal proceedings in District Courts. Also, matters appealed to the High Court from a District Court may be taken to the Court of Appeal with leave, if they are considered to be of sufficient significance to warrant a second appeal. The court may, if it grants leave, hear appeals against pre-trial rulings in criminal cases. Leave to appeal to the Supreme Court may be granted only if it is “in the interest of justice”, which is defined as a matter of general or public importance, or where a substantial miscarriage of justice has occurred or may occur if the appeal is not heard, or if the appeal involves a matter of general commercial significance.

B. England and Wales

In England and Wales the Court of Appeal (together with the High Court and the Crown Court) is part of the Supreme Court of Judicature of England and Wales which, under the Constitutional Reform Act, 2005, is to be known as the Senior Courts of England and Wales. It is the second most senior court, the Judicial Committee of the House of Lords being the ultimate court.

The Court of Appeal is divided into two divisions, the Civil Division and the Criminal Division.¹² The Master of the Rolls presides over the Civil Division and the Lord Chief Justice presides over the Criminal Division. There are thirty seven (37)

¹² see <http://www.hmcourts-service.gov.uk/cms/1235.htm>

other permanent judges of the Court of Appeal who are known as the Lords Justices of Appeal. Three judges usually hear an appeal, where there may be a majority decision. A single Lord Justice of Appeal may hear applications for leave to appeal.

The Court of Appeal was created by the Judicature Act, 1873. Under that Act as originally drafted the Court of Appeal was to have been the ultimate appeal court as it was planned that the appellate jurisdiction of the House of Lords was to be abolished. However, that did not transpire. Originally the Court of Appeal was set up to hear civil appeals only. However, nowadays it hears criminal appeals also as the Criminal Appeal Act, 1966 created its criminal division to replace the Court of Criminal Appeal.

C. Canada

Under the Constitution Act, 1867 the judicial system in Canada is divided between the federal government and the ten principal governments. The courts infrastructure in a federal State is not similar to that of unitary State, such as Ireland. However, there are aspects of the infrastructure and court rules which may be of assistance in a study of a Court of Appeal system.

D. Australia

Australia has a federal system also and while its value in reviewing the structures in a unitary State such as Ireland is limited, there are useful points of information in an analysis of a Court of Appeal.

Each State or Territory has a system which administers State laws. The Federal Court System administers Federal law. Appeals from the Federal Court – being a single Federal Court Judge – are to a Full Federal Court (three Federal Court Judges). Decisions of the Full Federal Court may be appealed to the High Court, if the High Court gives leave to appeal in the case.

By looking at the Australian system, including the Courts of Appeal, through the prism of the High Court of Australia (the Supreme Court), we may see the benefit of a Court of Appeal. The High Court of Australia is the equivalent of our Supreme Court. Thus the type of work in both courts would have degrees of similarity. The High Court has civil and criminal jurisdiction, is

Australia's ultimate court of appeal and the primary function of the High Court is to determine cases involving Australia's constitution. The High Court was established in 1901.¹³ Cases which involve interpretation of the Constitution, or where the Court may be invited to depart from one of its previous decisions, or where the Court considers the principle of law involved to be one of major public importance, are normally determined by a full bench comprising all seven Justices if they are available to sit.

Other cases which come to the High Court for final determination involve appeals against the decisions of the Supreme Courts of the States and Territories, of the Federal Court of Australia and of the Family Court of Australia and these are dealt with by a court of not less than two Justices. In addition there are certain matters which can be heard and determined by a single Justice.¹⁴

The subject matter of the cases heard by the Court traverses the whole range of Australian law. It includes, for instance, arbitration, contract, company law, copyright, courts-martial, criminal law and procedure, tax law, insurance, personal injury, property law, family law, trade practices, etc. There is no automatic right to have an appeal heard by the High Court and parties who wish to appeal must persuade the Court in a preliminary hearing that there are special reasons to cause the appeal to be heard. Decisions of the High Court on appeal are final and the decision is binding on all other courts throughout Australia.

VII. THE SUPREME COURT OF IRELAND

The Supreme Court of Ireland has a number of unusual features, for it fulfils many functions. It is the final court of appeal in most cases which are heard by the High Court, not only constitutional cases or cases involving important points of law. The following illustrates the wide ranging jurisdiction of the Supreme Court:-

¹³ See http://www.hcourt.gov.au/about_02.html.

¹⁴ See http://www.hcourt.gov.au/about_03.html

1. It is the ultimate Constitutional Court, determining constitutional issues.
2. It receives references from the President under Article 26 to determine the constitutionality of a bill.
3. It is the general court of appeal from the High Court
4. It receives cases stated on matters of law from the Circuit Court.
5. It is the ultimate court of appeal, on matters of exceptional public importance, from the Court of Criminal Appeal.
6. It hears appeals from Rulings of the High Court on Prisoners applications.

VII. COURT OF APPEAL IN IRELAND

In common law countries there is usually a Court of Appeal interposed between the courts of trial and the Supreme (Constitutional) Court. In the States of the European Union there is usually a Constitutional Court in each jurisdiction which is *not* also a general appeal court.

It would be more efficient and effective, and assist the establishment of consistent jurisprudence, to have a Court of Appeal in Ireland. A Court of Appeal should be made up of permanently appointed judges and should hear both civil and criminal cases.

A Court of Appeal could grant leave to appeal to the Supreme Court where there was a matter of public importance. The Supreme Court also should have the right to grant leave. A filtering system would be monitored by the Supreme Court. Such a Court of Appeal would incorporate the current Court of Criminal Appeal. Many matters of importance would have to be addressed if a Court of Appeal were to be considered formally. The following illustrate a few such issues.

A. The High Court

The High Court would, of course, remain the constitutional court of first instance. Appeals from the High Court concerning the constitutionality of any Act of the

Oireachtas would, as the Constitution requires, remain appealable directly to the Supreme Court.

B. President of the High Court

The position of the President of the High Court would have to be considered carefully. As in the 1920s, a fundamental review of workloads could be made. The onerous functions and duties of the President of the High Court have developed in tandem with the growth of the High Court. As in 1924 when some work which originally was such that it should strictly have gone to the Chief Justice went to the President of the High Court, so too it may be useful to give some thought to the workload currently with the President of the High Court and consider whether some should be transferred to a President of the Court of Appeal. This is a matter requiring careful consideration.

C. Constitutional Amendment

A Court of Appeal could be established by legislation. The Supreme Court has held that there is nothing in the Constitution to preclude the establishment by the Oireachtas of the Court of Criminal Appeal.¹⁵ However, there is great merit in establishing such as an important structure of the State by way of constitutional amendment. Perhaps a staged process should be envisaged – a statute followed by a constitutional amendment.

D. Court of Criminal Appeal

The Court of Criminal Appeal was established by The Courts of Justice Act, 1924. It consists of a judge of the Supreme Court and two judges of the High Court. These personnel are assigned by the Chief Justice and the President of the High Court. Judges are rotated through the court. It is not a court with permanent judicial personnel. The judicial personnel of the court constantly change.

A permanent Court of Appeal would not have the problems which arise from a situation where there is revolving personnel of the court. Further, the Court of Criminal Appeal usually sits on a

¹⁵ *The People (Attorney General) v. Conmy* [1975] 1 I.R. 341 (S.C.).

Monday, and some other days when feasible, and a permanent court would sit more frequently.

VIII. THE ADVANTAGES AND DISADVANTAGES OF CREATING A COURT OF APPEAL

A. Disadvantages

It creates a new tier in our court structures.

B. Advantages

A permanent Court of Appeal would administer justice in a more efficient and effective manner. Specifically, it would enable a reduction of the delay between trial and appeal hearing. Moreover, it would assist consistency in decisions, for example sentencing.

1. Reducing Time Delays in Processing Cases

One of the methods of determining the efficiency of a court system is to consider the time taken to process cases. Longer time delays may indicate inefficiencies and give rise to various difficulties:

- (i) *Liability for unreasonable delays.* Unreasonable delays render Ireland liable for damages under the jurisprudence of both the European Court of Justice¹⁶ and the European Court of Human Rights.¹⁷ Consequently, improved infrastructure in the Courts would reduce the exposure of Ireland to liability arising because of delays in the court system.
- (ii) *Economic considerations.* Our State is an open economy, competing for business on the world stage. A critical aspect of attracting and retaining commerce in Ireland is to have an independent court system with an

¹⁶ *Köbler v. Republic of Austria* (Case C-224/01) [2003] C.M.L.R. 1003.

¹⁷ *Barry v. Ireland* [2005] ECHR 865 (15th December, 2005).

efficient delivery of decisions. The Commercial Court was established with a view to benefiting commerce in the State. It accommodates modern business commercial needs in the State for national and international trade. The Commercial Court has been a great success. Recently it won an “Excellence in Public Service” award. The Commercial Court delivers its decision in a speedy fashion, and it is a court of importance in the commercial life of Ireland. However, concerns have been raised because of the time taken to process appeals to the Supreme Court. There is little point in having a speedy process in the Commercial Court if there is not also a speedy appeals process. The Chief Justice currently lists appeals from the Commercial Court in the priority list – but that in itself causes problems for the general list of the Supreme Court. A Court of Appeal would meet this problem.

(iii) *International Obligations*. However, the concept of justice without delay is not only a matter for the commercial side of our society. It is also relevant to the State's international obligations. Ireland has an obligation internationally to process extradition cases as a matter of priority. There is a special list in the High Court to deal with such cases in a speedy fashion. However, many cases are appealed to the Supreme Court. Once again, they are placed on the priority list. A Court of Appeal would meet most of such cases. International obligations also arise in relation to abducted children, under the Hague Convention. Child abduction cases are dealt with as a matter of urgency in the High Court – there is a special list. Once again appeals from this list go on the priority list in the Supreme Court. A Court of Appeal would address this necessity for urgent consideration in the generality of cases.

(iv) *Immigration lists*. Time is also important in one of the new lists – that of immigration. Immigration cases also

have to be dealt with in a speedy fashion. Once again there is a special list in the High Court. Another candidate for the Supreme Court priority list! Equally, most such cases could conclude in a Court of Appeal.

- (v) *Protecting personal liberty.* While we must take heed of international obligations and the commercial requirements of the State we have a clear duty to protect personal liberty, as a matter of priority. The Constitution specifically provides in Article 40.4.2° that: “Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint”. Applications for *habeas corpus* are dealt with as a priority in the High Court. This is true also in the Supreme Court where such cases go on the priority list. Bail cases are also dealt with speedily in the High Court and they join the priority list in the Supreme Court.
- (vi) *Constitutional decision-making.* Amidst all these cases – some with constitutional roots, some not – the critical work of a Constitutional Court must also get priority. Thus an Article 26 reference has to be dealt with, pursuant to the Constitution, within 60 days. This is the appropriate work for the Supreme Court. But when such a reference arises much of the other work of the Court has to be put back for several months.

2. *Consistency*

An important advantage of a permanent Court of Appeal would be consistency. A permanent Court of Appeal dealing with appeals from criminal courts would obviously develop a jurisprudence in its work - which would include sentencing. Thus it would assist the consistency of sentencing, both actual and the perception thereof. Similarly, consistency would be a product of the civil work of a Court of Appeal.

IX. CONSTITUTIONAL ROLE OF SUPREME COURT

If a Court of Appeal were established the Supreme Court would continue to hear and determine constitutional cases, and issues of exceptional public importance arising in civil and criminal cases. It would thus usually sit *en banque* as a court of five or occasionally seven. A court of judges working in such a system is an appropriate method of developing constitutional jurisprudence in the State.

Such a Supreme Court is in keeping with other jurisdictions in the common law world. It is also similar to the court structures of other States of the European Union.

X. CONCLUSION

I propose that a permanent Court of Appeal be established in Ireland. Such a court would benefit litigants – private persons and major corporations. It would also benefit the State, as it would make the court system more efficient and effective. In addition, it would provide an infrastructure which would support the development of a consistent jurisprudence at appellate level.