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NEW IRELAND FORUM

The Legal Systems, North and South

A Study prepared for the New Ireland Forum by
Professor C. K. Boyle, University College, Galway and
Professor D. S. Greer, Queen's University, Belfast

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The New Ireland Forum was established for consultations on the manner in which lasting peace and stability can be achieved in a new Ireland through the democratic process. The opening meeting of the Forum was held on 30 May, 1983.

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STUDY OF THE LEGAL SYSTEMS, NORTH AND SOUTH

Terms of Reference and Summary

To undertake a *general* survey of the two legal systems, *as systems*:

— of their common roots in the legal system in operation in Ireland before the establishment of the State:

Until the twelfth century, Ireland had its own system of law — the Brehon law. The coming of the Normans, however, resulted in "the first adventure" of the English common law and for the next four centuries or so, common law and Brehon law competed for supremacy. Following the Tudor reconquest of Ireland and the Flight of the Earls, the Brehon law was completely superseded, and Irish law became synonymous with the common law. However, though the official policy was to ensure that Irish common law was identical to English common law, some differences did begin to appear during the 17th and 18th centuries and by 1800, there was in some respects a distinctively Irish common law tradition which survived and if anything became more pronounced after the Act of Union (see Annex I for further details).

— of the evolution of the two systems since that time:

From the perspective of Irish nationalism, common law was an alien imposition, but efforts to shed the inherited corpus of law were effectively pursued only as regards the administration of law and the institutions of the legal system. The Courts of Justice Act, 1924 made a clean sweep of the old system of judicature, but the emphasis was otherwise on continuity with pre-1922 law. While using its independence to assert external legal personality in international affairs, the Irish Free State and the Republic saw little internal legal innovation until the 1960s. Up to that period, the legal system as with Northern Ireland displayed a high degree of dependence on English legal precedent, doctrines and literature. The catalyst of change was the Constitution; under a phase of activist judicial interpretation, the Constitution was transformed from a background political document to the central engine of legal development in the State. While the effects of constitutional interpretation have been pervasive, there is still lacking a coherent judicial theory of this phase of jurisprudence and something of the impetus appears to have now gone out of constitutional development through the courts.

In Northern Ireland, continuity with the pre-1920 law and court system was maintained. There was also a conscious policy of keeping in step with British legislation (parity legislation). Never-

theless, the developed powers afforded considerable opportunity for legislation unique to Northern Ireland, and this was exercised by Stormont. While devolution in that regard was successful, it was less so in responding to grievances and legal institutions did not develop to counterbalance the consequences of domination of the political process by one party. However, since the 1970s there have been major improvements with respect to protection of rights and freedoms under law in Northern Ireland.

— of the extent to which they continue to have principles and procedures in common and of the extent to which they have diverged in these respects:

Surveying the legal field in general terms, there continue to be major areas where the law is identical or very similar. This is the case even in fields which have been heavily developed in both jurisdictions by legislation, and is even more so where the common law has been left to develop without much statutory alteration.

In Northern Ireland, there was a conscious policy of adopting legislation from Great Britain, and in the Republic, while diverging as it appeared to suit her needs or policy, there was equally a practice of following British legislative precedent. An obvious illustration would be in the fields of commercial, consumer and company law, where there were sound reasons for a common approach between all three jurisdictions. Given the common corpus of statute law and common law pre-1920, and the tendency in many areas for both jurisdictions to enact laws based on British statutes, and given the dominance in the courts, North and South, of English case law since 1920, the conclusion is justified that the laws of both states had by 1972 ("Direct Rule") differentiated from a common base only to a quite limited extent. However, since 1972 a process of 'legal' integration of Northern Ireland with Great Britain can be identified and as it has accelerated, there is an increasingly pronounced differentiation between North and South. Arguably, the 'constitutionalisation' of law in the Republic, also relatively recent, has contributed to this differentiation.

— of the institutional arrangements in operation and how similar or different they are;

The judicial systems in both jurisdictions reflect their common roots prior to 1920. The changes in judicature in the Republic in 1924 were more of form than substance, though a 'clear sweep' was made of personnel, offices etc. The current courts in the Republic were established only in 1961, while the pre-1920 courts lasted in substance in Northern Ireland until major reorganisation

in 1978. A characteristic that, since 1920, distinguished both judiciaries from the English courts has been the powers of judicial review conferred upon them but neither the Irish Free State Courts nor the Northern Ireland Courts made much use of this power to strike down legislation.

There was no parallel judicial activism in Northern Ireland to that in the Republic since the 1960s, because of the more limited possibilities for such a judicial role under a legal order based on parliamentary sovereignty. Nevertheless, it is noticeable that the Constitution Act, 1973 gives considerable powers in that regard to the Northern Ireland courts.

Similar institutions reflecting concern with better administration and further protection of rights have been established or are contemplated in each jurisdiction (e.g. the Director of Public Prosecutions, Ombudsman, Sex Equality Agencies etc.).

— of the interaction of the two systems in case law and through the operations of legal practitioners.

Virtually all formal links between the legal systems have died out. With the exception of joint executive agencies such as the Foyle Fisheries Commission, or the procedures established under the Criminal Law Jurisdiction Acts, links between the two jurisdictions are of an informal kind. There is provision between the Inns of Court for mutual calls to the Bars of both Northern Ireland and the Republic, and there is an historical link between the two Incorporated Law Societies.

Analysis of the use of judicial decisions in the courts, North and South, confirms that the precedent of neither jurisdiction has been important for the other. Out of a total of 2,097 precedents considered in the Republic's Courts between 1922-1975, 23 or 1% were Northern Ireland cases. In the same period, out of a total of 297 cases referred to in Northern Ireland Courts, 9, or 3% were Republic of Ireland cases. In the same period, 61% and 50% of cited cases were English in Northern Ireland and the Republic respectively.

A major factor in explaining the limited interaction and the limited achievement of a single legal identity, North and South, which might have been predicted despite partition, is the dearth of legal scholarship until the 1970s. In the absence of a local legal literature the better documented system (England) will dominate the less well-documented one. This has occurred in both parts of Ireland, although the beginnings of change are to be seen, reflected for

example in the creation of an Irish Association of Law Teachers which includes both jurisdictions. It is recommended that an Annual Survey of Irish Law be instituted should the policy of preserving and developing what remains of a common Irish legal tradition be considered worthwhile.

THE LEGAL SYSTEMS, NORTH AND SOUTH

"Ireland was the first adventure of the common law . . ."

Johnson J. (Judge of the High Court and Supreme Court 1924-1940)

Part 1

The Development of the Irish Law and Legal System before 1920

The law and legal system of both the Republic and of Northern Ireland derive from a common source — English common law — which arrived in Ireland at the end of the 12th century with the coming of the Normans. In sketching the history of legal developments in the island over the next eight centuries or so, it must be acknowledged at the outset that much is not known, partly as a result of the destruction of many of the early legal records, and partly as a result of the dearth of research in Irish legal history. It is possible nevertheless to give a broad general picture of legal developments and this is done for the period 1170-1800 in Annex I to the Report.

For present purposes, it is enough to note that over an extended period the indigenous Brehon law gave way before the imported common law — a process completed by the beginning of the 17th century. Thereafter, Brehon law had no impact on the development of law in Ireland. The second important historical aspect is the affinity if not identity achieved between the law and legal system of England and that of Ireland. It was consistent English policy over the centuries of the formative years of the development of English law that law in Ireland should keep in step. The effect of this policy was to stop the development of a distinctive Irish common law, but it did not succeed in preventing all variation or the emergence of at least a recognisable Irish legal tradition.

Ironically, it was the period after the Act of Union of 1800 which saw a significant development of a distinct body of Irish law, and the continuation or introduction of a number of distinctive Irish legal institutions, particularly in relation to the administration of criminal justice. This was made possible by the fact that although the Irish Parliament was abolished and despite the intention to unite the two countries, there remained a separate Irish administration and with it came acceptance of the notion that Ireland was a separate problem requiring separate treatment. Thus it was that throughout the 19th century, the United Kingdom Parliament regularly enacted legislation and approved measures applicable only to Ireland. It is noteworthy that of the total corpus of statute law affecting Ireland enacted between 1310-1921, over

10,000 enactments, almost 6,500 were legislated in the 1801-1921 period. In the view of at least one historian (W. C. Burn), 19th century Ireland formed a "social laboratory" in that:

> "The most conventional of Englishmen were willing to experiment in Ireland on lines which they were not prepared to contemplate or tolerate at home."[1]

"Experiments" were conducted in such fields as public health, public works, and state education; the one notable exception in this field is the Poor Law where, contrary to the majority recommendations of a Commission of Inquiry, the English system of Poor Law was imposed in 1834. Other areas on which Irish law developed on distinctive lines were land law, the organisation of the police and the administration of criminal justice. The land problem and the resolution of it, gave rise to a unique body of legislation and case law which still today forms a basic "code" of law applicable on both sides of the border. Similarly, many of the present-day features of the administration of criminal justice in Ireland trace their origins to 19th century developments — a national police force (from 1836), full-time stipendiary magistrates (1836), public prosecutors (1801), and special criminal courts (1814). These statutory and institutional developments, largely 19th century, represent, in general terms, a tradition which continues to unite Ireland, North and South and distinguishes both from England and Wales.

During the 19th century also, the Irish legal profession began to take on a separate identity and develop its own traditions. The attorneys (solicitors) formed their own society (first in 1830, and then the Incorporated Law Society in 1852). The 1860s saw the beginning in Ireland of the provision of legal training for intending barristers and solicitors and, in 1885, the requirement for intending Irish barristers of attendance at an English Inn of Court was ended. Further from the beginning of the 19th century (and indeed, perhaps as far back as 1770), most of the judges appointed to the Irish courts were Irish practitioners — although it was not until after 1829 that Roman Catholics could be appointed to the Bench (O'Loughlin J. in 1835 was the first), and not until the 1860s that the head of the Irish judiciary — the Lord Chancellor — could be a Roman Catholic (Lord O'Hagan being appointed in 1868). In addition, there was a significant increase in the publication of law reports of Irish decisions, particularly after the setting up of the Incorporated Council of Law Reporting for Ireland in 1866. All these developments led to the growth of a separate professional tradition and, to some extent, to different practices and procedures in the courts. However, in 1877, when

the superior courts in Ireland were re-organised on English lines it was expressly enacted that,

> "In making, altering or annulling Rules of the Court in pursuance of this Act, regard shall be had to the Rules of Court for the time being in force (in England) . . . so as that . . . practice and procedure (in Ireland) . . . shall, so far as may be practicable and convenient, having regard to the difference of the laws and circumstances of the two countries, be the same as (in England) . . ."

In spite of this provision, Irish practice and procedure remained far from being an exact copy of the English.

To what extent was there a separate Irish legal tradition in 1920? By way of summary, it may be stated that, by 1920, the Irish law and legal system had, for 300 years, been exclusively based on the English common law tradition and been developed, in general, in such a way as to preserve the similarity of the two jurisdictions. Within this general policy and given the essentially different social and economic circumstances between Ireland and England, however, there was room for some substantive legal differences and the development of some distinctive professional and procedural traditions. There was, therefore, no difference in kind; but there was a difference in degree sufficient to allow, in certain respects, the identification of a separate Irish common law tradition.

It might be useful at this stage to point out that as a common law jurisdiction, Ireland shared a legal tradition that by 1920 extended not just to England and Wales, but to most English-speaking countries including Australia, New Zealand, Canada (excluding Quebec) and the United States (with the possible exception of Louisiana). The other major legal tradition in the western world derived from Roman Law, as developed particularly in France and Germany; this "civil law tradition" covered most of Western Europe, Scotland (to some extent), Quebec, Louisiana, and most of Central and South America. In general terms, these two major legal traditions had developed quite separately and with their own distinctive characteristics. Irish law in 1920 had, therefore, much more in common not just with English law but with all the other "common law" jurisdictions, than it had with the law of its continental neighbours.

It should also be pointed out that by 1920 the common law was no longer an exclusive English preserve in the sense that legislative developments and judicial decisions in various common law juris-

dictions were coming to influence developments in the other jurisdictions. In this way, Irish lawyers and judges themselves contributed, albeit in a modest way, to the general development of the common law. Furthermore, a number of lawyers, born and trained in Ireland, rose to eminence in other jurisdictions and in this way also made a significant contribution to the development of the law.[2]

Part 2

Irish Law and Legal Systems since 1920

(i) Development of the law and the legal system in the Republic of Ireland.

The root of title of Irish constitutional authority and, therefore, of the law and the legal system in the state derives from the Proclamation of the Republic in 1916 and from the Declaration of the Republic in 1919 by the first Dáil Eireann. Following the Anglo-Irish Treaty in 1921, the Republic was dismantled by a vote of the Dáil and the Irish Free State established with the status of a Dominion within the British Commonwealth. The Constitution of the new State was regarded by the Irish courts as the creation of the Third Dáil acting as a constituent assembly; the English courts, on the other hand, saw the constitution as the creature of the United Kingdom Parliament (through the Irish Free State Constitution Act, 1922). The legal significance of this distinction (which had little practical effect) was that even before the enactment of the Statute of Westminster in 1931, the Oireachtas was (according to the Irish courts) perfectly free to depart from English legislative precedents. The 1922 Constitution also provided that any legislation enacted by the Oireachtas which was inconsistent with the provisions of the Constitution could be declared void by the Irish courts.

The process of political and constitutional development from 1922 to 1949 was one which sought to sever all remaining links between Dublin and London. It is unnecessary here to trace the steps by which full independence was achieved, save to note the adoption in 1937 of the Constitution which remains in force today and the legislation finally severing links with the United Kingdom and Commonwealth, the Republic of Ireland Act, 1948, a state of affairs recognised in the corresponding United Kingdom's Ireland Act, 1949. In the present context, the most distinctive feature of both the 1922 and 1937 Constitutions is their departure from British constitutional theory in the affirmation of the ultimate authority of God and of the People, as opposed to the supremacy of Parliament. From this it followed that if the Oireachtas enacted a law inconsistent with the Constitution, the Courts could declare it void — a power of judicial review denied to the English courts. This power was, however, limited to some extent in 1972, when the Republic joined the European Communities. Article 29.4.3 of the Constitution now provides that:

"No provision of this Constitution invalidates laws enacted,

acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State."

As Professor Kelly has noted, the consequence of this provision is that a considerable body of "Irish" law has been withdrawn from judicial control on constitutional criteria.[3]

The legislature — and the judiciary — in the new State were, therefore, bound to act in accordance with the Constitution; subject to that requirement, both were free to develop the law as they saw fit. How then did Irish law develop after 1920?

In general terms, Irish nationalists regarded the inherited English law and legal system as an alien and oppressive imposition. However, little serious thought appears to have been given to replacing the corpus of English law with something more acceptable. The First Dáil did establish National Arbitration Courts in June 1919, and in August 1919, a decree was passed providing for the establishment of a Supreme Court, District Courts and Petty Courts to replace the existing "common law" courts. Later, on 29 June 1920, the Dáil resolved to establish a Court of Justice and Equity, and courts having criminal jurisdiction. Rules for these courts were drawn up by a committee of lawyers appointed by Austin Stack, Minister for Home Affairs, and were published in 1920 in a pamphlet called "The Judiciary Rules and Forms of Parish and District Courts".[4] The impulse to break with the received common law is reflected in the paragraph in that pamphlet which reads as follows:

"Legal Code

The law as recognised on 21 January 1919, shall, until amended, continue to be enforced except such portion thereof as was clearly motivated by religious or political animosity. Provided however that except until further ordered in the case of the registration of deeds, local registration of title and the non-contentious business of probate and administration, a reference to any department or office of the Government at Dublin Castle shall be deemed to be a reference to the corresponding officer of the Department of An Dáil.

Without prejudice to the foregoing and pending the enactment of a code by An Dáil, citation may be made to any court from the early Irish Law Codes or any commentary upon them in so far as they may be applicable to modern conditions and from

the Code Napoleon and other codes, the corpus iuris civilis and works embodying or commenting on Roman law but such citations shall not be of binding authority. Save as aforesaid, no legal textbook published in Great Britain shall be cited to any court."

This attempt to supplant the common law did not succeed. In view of the tumultuous developments of the next decade, this is not altogether surprising. But there were in any case probably insuperable difficulties for any Irish state in making a complete break with the common law. In the first place, there was the problem of inherited rights and the keen concern of the new State to reconcile all minorities to it. This ambition of itself dictated a policy of continuity rather than fundamental change, not least in law, government and administration. To consider adoption of the ancient laws of Ireland also presented difficulties. There were at least two fundamental weaknesses in the Brehon legal system as compared with any modern legal system — the absence of a strong central authority to enforce the law and of a legislative authority to change the law and keep it up to date.[5] These, and other deficiencies, could perhaps have been made good — but there remained another problem. Where was the Brehon law to be found? The 1920s saw the start of serious Brehon law scholarship and it soon came to be accepted that the texts and commentaries published during the 19th century were unreliable.

Equally, the weight of three centuries of common law tradition made a sudden switch to Roman or civil law systems quite impracticable. Thus it was, on further reflection, decided that subject to certain exceptions, the existing corpus of pre-1922 law should form the basis of the law in the new state. Article 73 of the 1922 Constitution therefore provided:

"Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas."

The 1937 Constitution contains, in Article 50, a substantially similar provision. The principal justification for these provisions was to prevent the State from being deprived of "the benefit of the vast body of statutory law which regulated hundreds and thousands of necessary matters in the body politic at the date of the coming into operation of the Constitution."[6] The Irish Free State courts had held that Article 73 applied both to statute and

case law (see e.g. *State (Kennedy)* v. *Little* (1931); *State (McCarthy)* v. *Lennon* (1936)). However, in *Gaffney* v. *Gaffney* (1975) Walsh J. and O'Higgins C.J. stated that Article 50 of the 1937 Constitution did not apply to any law other than statute law. While this view has been criticised, it has considerable theoretical significance for Irish law. Common law and equity while subject to the Constitution remain free to develop as living law according to changing circumstances. Indeed, it is arguable that it has been the interaction of the traditional role of the common law judge and the novel role of interpreter of a rigid constitution which has led to the vitality of the judiciary in modern Ireland, a topic developed later in this Report.

The Administration of Law

Though there could, therefore, be no immediate change in the corpus of the law applicable in the new state, the desire in 1920 for a radical break with the past could also have been achieved by changes in the *administration* of law and in legal institutions and personnel. This was precisely what was done. A leading light in this development was Hugh Kennedy, the first Attorney General of the Irish Free State and later the first Chief Justice. It was he who appears to have been the most important influence on the shape of the legal and constitutional system established in the period 1922-1924. Kennedy wrote to the Judiciary Committee established in 1923 to recommend reform:

> "In the long struggle for the right to rule in our own country, there has been no sphere of the administration lately ended which impressed itself on the minds of our people as a standing monument of alien government more than the system, the machinery and the administration of law and justice which supplanted in comparatively modern times the laws and institutions until then a part of the living, national organism. The body of laws and the system of judicature so imposed upon this Nation were English in their vitality. Their ritual, their nomenclature were only to be understood by the student of the history of the people of Southern Britain. A remarkable and characteristic product of the genius of that people, the manner of their administration prevented them from striking root in the fertile soil of this Nation."

Among Kennedy's objections to the existing system which he hoped the Judiciary Committee of 1923 would end, was the fact that the judges were highly politicised and had regularly involved themselves in the executive government of Ireland.

The reforms introduced in the Courts of Justice Act, 1924, based

on the Judiciary Committee's recommendations, did strike a distinctive note. The original Republican concepts of district, circuit and supreme courts were adopted in this legislation, although the Republican courts themselves were ultimately wound up. Institutions such as the grand jury, the county court and assizes were abolished, to be replaced by courts entitled to hear proceedings in both Irish and English languages, the languages recognised as official by the 1922 Constitution. Since the pre-1920 institutions had, in substance, been retained in Northern Ireland, the 1924 Act established a clear distinction between legal administration, North and South — in the words of one contemporary commentator (Horan) the Act made "a clean sweep of the old tribunals and set up an entirely new judiciary system".[7] However, many of the changes were of form rather than substance and, in any case, despite this emphasis on the creation of new institutions, the practice of law nonetheless continued much as before.

Constitutional Law

Such potential as there was for the development of new legal doctrine — as, for example, through the new jurisdiction to review the constitutionality of legislation — was largely unexplored. The most plausible explanations for this judicial passivity are that both the judges and the lawyers appearing before them had been trained in the pre-1922 traditions and that the unsettled nature of the times prevented the Constitution from taking effect as had been intended. On the other hand, it is worth noting that in external relations the new state was active in asserting its international legal personality through ratifying international instruments and through shaping to a considerable degree the rapid evolution in this period of the British Commonwealth.[8] It is the 1937 Constitution which marks the first major distinctive feature of the Republic's internal legal evolution since 1922. In many respects, there was a considerable degree of continuity with the 1922 Constitution; the 1937 Constitution still enshrined the concept of limited sovereignty, the popular source of sovereignty, a bicameral legislature and a government responsible to the legislature. The role of the President was perhaps the major institutional innovation; a new court system was also envisaged — but this involved little change in substance — and in any case, these new courts were not legally established until 1961.

The distinctive features of the 1937 Constitution are its religious hue and its adoption of current Roman Catholic social teaching. In particular, the Constitution in its concepts and language is imbued with Roman Catholic theory of the relationship between Man and State, Society and the Deity. The most striking

illustrations of this reliance are in provisions concerning the family, including the formal ban on divorce. But the Constitution is also notable for its explicit formulation of fundamental rights, principles of social policy and extensive provision for judicial review. In this respect it was a progressive document for its time, and had a considerable influence on the drafting of constitutions for other newly-emerging nations.[9]

The declaration of sovereignty in the Constitution was muted to allow for continuing links with the Commonwealth (Article 29.4.2), in which, as a Dominion, the Republic in strict theory remained until 1948-49. (It may be noted that Article 29.4.2 would entitle the State to re-establish a relationship with the British Commonwealth, without further constitutional adjustment or to participate in any other grouping of nations. 'Executive functions' may be exercised by the Government on behalf of the State through, and in co-operation with, any such grouping by virtue of this provision.) The Constitution in Article 15.2 provides for the creation of subordinate legislatures. This provision (and its equivalent in Article 44 of the 1922 Constitution) were intended to provide for Northern Ireland. Article 15.2 appears to allow for either federal or devolved legislative institutions in Northern Ireland. The controversial claim that the 'national territory consists of the whole island of Ireland, its islands and the territorial seas', (Article 2), and the claim of right to exercise jurisdiction over that 'territory', (Article 3), have continued to be a major source of grievance to Northern Ireland Unionists, notwithstanding the explicit limitation in Article 3 on the extent of the application of laws enacted by the Oireachtas. The most important and most recent judicial pronouncements on these Articles appear to have been largely overlooked in discussions on them, and are appropriate to record here:

> "Articles 2 and 3 can be understood only if their background of law and political theory is appreciated . . . One of the theories held in 1937 by a substantial number of citizens was that a nation, as distinct from a State, had rights: that the Irish people living in what is now called the Republic of Ireland and in Northern Ireland together formed the Irish Nation; that a nation has a right to unity of territory in some form, be it as a unitary or federal State; and that the Government of Ireland Act, 1920, though legally binding, was a violation of that national right to unity which was superior to positive law. The national claim to unity exists not in legal but in the political order and is one of the rights which are envisaged in Article 2; it is expressly saved by Article 3 which states the area to which the

> laws enacted by the Parliament established by the Constitution apply. The effect of Article 3 is that, until the division of the island of Ireland is ended, the laws enacted by the Parliament established by the Constitution are to apply to the same area and have the same extent of application as the laws of Saorstát Éireann had. The area to which the laws of Saorstát Éireann applied was, having regard to the Articles of Agreement of 1921 and the Act of 1925 unquestionably the area now known as the Republic of Ireland."

(per O'Higgins C.J., *In the Matter of the Criminal Law (Jurisdiction) Bill 1975* (1977) I.R. 129)

> "It is . . . worth remembering that in 1936, when the Constitution was being drafted, Mr. de Valera was President of the League of Nations and that some of the values of the Covenant of the League of Nations are reflected in the Constitution itself and, in particular, . . . it appears to me to be important to relate Articles 2 and 3 to Article 29 which provides that Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other states.
>
> Article 29 also provides that Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality. It then continues:—
>
> > "Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination."
>
> Fully to understand the significance of these statements, it is necessary to go to the Covenant of the League of Nations and to the 1925 Boundary Agreement which, unlike the Constitution is an international agreement and registered under the auspices of the League of Nations as such . . .
>
> Under Article 12 of the Covenant the members of the League agree that if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or to an enquiry by the Council of the League and under the provisions of Article 13 they agree to accept the findings of any such arbitration . . .
>
> Whatever political doctrine is stated in Article 2 the State established by the Constitution is pledged to respect for international obligations and the peaceful settlement of international disputes. Article 3 accordingly prohibits it from

attempting to legislate for Northern Ireland. The implication is that the State, with whatever political reservations, accepts the border between North and South in law and in fact until such time as a peaceful solution can be found to the problem. The Constitution, so far from giving a mandate to the Provisional I.R.A., commits the State to seeking to solve the problem by peaceful means only."

(Mr. Justice Barrington, "The Constitution and other Charters" *De Brun Lecture*, U.C.G., Nov. 1981)

The new judicial institutions created in 1922 were, as we have seen, to continue to apply the old law, except where this had been modified by new legislation or was inconsistent with the Constitution. These new elements might have from the outset provided the basis for the development of a new legal tradition — but with one notable exception the period 1922-1965 is marked by a noticeable lack of judicial innovation. The one exception was Gavan Duffy J. who, in a number of cases in the late 1930s and 1940s, did attempt to develop a post-independence Irish legal philosophy. It transpired that the essential issue to Gavan Duffy J. in cases such as *Hanley* (1940) and *Tilson* (1951) was the extent to which the legal tradition of England, a Protestant country was applicable in an overwhelmingly Catholic state. But he also considered (in *Exham* v. *Beamish* (1939) that

"If, before the Treaty, a particular law was administered in a way so repugnant to the common sense of our citizens as to make the law look ridiculous, it is not in the public interest that we should repeat the mistake."

Such dicta did not, however, receive any support from the other judges on the Irish Bench.

Here then was a clear attempt to create a distinctive Irish legal tradition; one that was firmly based on the philosophy of the contemporary Catholic Church, which was presumed (by reference to the preamble of the 1937 Constitution) to be equivalent to the philosophy of the people. But at the same time, in an article entitled "A Brief Survey of the Case for Irish Law Reform twenty years after the Treaty" (1942), Gavan Duffy J. showed that he was also willing to suggest reforms derived from other sources and philosophies — reforms which, if implemented, would in some respects have brought about a uniquely Irish development of the common law. His views, however, were not to be followed.

The full potential of the interaction of the common law tradition

with the new written Constitution did not begin to be revealed until the early 1960s. Under the leadership of the then Chief Justice, Cearbhall Ó Dalaigh, the Irish judiciary entered on a period of constitutional interpretation, the results of which twenty years on can be said to have deeply influenced the constitution, law and the legal system in the Republic of Ireland. Their achievement in this period, at the most general level has been to *implement* the Constitution. It is no longer a background document largely of political significance, but a pervasive influence over government and citizen and over their relations with each other. By any standards, this achievement of breathing life into constitutional principles, standards and guarantees was remarkable for a small judiciary which had not been envisaged as a specialised constitutional court such as the German Constitution Court or the French Conseil d'État. Rather, its constitutional review functions were and are interspersed with the most varied general jurisdiction. In some respects, this has proved a boon for the scope of the constitution's impact. It has meant that the constitutional dimension has been raised in almost every field of litigation. It is in that sense that the traditions of the common law judge and the new jurisdiction of constitutional supervision have welded firmly and harmoniously together to provide a vitality for the judicial function, which contrasts sharply with the situation a generation before. Some commentators detect today a period of retrenchment or caution in constitutional interpretation. While that may be so, and would hardly be surprising, the major problem which the High Court and Supreme Court face is that of adapting with limited resources to the ever-increasing quantity of litigation.

The work load of the Supreme Court, which is much greater for example than the United Kingdom's House of Lords, is of such proportions that it cannot but have an impact on the decisions made by that court.

Judicial Development of Fundamental Rights

The range of constitutional litigation has been so wide that it would not be possible in this Report to convey an appreciation of it in all aspects. But its most significant impact has been in the area of personal rights. In 1963, Kenny J. was faced with a claim that the Constitution protected a "right to bodily integrity", in the context of an objection to the compulsory fluoridation of the Dublin water supply. While upholding the fluoridation, the judge declared that although such a right was not mentioned in the Constitution, it was implicit in it:

"the personal rights which may be invoked to invalidate

legislation are not confined to those specified in Article 40 but include all those rights which result from the Christian and democratic nature of the State."

Significantly, in asserting the power of the judiciary to determine the implied rights in the Constitution, Kenny J. invoked the common law:

> "In modern times determining rights would seem to be a function of the legislative rather than the judicial power, but it was done by the Courts in the formative period of the common law and there is no reason why they should not do it now." (*Ryan* v *Attorney General* (1965))

The Supreme Court upheld the decision and so the way was opened to a series of decisions over the next decade, establishing a number of "unspecified" personal rights entitled to constitutional protection. Some examples are:

the right to have access to the High Court,
the right to recover damages against a wrongdoer,
the right to earn a livelihood,
a right to work,
a right to basic fairness of procedures,
the right to marry,
the right to free movement within the State,
the right to freedom from torture, inhuman and degrading treatment,
the right to privacy in marital relations,
the right to a passport,
the right to prepare for and follow a chosen career,
the right to communicate,
rights while under arrest on suspicion of an offence,
the right to use the Irish language in all dealings with the State.

It has been significant too that in this phase of interpretation, the courts have taken the opportunity to emphasise that the Constitution is not to be interpreted in the light of exclusively Roman Catholic doctrine or beliefs, but in terms of both Christian principles and secular sources of the common good. Nevertheless, much work remains to be done to synthesise a coherent judicial philosophy from the activism of the past two decades.

It is from this period that a vivid contrast can be drawn between the role of the judiciary in the Republic and in Northern Ireland, developing largely from differences in their perceived function

under their respective constitutions. In other words, it is only since the mid-1960s that the significance of a written constitution as a general source of law and as a specific basis for the protection of individual rights has become evident.

Statute Law

While the Constitution is the fundamental law and the courts have the role of evolving common law, the bulk of law applicable in the Republic past and present derives from legislation. Tables I and II give a rough picture of the sources and extent of the statute law of Ireland, both North and South. Further work needs to be done to refine these tables and they can afford only very general observation at this point. The period analysed is 1922-1972 — to afford comparison with Northern Ireland before the suspension of the Stormont legislature.

Table I: Total Statute Law Affecting Ireland, 1310-1922

1310-1800 (Irish Parliaments)	1,921
1226-1800 (Statutes of the British Parliaments) ...	1,677
1801-1922 (United Kingdom of Great Britain and Ireland Parliament)	6,492
Total pre-1922 Statute Law	10,090
Total pre-1922 Statute Law repealed by:	
Statute Law Revision Acts pre-1922	1,704
Statute Law Revision Acts, post-1922 (Republic) ...	1,066
Total pre-1922 Statute Law applicable in the Republic ...	7,320

Table II: Statutes made in the Republic of Ireland and Northern Ireland, 1921-1972

A. Irish Free State/Republic of Ireland from mid-1922-1972	1,891
B. Northern Ireland, 1922 until prorogation of Stormont, 30/3/1972	1,451

The approximate nature of these tables is emphasised by the fact that time has not allowed for counting revision of the statute law other than through Acts designed to get rid of 'deadwood' on the statute book, viz Statute Law Revision Acts. Therefore, no account is taken of consequential repeals of pre-1922 law arising from the passing of enactments since 1922. Similarly, it has not proved possible in the time available to determine the full extent of repeal of the pre-1922 corpus of statute law as it applies to Northern Ireland since 1922. While the Northern Ireland

Parliament repealed a total of 120 such Acts, the United Kingdom Parliament since 1922 has abolished a much greater number. At this juncture, therefore, it is not possible to state accurately what corpus of statute law, pre-1922, when the jurisdictions were united, remains applicable today to both.

The tables are not, however, without all utility. It is at least clear that since the bulk of the statute law pre-1922 was passed in the period 1801-1922, a great deal of that law still remains common to both jurisdictions. Reference was made earlier to the common statutory code of land law, to which may be added for example large sections of the statutory criminal law, including the Offences Against the Person Act, 1861. Further examples of this shared statute law are discussed in Part 4 below.

From the perspective of the Republic, it is clear that the bulk of the technically applicable law pre-dates the establishment of the state in 1922. The ambition to recast the pre-1922 statute law that it would be desirable to retain in modern statutes passed by an Irish Parliament, first articulated as a goal in a White Paper in 1962, has not been achieved. Nor has the more ambitious project of codification, also envisaged in that White Paper.

On the other hand, as is evident from Table I, a considerable amount of statute revision, (repealing the defunct statute law), has occurred and there have been signal achievements in the field of consolidation of post-1922 legislation of which the Income Tax Act 1967, and the Social Welfare Act, 1981 are but illustrations. Nevertheless, the record of statute law reform, as with the field of law reform generally has not been outstanding. Without elaboration, it may be noted that the most successful period was in the 1960s, when the achievement of the then Minister for Justice, Mr. C. J. Haughey, T.D., was not only in devising a programme, but securing legislative time to see reform through the Oireachtas. Similar possibilities were opened in the 1970s with the establishment of the Law Reform Commission, but the implementation of its many excellent proposals for reform appeared never to achieve the necessary commitment of successive governments. We return to the question of law reform later in this Report.

Turning to legislation as a source of law in the Irish state since 1922, (Table II), one question of interest is the extent to which the output of the Oireachtas has resulted in the statute book of the two jurisdictions, North and South drawing apart. Answers must be necessarily general and impressionistic pending more systematic study of both parliaments' legislation. An analysis of the statute

law passed by the Stormont parliament for selected years into the categories "unique", "parity" and "mixed"is made in Part 3 below . This reflects the fact that Northern Ireland's laws were a matter for two parliaments, Westminster and Stormont. In the Republic, on the other hand, the Oireachtas had sole legislative responsibility for the period in question. The bulk of legislation in the Irish state reflects that reality, particularly with respect to its revenue and administrative functions and its international commitments in terms of the incorporation of Conventions and Treaties. The vast bulk of legislation enacted, therefore, is "unique" to the Republic in response to its own needs and policies. Nevertheless, within that mass of statute law down the years, there was a distinct tendency to adapt, where appropriate, British precedents in legislation. This has been particularly true of the commercial and tax areas for reasons that flow obviously from the very many commercial links between Britain and Ireland. Such a policy could otherwise have been dictated by the existence of common statutory law often stretching over centuries prior to 1922. When change was mooted in the Republic, it was understandable that changes already enacted or proposed to the common legal framework in Britain would as a matter of course be examined, with a view to its adoption especially where change was *ad hoc* rather than systematic revision. Since it was policy in Northern Ireland to keep in step with Britain, even in fields where Stormont had effective legislative independence, the result was achieved in many areas that the statute law, North and South, changed identically or virtually so over the years. Many illustrations could be given, but an example almost at random is the Mines and Quarries legislation in both jurisdictions. The *Mines and Quarries Act, 1954* in the United Kingdom, concerned with the regulations of mines largely from the safety point of view was the model for the Republic's *Mines and Quarries Act, 1965,* and equally the *Mines and Quarries Act (Northern Ireland), 1969.* This process of adaptation of Westminster law by both jurisdictions was even more pronounced in the areas of "private law" and "lawyers' law", one notable illustration being the criminal procedure reforms of the 1960s. If the common tendency over the years in both jurisdictions to cite and rely on the decisions of the English courts, (see Part 4 below) is taken into account, the general conclusion that the law of both states had by 1972 differentiated from a common base prior to 1922, to a quite limited extent would appear to us to be justified. However, the position *since* 1972 is different. "Direct Rule" has accelerated the process of legal integration if not constitutional integration with Great Britain. In consequence, the tendency over the last decade for greater differentation between North and South in the legal field is more pronounced, particularly in the area of

legislation. We discuss this process further in the next section of the Report.

(ii) Development of the law and legal system in Northern Ireland. Though in favour of partition, the Ulster Unionist leadership in the run-up to 1920 had not wanted "Home Rule" for Northern Ireland. However, the constitutional settlement envisaged in the Government of Ireland Bill, 1920 proposed separate legislatures for both Northern and Southern Ireland, and the Ulster Unionists decided to accept this arrangement on the grounds that with its own parliament, Northern Ireland would acquire legitimacy and be more able to prevent its coercion into a united Ireland. The 1920 Act was, therefore, accepted "as a final settlement and supreme sacrifice in the interests of peace". This background has considerable relevance to the subsequent development of the law and legal institutions in Northern Ireland:

> "Devolution is usually conceded as a response to nationalist pressure, its purpose being to establish institutions expressing the particular national feelings of a region within a state; in Northern Ireland, however, the motivation was precisely the opposite — not to provide for different legislation from the rest of the country, but to ensure that she was governed on the same terms as the rest of the country, and that her legislation diverged as little as possible from that of the rest of the United Kingdom... Thus the pressures which led to devolution in Northern Ireland were not 'centrifugal' ... but 'centripetal' ..."[10]

Section 4 of the 1920 Act conferred on the new Parliament of Northern Ireland a general power to make laws for "the peace, order and good government" of the province. This general legislative power was, however, qualified in two ways. First, certain matters, of concern to the United Kingdom as a whole, were "excepted" from the authority of the Northern Ireland Parliament. Other matters (including in particular, the Supreme Court) were "reserved" to the United Kingdom Parliament pending the reunification of the island which was envisaged in the Act. Since the 1920 Act was utterly rejected in the South, this classification of matters excluded from the competence of the Northern Ireland Parliament into "excepted" and "reserved" matters came to have no practical significance. The matters that did not fall into either category were quite extensive; in addition the United Kingdom Parliament could, and did on a number of particular occasions, clarify or extend the competence of the Northern Ireland Parliament by enabling it to enact legislation

which did or might involve an excepted or reserved matter. As a result, the Northern Ireland Parliament came to enjoy a wide degree of legislative competence.

The 1920 Act also attempted to prevent religious discrimination by providing in section 5(1) that:

> "...the Parliament of Northern Ireland shall not make a law so as either directly or indirectly to establish or endow any religion, or prohibit or restrict the free exercise thereof, or give a preference, privilege or advantage, or impose any disability or disadvantage, on account of religious belief or religious or ecclesiastical status..."

Section 8(6) of the Act provided further that:

> "In the exercise of power delegated to the Governor of Northern Ireland in pursuance of this section no preference, privilege or advantage shall be given to, nor shall any disability or disadvantage be imposed on, any person on account of religious belief..."

Any law made in contravention of these restrictions was to that extent void. The taking of property without compensation was (until 1962) also prohibited by section 5(1). The validity of any legislation in the light of these prohibitions was a matter for decision by the courts — thus giving the Northern Ireland courts a power (albeit a more limited one) of judicial review of legislation similar to that given to the courts in the Republic by the 1922 and 1937 Constitutions. No such power was exercisable by the courts in Great Britain — and (with the possible exception of matters falling within the European Communities Act, 1972) no such power yet exists. This power of judicial review is thus a feature which both North and South had in common and served to distinguish both from the strict legislative supremacy doctrine of the English common law.

However, so far as the application of Northern Ireland law by the courts was concerned, the Government of Ireland Act retained, in most (but not all) cases the right of appeal ultimately to the House of Lords in London.

Finally, section 75 of the 1920 Act made it clear that the Northern Ireland Parliament was subordinate to that of the United Kingdom;

> "Notwithstanding the establishment of the Parliament of

> Northern Ireland... or of any thing contained in this Act, the supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters and things in Northern Ireland and every part thereof."

In spite of this declaration, the Northern Ireland Parliament *in practice* came to gain a considerable degree of autonomy — and in the end, control by Westminster had to be imposed not through section 75, but by invoking section 75 to suspend the whole of the legislative authority delegated to the Parliament of Northern Ireland.

This, in the end, was what was done for a brief period in 1972 and again, after the collapse of the Assembly, in 1974. The legal authority for "Direct Rule" is contained in three statutes of the United Kingdom Parliament — the Northern Ireland Constitution Act, 1973, the Northern Ireland Act, 1974 and the Northern Ireland Act, 1982. As regards the "Constitution" of Northern Ireland, these Acts have almost completely superseded the Government of Ireland Act, 1920. The 1973 Act provided for the devolution of legislative authority to a Northern Ireland Assembly, but only where it appears to the Secretary of State for Northern Ireland.

> "that a Northern Ireland Executive can be formed which, having regard to the support it commands in the Assembly and to the electorate on which that support is based, is likely to be widely accepted throughout the community."

If this condition (which has since been repealed and replaced by the 1982 Act provision) is satisfied, the Northern Ireland Assembly may under the 1973 Act, enact "Measures" having the force and effect of parliamentary Acts. But this legislative authority (if conferred) is considerably narrower than that conferred by the Government of Ireland Act on the Northern Ireland Parliament. Thus, the categories of "excepted" and "reserved" matters have, in effect, been retained—and enlarged. Under the 1973 Act, the appointment of all judges, resident magistrates, the Director of Public Prosecutions, etc., is now an excepted matter; as also are "special powers and other provisions for dealing with terrorism or subversion." Excepted also are legislative powers to deal with elections (including the franchise) in respect of the Northern Ireland Assembly and local authorities. The whole range of matters dealing with the organisation and powers of the police, and with the criminal law and its administration are "reserved". All of these matters (with the exception of Supreme Court judges) were within the competence of the Northern Ireland Parliament. Subject to these

major exceptions, the authority of the Northern Ireland Assembly could extend over an extensive range of "transferred" matters — i.e. those which are not "excepted" or "reserved".

On the other hand, section 17 of the 1973 Act confers a more extensive power of judicial review of measures of the Northern Ireland Assembly than the old section:

> "Any Measure . . . shall, to the extent that it discriminates against any person or class of persons on the ground of religious belief or political opinion, be void."

In addition, the 1973 Act makes it "unlawful" for a Minister of the Crown, a member of the Northern Ireland Executive and various other office-holders "to discriminate, or aid, induce or incite another to discriminate . . . against any person or class of persons on the ground of religious belief or political opinion". Any breach of this duty not to discriminate on these two grounds is stated to be actionable in the courts.

Finally, the 1973 Act stated that nothing in the Act was to affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland.

The powers contained in the 1973 Act were actually conferred on the Northern Ireland Assembly which met for the first time in January 1974. Four measures had been enacted when, in May of the same year, the Assembly was dissolved. This led to the passing of the Northern Ireland Act, 1974 which provided, in essence, that pending the restoration of the Assembly, legislation which could have been made by it (i.e. legislation in respect of transferred matters) and legislation in respect of reserved matters was to be made by Order-in-Council. Draft Orders are laid before the Westminster Parliament for approval (they cannot be changed or amended in any way) under the procedures for delegated legislation.

The present Assembly has no legislative authority. Power to legislate in respect of transferred matters may be conferred by the Parliament of the United Kingdom on a step-by-step basis ("rolling devolution"), but only where the Assembly has proposed to the Secretary of State that legislative functions should be resumed; no such proposal is to be made unless —

> "(a) the proposals have the support of at least 70% of the members of the Assembly, or
> (b) the proposals have the support of a majority of these

members and the Secretary of State has notified the Assembly that he is satisfied that the substance of the proposals is likely to command widespread acceptance throughout the community."

Neither condition has yet been satisfied.

We may now turn to the development of the law and legal institutions in Northern Ireland since 1920 in the context of this general constitutional framework.

Statute Law

In Northern Ireland, as in the South, the new legislature and courts inherited the whole corpus of statute and case law in force throughout Ireland immediately before partition. But in the North, the emphasis was on continuity, not change. Thus, the Government of Ireland Act, 1920 provided, for Northern Ireland, a set of legal institutions very similar to those which had existed in Ireland before 1920. A Supreme Court of Judicature of Northern Ireland was established, consisting of a Court of Appeal, High Court and Assizes. The County Courts and magistrates courts were continued, and the House of Lords in London remained the final court of appeal. The 1920 Act did, however, provide Northern Ireland with the semblance of a written constitution and gave those courts a new power of judicial review of legislation of the Northern Ireland Parliament — but, as in the South, little use was in fact made of this power. The probable reasons for this inactivity have been summarised as —

". . . a combination of the unavailability of legal aid until 1965, some unadventurousness by the local legal profession, an unawareness of the opportunities court machinery creates for manipulation of the political process, and a general tendency on the part of the political opposition to dismiss the courts as manifestations of the Unionist establishment . . ."[11]

It is, therefore, to the Parliament of Northern Ireland itself that we must look for any significant development of the law after 1920.

In broad terms, the legislation enacted by the Northern Ireland Parliament may be divided into three categories:

(a) Parity Legislation
In a number of cases, the Northern Ireland Parliament followed very closely developments in English or British legislation.

(b) Legislation unique to Northern Ireland
In other areas, the Northern Ireland Parliament decided either not to follow English developments or to enact its own legislation. A number of instances falling under the first category represent in effect a decision to retain a pre-1920 Irish tradition — e.g. the decision not to enact the English 1925 land legislation, the retention of juries in civil cases, the decision (before 1939) not to introduce judicial divorce. Some legislation falling into the second category also continued an Irish tradition (e.g. the extension of the powers of Resident Magistrates in 1935), but other legislation was wholly unique in that it had no Irish or English counterpart.

(c) "Mixed" Legislation
This third category represents legislation which fell somewhere between (a) and (b).

As regard categories (b) and (c), a useful summary was provided in the evidence given by the First Draftsman, Mr. W. A. Leitch, to the Royal Commission on the Constitution in 1970:

"Having our own Parliament has enabled us to deal with our own problems in our own way. An example of this concerned earlier difficulties of unemployment in the shipyards. We were able to bring into force legislation in the shape of the Loans Guarantee Acts (N.I.) 1922 to 1931 to enable us to keep our shipyards going. We also had difficulties over the administration of justice at petty sessions and were able to do away with lay justices in 1935. Then came mental health legislation in which we were well in advance of Great Britain until comparatively recent times. Another important example is our agricultural industry . . . we have a great deal of legislation on agriculture and fisheries, on milk marketing, forestry, pig production, and diseases of fish . . . We had legislation about our tourist industry long before there was any legislation . . . in England . . . We are in advance of (Britain) in the enforcement of judgments . . ."

The record of the Northern Ireland Parliament in relation to industrial development and regional planning was also imaginative and innovative. However, in many other respects (and, in particular, in relation to social welfare legislation) the Northern Ireland Parliament deliberately adopted a "step-by-step" policy of following Westminster legislation. Nonetheless, there remained considerable scope for innovation by Stormont, as evidenced by the analysis of Northern Ireland legislation during the years 1965 to 1969, presented to the Royal Commission:

	No.	%
A. "Parity" Legislation	36	22
B. "Mixed" Legislation	60	36
C. "Unique" Legislation	70	42
Total	166	100

This analysis by Mr. Leitch continued:

> "It is estimated that, if legislation is divided into two categories only — parity and non-parity matters — about two-thirds of both administrative and legislative time is spent on purely Northern Ireland matters. This is, however, a rough estimate only and the proportions vary from department to department; in the Ministry of Health and Social Services, for example, the proportion of time spent on parity matters would be much higher."

The Royal Commission concluded generally that Home Rule had, in some respects, been of advantage to Northern Ireland in that it had enabled special provision to be made for certain matters that might have been less well catered for by legislation emanating from Westminster. Unfortunately, however, this legislative automony was less well used when it came to the "peace, order and good government" of Northern Ireland. Many grievances went unresolved and the constitutional arrangements provided by the Government of Ireland Act proved incapable of ensuring or allowing legal or constitutional developments which might have enabled these grievances to be satisfactorily resolved. This was particularly true in the late 1960s, when the civil rights campaign particularly exposed the weaknesses in a legislative system dominated by one political party. The ultimate result was, of course, the suspension (and later the abolition) of the Northern Ireland Parliament.

Under the system of "Direct Rule" which has operated since 1974, certain matters which could have been dealt with by the Northern Ireland Parliament or which might in future be dealt with by the Northern Ireland Assembly are "enacted" by the special procedure of Order-in-Council. In that respect, there remains a Northern Ireland "legislature" and indeed a separate Northern Ireland statute book. However, were an analysis to be made of this statute book for a five-year period (say 1978-1982), it is confidently expected that the percentage of "parity" legislation would greatly exceed the figure of 22% derived from the period 1965-1969. There still remains, however, a significant degree of "unique" legislation. A most notable example of this is expected

shortly; proposals to reform the land law of Northern Ireland may *not* slavishly follow the English legislation and in many respects will suggest rules peculiar to the province. The proposals, if implemented, will, however, largely remove one of the areas of law where considerable parity between Northern Ireland and the Republic still exists. In general, the degree of legal continuity with the Republic has steadily decreased. To the extent that it has been maintained, that is primarily due to the Republic choosing to bring its own law into line with that already existing in Northern Ireland directly (or indirectly through application in Northern Ireland of English law). To some extent, this process of "de-Irishisation" of Northern Ireland law has been accelerated in recent years by the growing feeling that Irish legislation and law is increasingly influenced and shaped by the requirements of the Irish Constitution.

Legal Protection of Individual Rights and Fundamental Freedoms in Northern Ireland

The absence of a written constitution and its corollary — the supremacy of Parliament — has meant in Northern Ireland that the protection of individual rights is a matter first for Parliament, and then for the courts, insofar as they are left by Parliament with any scope for action. It has, however, been suggested from time to time that the Government of Ireland Act, 1920 gave Northern Ireland a kind of written constitution which could — or indeed should — have expanded the scope of a judicial review of legislation and of executive action and thereby conferred on the courts a (potentially) more positive role in the protection of individual liberties. This analysis then goes on to suggest that, for various reasons (not all of their own making) the courts failed to take proper advantage of this situation — with the result that individual freedoms in Northern Ireland were less protected than they might otherwise have been.[12]

There are two difficulties with this analysis. The first is that the most relevant legislation — the Civil Authorities (Special Powers) Act 1922 — was drawn up so widely as to admit little judicial control. If it is conceded that the Act was *intra vires* the Government of Ireland Act, 1920 (and this has never seriously been doubted) there was little scope for the judges to declare executive action not within the powers conferred by Parliament. Secondly, it is not entirely the case that the 1920 Act provided Northern Ireland with a written constitution in the sense in which that phrase is normally used. Certainly it did not stimulate the broad kind of judicial review and purposive interpretation which

written constitutions are often intended to provide (as, indeed, was also the case in the Republic before 1965). But, whatever the reason, it is probably true to say that the provisions of the 1920 Act, which might have provided the basis for greater judicial interventions in the protection of individual liberty were not so used during the life of the Act.

The legal position in Northern Ireland since the early 1970s has changed in four respects:

(1) Right of individual to institute proceedings under the European Convention on Human Rights

The decision by the United Kingdom Government to accept the individual right of petition under the European Convention on Human Rights (ECHR) has meant that, in certain circumstances, Northern Ireland individuals can initiate proceedings at Strasbourg to vindicate individual freedoms. The general effect of individual cases *may* have been an increasing awareness by the authorities to ensure, as far as possible, that ECHR requirements are complied with. But ECHR is not directly part of the law and proposals made, from time to time, to make it "legal" by enacting a Bill of Rights based on the Convention (for either Northern Ireland or the U.K. as a whole) have so far been rejected by Government — and now seem, if anything, less likely to be accepted than five or ten years ago. In any case, the ECHR organs have recognised that there exists in Northern Ireland (as in the Republic at different times) a "public emergency threatening the life of the nation" enabling the U.K. to take measures which derogate from its obligations under the Convention. In these circumstances, the ECHR (or a Bill of Rights) can have limited effect in the short term — though it may have considerable beneficial impact in the longer term. The arguments for and against a Bill of Rights are discussed in detail in the 1977 Report of the Northern Ireland Standing Advisory Commission on Human Rights (SACHR) which concluded:

> "There is a need for human rights to be given further protection in Northern Ireland and one of the ways in which this should be achieved is by the enactment of an enforceable Bill of Rights for the United Kingdom. The best way to do this would be to incorporate the European Convention on Human Rights into the domestic law of the United Kingdom as a whole . . . "

(2) Abolition of executive detention and reliance on a modified judicial system

The suspension of internment in 1975 and the institution of the "Diplock" system after 1973 have enhanced judicial control over

the protection of individual freedom in Northern Ireland. It still remains the case that emergency legislation is drafted in terms which exclude some normal means of judicial control; but, as compared with the Special Powers Act, the Northern Ireland (Emergency Provisions) Act, 1978, as interpreted and applied by the judges, has restored, to a considerable degree, the rule of law.

(3) Further development of specific rules governing conduct of security forces

In addition, the judges have consistently taken the view that the ordinary rules of the common law continue to apply, even in an "emergency", unless expressly abrogated by statute. While they may not have spelled out, as clearly and precisely as they might, the application of these rules in the kinds of situation which regularly occur, they have not shrunk from applying them in appropriate cases which have come before them. It is also worth noting that criticisms of the treatment of suspects in policy custody decreased signficantly following implementation of the detailed recommendations contained in the (Bennett) *Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland (1979),* although these fell short of an enforceable code governing interviewing as had been advocated. The protection of individual rights by such detailed provisions was also supported by the SACHR in its 1977 Report:—

> "The traditional method of introducing detailed reforming measures to deal with specific problems is valuable and should be pursued. A Bill of Rights is not a substitute for such action and should not of itself be considered a sufficient or adequate approach".

(4) Ratification of other international human rights instruments.

The United Kingdom Government has ratified a considerable number of instruments promoted by the United Nations, which although again not part of the domestic law, constitute at least some ultimate protection for the rights of individuals and communities in Northern Ireland. Thus the Government in 1976 ratified the "International Bill of Rights", the Covenant on Civil and Political Rights 1966, and the Covenant on Economic Social and Cultural Rights 1966, (although not accepting the Optional Protocol to the Civil and Political Covenant, which provides for individuals to complain to the Human Rights Committee). The Covenant on the Elimination of all Forms of Racial Discrimination (CERD) has also been ratified. These treaties create a mesh of international obligations on the Government and are a source of standards for administration and the courts in developing

human rights policies. But their chief significance as far as Northern Ireland is concerned is the acceptance by the United Kingdom of the concept of international supervision of human rights issues in Northern Ireland. Taken together, the obligations undertaken by the British Government in the field of human rights are far more extensive in international law than those undertaken by the Republic, which has yet to ratify any of these instruments.

Part 3

Legal Organisation since 1920

(i) Republic of Ireland.

The Courts Act, 1924 established the court system envisaged by Articles 64-66 of the 1922 Constitution. As already noted, this system of judicature continued until 1961, when an identical system of courts was established, but on this occasion based on the provisions of the 1937 Constitution. Article 34 of the Constitution declares 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."

Under two statutes, the Courts (Establishment and Constitution) Act, 1961, and the Courts (Supplementary Provisions) Act, 1961, the current judicial system was founded, consisting of a Supreme Court, the High Court, the Court of Criminal Appeal, the Circuit Court and the District Court.

The District Court is a unified court which consists of a President and up to 39 justices. The country is divided into 23 District Court Districts and over 200 District Court Areas. The courts are staffed by district justices, legally qualified, who are assigned to particular District Court areas. This, the lowest court in the judicial hierarchy has both criminal and civil jurisdiction and has by far the largest caseload of all courts. Its jurisdiction is broadly similar to the magistrates court in Northern Ireland, with, however, larger competence to dispose of criminal cases, and a greater civil jurisdiction, involving claims up to IR£2,500 following the Courts Act, 1981. Appeals in the normal way go to the Circuit Court by way of rehearing.

The Circuit Court is an integrated court which has a President and twelve ordinary judges (Courts Acts, 1977, 1981). The country is divided into eight circuits and five judges are permanently assigned to the Dublin Circuit. The court is the trial court for all but the most serious indictable offences tried by jury as guaranteed under the Constitution. It has civil jurisdiction now up to claims of IR£15,000 in contract and tort, an enlargement of jurisdiction included in the 1981 Courts Act, to relieve the case load of the High Court, and to ease the cost on litigants. Extensive family law jurisdiction was given to the Circuit Court by the Courts Act, 1981. Civil juries were abolished in the Circuit Court in 1971.

The High Court under the Republic's scheme of judicature is, like the Northern Ireland High Court, the centre piece of the system. It is vested with "full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal". A President and fourteen ordinary judges staff this court. When exercising criminal jurisdiction, the High Court is known as the Central Criminal Court, but this name is not explicitly authorised by the Constitution. The court tries all homicide cases in the State and other serious cases transferred from circuit courts. All constitutional cases commence in the High Court. As in Northern Ireland, when the High Court sits as a civil court, it may try cases with a civil jury.

Under Part V of the Offences Against the State Act, 1939, the Minister for Justice may by order bring into existence an additional court to deal with criminal cases if he is satisfied that the ordinary courts are not adequate. This court, known as the Special Criminal Court, has been established since 1972. It has an identical rationale to the "Diplock" courts in Northern Ireland, to deal with terrorist or subversive crime, sits without a jury, but trial in the Republic is before three judges while in Northern Ireland a single judge tries such cases. Appeals from the Central Criminal Court and Circuit Courts are to the Court of Criminal Appeal which consists of a judge from the Supreme Court and two High Court judges.

The Supreme Court which consists of the Chief Justice and five ordinary judges is the Court of last resort (subject to the European Court of Justice, for matters concerning European Communities law). Generally, the Supreme Court is an appellate court although it has original jurisdiction in dealing with references under Article 26 of the Constitution from the President. In terms of comparison with Northern Ireland, it combines the roles of the Court of Appeal and the House of Lords for that jurisdiction.

Court Business

Figures available for the High Court in Republic for 1978-79 show a total of 11,657 summons (special and plenary) issued, compared with 9,324 writs in Northern Ireland's High Court. In the same period, 2,408 High Court actions were disposed of by trial or settlement in the Republic compared with 2,088 in Northern Ireland. The volume of High Court cases in the Republic had risen rapidly from 1978, until the coming into force of the Courts Act, 1981, which has transferred some of the volume to the Circuit Court. In 1980-81, summons totalled 23,455, but in 1982-83 had fallen to 12,929.

Legal Aid

A Civil Legal Aid Scheme was introduced at the end of 1979. It provides both legal advice and aid through Law Centres staffed by solicitors in the full-time employment of the Legal Aid Board. It thus contrasts fundamentally with the criminal legal aid system and with the civil legal aid scheme in Northern Ireland, which are run entirely by solicitors in private practice. However, like the Northern Ireland system, it is means tested and it contains provisions whereby the merits of a case, once eligible for public funding is assessed by the Legal Aid Board. Legal aid is available at all court levels. As in Northern Ireland, financial eligibility is determined by reference to disposable income and capital. The minimum contribution for legal advice is IR£1 and for legal aid for court proceedings, IR£10. However, in hardship cases, these minimal contributions may be waived. All welfare recipients automatically get legal aid on payment of a standard charge of IR£15.00. The concept of 'legal assistance' in the Northern Ireland scheme is encompassed under 'advice' in the Republic, and covers help in probate matters, including the drafting of wills or other documents. The legal aid centres will also help prepare an applicant's case before a tribunal, although tribunal representation, as such, is not possible under the schemes in either jurisdiction. Most of the applications for legal aid are in respect of family law cases. Unlike the Northern Ireland scheme, legal aid in the Republic does not normally extend to actions for personal injuries suffered in road or factory accidents. The net cost of the scheme in 1981 was IR£855,000, and in 1982, IR£1,198,000.

Criminal Legal Aid is available in the Republic under a statutory scheme, introduced some years before the equivalent Northern Ireland scheme, by the Criminal Justice (Legal Aid) Act, 1962. The two schemes are in substance identical. The Republic's scheme was affected in a major way by the Supreme Court's judgment in *The State (Healy)* v. *O'Donohue* (1976), which added a constitutional basis for the entitlement to the services of solicitor and counsel when facing a serious criminal charge — for example, charges which could result in imprisonment — where the accused had insufficient means. In the result, the scheme has covered probably a much greater number of persons, particularly in the District Courts, than might otherwise have been the case if the entitlement was statutory only. Thus, in a recent systematic study of Galway District Court, it was found that free legal aid had been refused in no case where it was requested.[13] Legal aid in both jurisdictions is, therefore, very extensive in criminal cases. The total cost of criminal legal aid in the Republic in 1981 was IR£900,300; 1982, IR£1,179,000 and 1983, IR£1,600,000 (estimated).

Other Agencies

The Republic like Northern Ireland has a wide range of administrative tribunals and agencies, some unique, such as the Labour Court, some similar, such as in the field of social welfare and social security. In addition, certain parallel offices have been instituted which may be noted here:

1974 Office of the Director of Public Prosecutions (who has formal independence from the Attorney General in the matter of prosecutions).

1977 The Employment Equality Agency (the equivalent of the Equal Opportunities Commission in Northern Ireland).

1983 The office of Ombudsman (the equivalent of the Parliamentary Commissioner for Complaints in Northern Ireland).

A police complaints machinery with an independent element, possibly based on the Northern Ireland model, is expected and the question of establishing a Police Authority is under active consideration in the Republic.

(ii) Northern Ireland

The Court System

The court system established in Northern Ireland by the Government of Ireland Act, 1920 remained substantially unchanged until the 1970s. However, a Court of Criminal Appeal was created in 1930 (six years after the Republic) and from 1935, all Resident Magistrates were required to be legally qualified (11 years after the Courts of Justice Act, 1924 has imposed a similar requirement in respect of District Justices). After the Second World War, the new Welfare State brought with it a number of welfare tribunals, and in 1965 the Industrial Tribunal was added. The organisation of the Supreme Court and County Courts in relation to both civil and criminal proceedings was considered in a number of reports in the early 1970s and these led ultimately to the enactment of the Judicature (Northern Ireland) Act, 1978. This Act made a number of significant changes in the organisation of the Northern Ireland legal system:

(1) The old system of criminal courts (Assizes, County Courts and City Commissions) was replaced by a new "Crown" Court closely modelled on the Crown Court introduced in England and Wales in 1971.

(2) The County Court became an exclusively civil court, except as regards appeals from magistrates courts. The general jurisdiction of this court is now £5,000: in the Republic, the

jurisdiction of the Circuit Court has recently been raised to IR£15,000. In addition, the 1978 Act envisaged the introduction of a new "small claims" procedure in the County Court and this was instituted in 1979 for certain claims involving not more than £200 (the limit is now £300).

(3) The Court of Appeal and Court of Criminal Appeal have been amalgamated into a single Court of Appeal; the power to appeal to the House of Lords in civil and criminal proceedings has not been altered.

(4) The High Court was divided into three divisions, instead of two — a Family Division being added to the old Queen's Bench and Chancery Divisions. The right to jury trial in personal injury actions in the Queen's Bench Divisions was retained.

(5) Generally, responsibility for the courts in Northern Ireland was transferred to the Lord Chancellor's Department and a new administrative office (the Northern Ireland Court Service) set up to supervise the work and personnel involved.

Legal Aid

Legal aid for most *civil proceedings* in the magistrates courts, County Court and Supreme Court (but not in tribunals) was introduced in 1965; to qualify a person must satisfy both a financial and a "merits" test. The financial qualification is stated in terms of disposable income and disposable capital; if the applicant's means are below a certain figure, he is entitled to free legal aid; if they exceed the lower limit, and are below an upper limit, he may have to contribute to the cost of litigation, particularly if he loses. If the applicant qualifies financially, he must then satisfy a certifying committee of lawyers that he has "reasonable grounds" for taking or defending the proceedings, and the Committee must also be satisfied that it is not unreasonable in all the circumstances of the case to grant legal aid. The net cost to the taxpayer of legal aid provided under the scheme in 1981/82 was £1,115,263; most of the applications for legal aid are in respect of divorce and domestic proceedings and actions for damages for personal injuries suffered in road or factory accidents.

The 1965 Act also made provision for "legal advice" to those whose disposable capital and disposable income came within certain limits. For legal advice, there is no "merits" test, but again, it may be free or contributory. In 1979, the scheme was extended to cover legal "assistance" as well as "advice". Under this new scheme, a person who qualifies can receive up to £40 legal assistance, and permission can be granted to exceed this sum.

The 1965 Act also extended the existing scheme for legal aid in *criminal proceedings,* so that if a person with "insufficient means" to pay for legal representation is charged with murder, he automatically qualifies for legal aid; in all other cases where the defendant's means are insufficient, legal aid is granted where this is "in the interests of justice". In practice, this means that virtually all defendants with insufficient means who are tried on indictment receive free legal aid; defendants in the magistrates courts receive legal aid in the more serious summary cases. The cost of criminal legal aid in 1981/82 was £2,143,016.

Other Agencies

The late 1960s and early 1970s also saw the introduction of a number of autonomous organisations broadly designed to ensure equality of opportunity and the prevention of discrimination on political or religious grounds in Northern Ireland. The following list provides a summary of these developments:

1969 Parliamentary Commissioner for Administration (Northern Ireland) (to investigate allegations of maladministration by Government departments)

Commissioner for Complaints (maladministration in local government).

1970 Northern Ireland Police Authority (to remove police from "political" control).

1972 Office of Director of Public Prosecutions (to secure an independent system of prosecution in criminal cases).

1974 Standing Advisory Commission on Human Rights (to advise Secretary of State on adequacy of law to prevent discrimination on religious or political grounds).

1976 Labour Relations Agency (to provide machinery for settling industrial disputes).

Equal Opportunities Commission (to tackle sex discrimination).

Fair Employment Agency (to develop equality of opportunity in employment).

1977 Police Complaints Board (independent supervision of complaints against police).

Some of these institutions mirror developments in Great Britain (especially, P.C.A., E.O.C. and P.C.B.); others are a quite unique attempt to deal with the problems of Northern Ireland (especially Northern Ireland Police Authority, D.P.P., S.A.C.H.R. and F.E.A.).

Part 4

Interaction between law and legal institutions in the Republic of Ireland and Northern Ireland.

After 1920 there remained some degree of formal connection between the two new jurisdictions. The Government of Ireland Act, 1920 established a High Court of Appeal for Ireland, consisting of judges from North and South, to hear appeals from either jurisdiction. A small number of cases was dealt with in this way, but the High Court of Appeal was abolished in 1922. Under the 1922 Constitution, it was possible for an appeal to be made from the Irish courts to the Judicial Committee of the Privy Council, but this power was seldom exercised and was formally abolished in 1935. For a few years after 1920, intending barristers in Northern Ireland were required to attend, and be examined by, the King's Inns in Dublin — but this practice came to an end in 1925 with the setting up of a separate Inn of Court of Northern Ireland (which restored for Northern Ireland the requirement for intending barristers to attend an English Inn). By 1935, therefore, all legal links between North and South had disappeared — with certain exceptions, formal and informal.

(1) Professional Links

Under the Supplemental Charter of the Incorporated Law Society of Ireland, granted in 1888, five representatives of the Northern Law Society may be extraordinary members of the Council of the Law Society. This right has, since 1922, been exercised by the Incorporated Law Society of Northern Ireland, but the extraordinary members from Northern Ireland refrain from taking part in the affairs of the Irish Law Society. The Solicitors Act, 1954, by section 44, provided for the recognition of the practicing certificates of Northern Ireland solicitors, permitting them to be enrolled in the Republic as solicitors, subject to passing an Irish examination and a satisfactory knowledge of the statute law. The section would come into force if reciprocal provision for Republic solicitors were made in Northern Ireland. However, no such arrangement was introduced in Northern Ireland and section 44 has never been brought into force.

On the other hand, in recent years reciprocal calls to the Bar of Northern Ireland and of the Republic have been arranged by the two Inns of Court, North and South, and equally each with the English Inns. A considerable number of counsel from both jurisdictions have been called and several Northern Ireland Queen's Counsel have appeared in cases in the Republic. It is to be noted that these arrangements would be required in any event under the

E.E.C. Directive on freedom of establishment for lawyers (Directive 249/1977).

In 1979 a scholarly society, the Irish Association of Law Teachers was formed. This Society which has over 100 members in both jurisdictions, has participation from all third-level institutions, including the non-university sector, North and South, and the professions, North and South. The Society exists to promote teaching, research and publications in law in both jurisdictions, and the bringing together of lawyers, North and South. Through its twice annual meetings held at different venues including Belfast and Dublin, the Society has already led through the exchange of ideas and through modest but concrete projects, to advances in legal administration and scholarship on the island.

(2) Cross-Border Legislation

A significant connection was the creation of certain cross-border executive authorities with powers to function in both jurisdictions, such as the Foyle Fisheries Commission, the Great Northern Railway, etc. Such developments were greatly facilitated by section 1 of the Northern Ireland Act, 1947, which provided that:

> "The general limitation . . . confining the legislative power of the Parliament of Northern Ireland to the making of laws in respect of matters exclusively relating to the portion of Ireland within their jurisdiction . . . shall not operate so as to invalidate legislative cross-border schemes relating to water power, the storage or supply of water, land drainage and irrigation, electricity supply, and highways, railways, inland waterways or bridges."

Section 6 of the same Act withdraws the application of the territorial limitation from laws providing for the transfer to transport authorities in Northern Ireland of property and persons carrying on railway undertakings partly in and partly out of Northern Ireland, and from laws conferring on such authorities powers and duties to provide transport out of Northern Ireland. A further formal link may be said to have been added in 1975 and 1976 with the enactment of the Criminal Law Jurisdiction Acts in both jurisdictions.

(3) Proof of Irish Law

Finally, the law of the Republic was put in a special category as regards its proof in a Northern Ireland court — it was provided that both that law and the law of England and Wales could be the subject of judicial notice in court proceedings in Northern Ireland

(see Judicature (Northern Ireland) Act, 1978, s.114). No reciprocal provision appears to exist in the law of the Republic (see *D.P.P.* v. *Fusco and Others* (1981)).

(4) Judicial Precedent

The formal separation of the courts in the two jurisdictions is reflected in the technical rules of precedent. Judges, both North and South, have stated that they are not formally bound to follow decisions given in the other jurisdiction. There is nothing peculiarly significant in this — in theory, Northern Ireland judges are not bound even by decisions of the English courts, except as regards decisions of the House of Lords on appeal from Northern Ireland. Some indication of the rarity with which, in practice, each jurisdiction has taken notice of the other may, however, be obtained from an analysis of the cases referred to in the headnotes of the reported cases. These references may be classified as follows:

Cases Referred to in the Headnotes of Reported Northern Ireland Cases, 1921-1975.

	No.	%
English or Scottish Cases	180	61
Pre-1920 Irish Cases	55	19
Post-1920 Irish Cases	9	3
Post-1920 Northern Ireland Cases	45	15
Other	8	3
Total	297	100*

(Of the *nine* Irish cases listed, five were "disapproved", "doubted" or "not followed".)

Reported Cases Followed, Over-Ruled, or Specially Considered in Irish Reported Decisions, 1921-1975

	No.	%
English or Scottish Cases	1,058	50
Pre-1920 Irish Cases	356	17
Post-1920 Irish Cases	654	31
Post-1920 Northern Ireland Cases	23	1
Other	6	1*
Total	2,097	100

*Rounded.

(Of the *twenty-three* Northern Ireland cases listed, two were "applied", seven "approved", two "considered", five "distinguished", six "followed" and one "not followed".)

In both jurisdictions, as already noted, the major source of influence remains the decisions of the English courts. The relative neglect of Irish precedent, whether North or South and whether pre- or post-1920, is generally believed to be a function of the relative ease of availability of English decisions and textbooks and the corresponding difficulties in producing contemporaneous Irish law reporting and texts on Irish law. In consequence, it was predictable that the better documented legal system would dominate the less well documented. This topic is raised further below.

In spite of this there remains a number of areas (especially in the law of torts, the law of contract and land law) where decisions in one jurisdiction continue to be cited and relied on in the other jurisdiction — and indeed the decennial *Digest of Irish Case-Law* includes reported cases from both North and South.

(5) International Links

Semi-formal links between the two jurisdictions exist by reason of what might be called a new form of "external association". Both the Republic and the United Kingdom are members of the European Communities; both are therefore "bound" by European Community legislation and by rulings of the European Court of Justice on issues of Community law. Similarly, both countries are members of the Council of Europe and are signatories to the European Convention on Human Rights and Fundamental Freedoms; both countries recognise the right of individual petition under that Convention. Again, both countries are members of the United Nations, which membership imposes further similar obligations on each. In relation to all three of these factors, however, it must be noted that whereas the Republic has its own international personality and is free to choose which international obligations it should accept, such obligations affect Northern Ireland only insofar as they have been accepted for the United Kingdom as a whole.

In Annex II we summarise, in broad terms, the relationship between the major areas of the law of Northern Ireland and of the Republic.

Has there developed an Irish legal identity since the 1920's?

Underlying these similarities and differences are several factors which might tend to encourage legal developments along similar lines in both jurisdictions. Thus Ireland, North and South, until very recently was largely an agricultural community, with a relatively small population. It possesses a number of social and economic characteristics which also differentiate it from its larger,

highly populated and industrialised neighbour. With such differences it would not be unreasonable to expect the development of a distinctive legal culture, common to both jurisdictions and serving to distinguish both from England and Wales. The gist of our submission is that this has occurred to a lesser extent than one might have anticipated and it may be worth considering why this might have been. We think we can identify four factors:

(1) Lack of Legal Scholarship

Before the 1970s, legal education in Ireland was very much a part-time affair, and the ending of the 19th century tradition of writing by legal practitioners meant that for fifty years, there was virtually no research into Irish law. The problem and its consequences is nicely caught by a remark of Kennedy C.J. in 1927;

> ". . . only too frequently one observes with regret even in (the Supreme Court) that diligence in the search for Irish precedents is numbed by the facility of reference to English textbooks."

Much the same was true of other "new" common law jurisdictions, such as Australia and Canada. The last 10-15 years have, however, seen the rebirth of Irish legal scholarship and this could provide the basis for the development of a new approach — as can, for instance, now be seen in Australia (in particular) and also in Canada (to a lesser extent) in recent years. Note, however, that such a development tends to involve three distinct stages — (1) exegesis of existing law; (2) detailed examination of that law in action and (3) the gradual development of new legal theories or of a new philosophy of law. Irish legal scholarship is still in the first stage of this development, and is seriously hampered by lack of resources as far as moving on to the second stage is concerned.

(2) Lack of judicial activism — at least before 1965

As we have already indicated, before the decision in *Ryan*, the Constitution had little real influence in the development of Irish law. The decade after *Ryan* saw a considerable judicial activity, especially in connection with the development of the concept of "unspecified" personal rights. But the absence of a coherent theory for the basis of this development and also (since 1975 or so) some degree of retrenchment (possibly in the face of public opposition) has meant that "constitutionalisation" of the law has not, as yet, yielded its full potential.

(3) The "catholic" approach of the Law Reform Commission.

One possible alternative to the judges and the legislature as a developer of Irish law is the Law Reform Commission set up in

1975. However, given its limited remit and resources, it was perhaps obvious that the Commission would tend to take a pragmatic approach to its programme of reform in general, and to its proposals for particular legal reforms. There has, as yet, been no attempt to develop a general philosophy for guiding law reform in the Republic, although the paper on law reform by Mr. C. J. Haughey T.D., published in 1964 in the *International and Comparative Law Quarterly*, could serve as a basis, and deserves reconsideration. Instead, the Commission has tended to draw on proposals from many common law and other jurisdictions and, in terms of its approach to law reform, has been particularly anxious not to adopt too parochial or insular an attitude. The notion that *good* law reform requires a high degree of comparative law (or at least a drawing on the legal imagination of other law reformers) in many ways prevents the development of a distinct local philosophy. In this context, it may well be that the English Law Commission (whose work influences much law reform in the North) does take a more insular and restricted approach, and this may reflect a basic difference between large and small jurisdictions; only the former have the resources — and the confidence — to "go it alone" and pay less attention to the work of others.

(4) Legal conservatism

To some extent at least failure of the law to develop is the responsibility of the legal practitioner; in any common law system it is up to the parties to prosecute their cases and to raise the issues of fact and questions of law to be resolved by the courts. If the Irish courts have not been particularly innovative, then that to some extent may be because they have not been "pushed" by lawyers to resolve novel and imaginative arguments. Of course, the general legal system has not assisted this process as well as it might. Legal conservatism is, perhaps, most vehement in its opposition to changes in the practice and procedure of the courts. The net effect of this — at least until recently — has been to discourage the bringing of doubtful or novel claims. On the other hand, the cost and delay involved would often have been prohibitive. Even if these barriers to "justice" were not insurmountable, it is likely that other procedural requirements or evidential rules would have discouraged litigation which came outside the normal range of legal business.

This inter-relationship between access to justice and development of the law was noted in particular by the Committee on Civil Legal Aid and Advice in its 1978 Report:

"The operation of a nationwide scheme of legal aid and advice should, over a period of time, make available . . . a substantial body of information on important aspects of law and legal services . . . and might point to the need for improvement of the law and legal remedies or for creation of more effective remedies."

Many of these factors are also relevant to the development — or lack of development — of a unique Northern Ireland law. We have previously pointed out that the desire to remain part of the United Kingdom did not carry with it a desire for complete harmonisation of the law — and that in a number of aspects, the Parliament of Northern Ireland felt the need for, and did enact, legislation which had no British counterpart. The imposition and form of "Direct Rule" in 1973 has considerably reduced the scope for separate development of the statute law. As a result, perhaps the most potent force for separate legal consideration of Northern Ireland since 1973 has been the views, formal and informal, of the Northern Ireland judiciary, but their "independence" too is subject to the ultimate control of the House of Lords in London.

Part 5
Future Developments in Irish Law

While it is no part of our remit to speculate about the future, it seems appropriate to conclude this general survey with some equally general remarks. Many of the issues raised in this paper, and in the terms of reference defined by the Forum have rarely if ever been asked before. It is an issue of policy once the question of the similarities and differences in law and administration have been essayed, whether both jurisdictions should seek to build on a common legal tradition, or indeed whether it matters. If it did matter, then certain policies could be pursued which would enhance the semblance of legal identity that still continues.

One that occurs to us is the establishment of an Annual Survey of Irish Law, on the model of United States surveys or the Annual Survey of Commonwealth Legal Developments. As often as not, the problems facing lawyers and politicians responsible for legal change, is ignorance of what is going on in the other jurisdiction. An annual volume jointly edited from a university in the Republic and from Queen's University, Belfast would supply the need for information and hopefully stimulate further interest in Irish law. Such a volume could also encompass the field of European Community law which is likely to be a significant harmonising factor in legal development in the 1980s.

While it is to be expected that academics would end a paper calling for more research, the case in this area is at least not difficult to make. The Forum might endorse the importance of research in the almost wholly unexplored field of legal history in this country. The only course on the subject taught on the island is at Queen's University Law Faculty, Belfast. The significance of Irish legal publishing might also be endorsed: no legal identity can be discovered, maintained or developed without local legal literature. Its absence in the past, we argue, has had major effects on law and practice, and with the pace of social and technological development, a failure to produce local research and writing on law will have increasing undesirable consequences. The National Economic and Social Council and the Economic and Social Research Institute should both take a greater interest in the discipline of law and its development on the island. Much of the research that needs doing is not library based but empirical. Law reform should, therefore, be more closely linked to empirical research through these agencies. We have already discussed the topic of law reform and would add only that it requires much more central policy attention than it has been accorded to date, North and South.

On a different plane, it is fair to conclude that law and legal institutions, particularly the courts have demonstrated over the last sixty years a capacity to adapt to change, somewhat cautiously perhaps and with a tendency to emphasis continuity with the past. But in the light of their history, there can be every confidence that whatever political structures are proposed for the future, the courts and the legal system can adapt to and work within them.

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ANNEX I

The Coming of the Common Law to Ireland

1. Relationship between Common Law and Brehon Law.

For more than four hundred years after its arrival in Ireland at the end of the 12th century, the common law had to compete with the indigenous, and totally different, system of Brehon Law. In the end, the common law triumphed completely; no trace of the Brehon law is to be found in modern Irish law. Looking back, this outcome seems to have been inevitable — merely one facet of superior political and military power. But at times, the "first adventure" of the common law often seemed to have been in danger of foundering and it was not until the early 17th century that the issue was finally put beyond doubt.

The early history of the common law in Ireland falls into three distinct phases. From 1170 to the early 14th century, the story is one of almost continuous expansion. By 1232 the main corpus of English law as it then existed had been successfully extended to those parts of Ireland under Norman control. By 1272, some three quarters of the island was (in theory at any rate) under Norman control (ironically, perhaps, much of the remaining quarter lay within the province of Ulster). During this period, there were several possible approaches which could have been taken with regard to the native Brehon law. The Normans could, for instance, have adopted that law (with such amendments as were necessary) and developed it to meet the new circumstances. Alternatively, they might have brought with them the nucleus of a new law, but allowed it to be filled out by whatever local customs were not repugnant to it. Either of these approaches would have led to the development of a distinctive Irish (common) law. But from the outset it was made clear that the "law of Ireland" was to be the common law as developed in England — and further — that this law was to be for the benefit only of the settlers. The native Irish, even in areas under Norman control, were not in general allowed to resort to Norman law, though during the course of the 13th century many were specifically granted the privilege of doing so. Indeed, in 1277 there was a move to make a general grant of this privilege, "because the laws which the Irish use are detestable to God and so contrary to all law that they ought not to be called laws"; but this proposal was not adopted. Thus it was that for most of this first phase the application of the new law was limited not only territorially, but also "personally".

The second phase of the early history of the common law began about the time of the Bruce invasion of 1315-1317. This invasion,

though ultimately unsuccessful, showed how brittle was the Norman hold over much of Ireland and shortly afterwards the Norman territorial hegemony began to decline — and with it the influence of the common law. By the end of the 14th century most of the island had reverted to Irish hands, and the area of English control — and hence the ambit of the common law — came to be restricted to the Pale. The increase of the areas under Irish control naturally resulted in a strengthening of the Brehon law, in spite of a number of attempted counter measures. Thus, one of the Statutes of Kilkenny in 1366 imposed severe penalties for the use of Irish laws or customs; but this provision was quite ineffective. Similarly in 1394-95 Richard II visited Ireland and received the fealty of many of the Irish chieftains who swore to obey his laws — but this strategy was also unsuccessful. And so the decline of the common law continued. By 1450 the Pale had been reduced to "four obedient shires" (Dublin, Meath, Louth and Kildare) and even within this small area Irish laws and customs began to appear.

The Pale nonetheless survived and acted as a bridgehead for the "reconquest" of Ireland during the 16th century. This third phase began about 1540 and is marked by two events of legal significance. In 1541 Henry VIII took upon himself the title "King of Ireland" (hitherto the English kings had been only "Lords" of Ireland); and in 1543 commissioners were appointed in Connaught, Munster and parts of Ulster to decide controversies — instead of Brehons. As English control was extended, so too was the common law. By 1585, the sole remaining areas outside English control were the O'Neill and O'Donnell territories in Ulster and with their defeat in 1601, the way was clear for the effective — and exclusive — application of the common law throughout the whole of Ireland. This was effected by three steps. By 1607, the whole island had been divided into shires, each with its full range of legal institutions. At the same time the common law judges held in two important cases (*The Case of Tanistry* and *The Case of Gavelkind*) that Brehon law was incompatible with, and repugnant to, the common law.

Finally, in 1612, the Irish Parliament declared:

> "all the natives and inhabitants of this Kingdom . . . are taken into his Majesty's gracious protection, and do now live under one law as dutiful subjects . . ."

That one law was the common law; so the Brehon law was completely superseded, at least in theory. In practice resort was probably had to the native law in some parts of Ireland after 1612 But for all legal purposes the Brehon law had ceased to be an authoritative part of Irish law.

2. The Extension of English Law to Ireland.

During the first stage of the application of the common law to Ireland, the official policy had been "una et eadem lex" — that there should be no distinction between English and Irish common law. So far as the courts were concerned, this was achieved in practice by the fact that most of the judges came from England, and the barristers who appeared in the courts had been trained in London. This latter practice continued after the setting up of the King's Inns in 1541; indeed, in 1542 the Irish Parliament provided that no person could appear in the Irish courts unless he had studied for five years in one of the English Inns of Court (The King's Inns, in fact, provided no system of legal training until the mid-19th century, and the requirement to attend an English Inn was not removed until 1885.) As Professor Newark has concluded:

> "In consequence the differences in common law and equity as applied in the Irish courts and as applied in the English courts were slight, and tendencies to divergence were always liable to be checked by the fact that the House of Lords at Westminster was the ultimate court of appeal for both countries".[1]

Irish law could, however, also be made by the Irish Parliament — but here parity was retained through control by the English Council. The most famous instance of this control was the enactment of Poyning's Law in 1495, to the effect that no legislation was to be enacted by the Irish Parliament except such as had been first approved by the English Council. The result of this provision was for some time to stifle any legislative initiatives by the Irish Parliament.

After 1612 it remained official policy that Irish law should develop step-by-step with English law — but it soon proved impossible or impracticable to adopt or enforce this approach in every case. In some instances English law was adopted in Ireland only many years after its introduction in England (thus the Irish Statute of Uses was not enacted until 1634, almost a century after its enactment in England; the Irish Statute of Frauds was passed in 1695, the English statute in 1677, etc.). In other cases, Irish statutes, though similar, were not identical to English statutes. In yet other instances the Irish Parliament enacted legislation which had no English counterpart. As the Irish Parliament became more "patriotic" these tensions increased. Steps were taken by the English Parliament, under "the sixth of George I" in 1719 to reassert the restrictions imposed by Poyning's Law — but ultimately in 1782, the Irish Parliament was given a substantial degree of legislative independence. This independence — granted

to an exclusively Protestant legislature — came to an end in 1800. In the present context, however, the result of these political tensions was the enactment, during the 18th century, of a number of statutory provisions peculiar to Ireland and the beginnings of the development of a separate Irish legal tradition, albeit one firmly grounded on English law.

To some extent a similar tension existed in the courts. Here, matters came to a head in the case of *Annesley* v. *Sherlock* (1719) in the form of a contest between the Irish House of Lords and the English House of Lords as the final appellate jurisdiction over Irish cases. The dispute was settled by the English Parliament in favour of the English House of Lords — again, until 1782 when constitutional developments led to the restoration of the judicial supremacy of the Irish House of Lords for a brief period. But in spite of the ultimate authority of the English House of Lords for most of this period, there is some evidence of judicial, as well as of legislative, initiatives. Thus, it was during the 17th century that the Irish judges developed a "civil bill" procedure quite unlike anything in operation in England — and indeed a distinctive procedure which even today provides a common basis for the Circuit Court (in the Republic) and the County Court (in Northern Ireland), differentiating both from the county court in England and Wales.

NOTE

1. F. H. Newark, *Notes on Irish Legal History*, (Queen's University Belfast, 1960), p. 26. See generally Donaldson, *Some Comparative Aspects of Irish Law*, (Duke University Press, 1957), Ch. 1. "Legal History and Present-Day Legal Systems".

ANNEX II

Summary of Relationship between Major Areas of the Law of Northern Ireland and of the Republic of Ireland

Administrative Law

The general principles of administrative law in both jurisdictions have been developed by the judges, and are substantially similar. The range of administrative tribunals, and their procedures, differ to some extent, and there are also some differences in relation to the remedies available.

Welfare Law

This is an area which is primarily statutory and where, because of a rather different philosophy and history (Northern Ireland followed step-by-step developments in England and Wales), a number of particular differences exist. However, membership of the EEC and recent developments in the Republic have helped to assimilate the law in the two jurisdictions.

Family Law

This also is an aspect of law dominated by statute — and in the Republic, by the Constitution. In recent years, the law in Northern Ireland has been brought much more closely into line with that in England and Wales and this has brought about in its train greater differences between that law and family law in the Republic.

Taxation

The basic structure is the same in the two jurisdictions (this is an area where Northern Ireland law must be the same as that in the rest of the United Kingdom), deriving in large part (at least as regards income tax) from 19th century legislation. Most post-1920 United Kingdom developments (especially PAYE) appear to have also been adopted in the Republic. Corporation tax was introduced in the United Kingdom in 1965 and in the Republic in 1976; United Kingdom changes in relation to capital gains tax and capital transfer tax have also been broadly adopted in the Republic. There are, however, a number of specific differences as regards rates, allowances and investment incentives.

Labour Law

In general, labour law in the two jurisdictions is very similar (this similarity is enhanced because of some unwillingness in Northern Ireland to adopt all changes introduced in Great Britain, and by adoption of legislation emanating from the European Communities, ILO recommendations, etc.). Specific differences exist e.g. in relation to the scope of legislation

dealing with unfair dismissal, equal pay, trade union activities (where Northern Ireland legislation tends to provide more extensive provision). More generally, the law in the Republic must conform to the requirements of the Constitution and this results e.g. in differences over "closed shop" arrangements etc. In addition, there is no precise equivalent in Northern Ireland to the form of voluntary arbitration conducted in the Republic under the aegis of the Labour Court.

Land Law

At present, the differences between the laws in this area are insignificant, due to a common heritage of 19th century legislation (especially Deasy's Act, 1860, Settled Land Acts, 1882-90 and Conveyancing Acts, 1881-92), similar systems for registration of deeds and registration of title, and non-implementation in Northern Ireland of major changes made in England and Wales in 1925. There are, however, some particular statutory differences arising, e.g., from the Republic's Landlord and Tenant (Ground Rents) Act, 1978 and the Family Home Protection Act, 1976 — though similar legislation in Northern Ireland on some of these points is contemplated. However, more general reform of the land law of Northern Ireland is now being considered and the effect of the changes which seem likely to be recommended will move Northern Ireland law closer to that in England and Wales, and away from that in the Republic.

Equity

The basic statute law (as contained in the Trustee Act, 1893 and the Trustee Act (N.I.), 1958) is very similar, but some particular differences exist as a result of other legislation such as the Trustee (Amendment) Act (N.I.), 1962 (trustee investments), Recreational Charities Act (N.I.), 1958, Charities Act (N.I.), 1964 and Charities Acts, 1961 and 1973 (R.I.).

Succession and Administration of Estates

The laws of the two jurisdictions are basically similar, but there is no precise equivalent in Northern Ireland, e.g., to section III of the Succession Act, 1965 (family inheritance), though the Inheritance (Provision for Family and Dependants) (N.I.) Order 1979 confers discretionary powers in such cases.

Criminal Law and Procedure

Much of the law remains similar, particularly where judge-made or derived from 19th century statutes such as the Offences Against the Person Act, 1861. There are, however, a number of important statutory differences due to the replacement in England and Wales, followed by Northern Ireland, of pre-1920

statutes such as the Malicious Damage Act, 1861 and the Larceny Act, 1916, and to the enactment in England and Wales, and Northern Ireland of new statutory provisions in relation e.g. to the defence of insanity, homosexual offences, etc.

Compensation for Criminal Injuries and Criminal Damage

This is another area where both jurisdictions inherited a legislative code quite distinct from that applicable in England and Wales. Recent developments in the two jurisdictions created a number of specific differences, but a substantial common element still remains.

Tort

This is an area of law which is essentially judge-made, and, as a result, there are few differences of any substance. There is one major Irish statute — the Civil Liability Act, 1961 — which created some particular differences (while at the same time removing others), and differences have also resulted from non-enactment in the Republic of legislation "modernising" other areas of tort law such as occupiers' liability, liability for animals, etc.

Contract

The laws are basically similar, but particular differences relate e.g. to the age of majority (18 in Northern Ireland, 21 in the Republic), the consequences of frustration (no equivalent in the Republic to Frustrated Contracts Act (N.I.), 1947), and the scope of the remedy of damages for innocent misrepresentation (limited in the Republic to contracts for the sale of goods by 1980 Act, but not so limited in Northern Ireland under 1967 Act).

In Northern Ireland, the Sale of Goods Act, 1893 (which is still in force in the Republic) has been superseded by the Sale of Goods Act, 1979 which in turn has been supplemented by the Supply of Goods and Services Act, 1982. The 1893 Act has, however, been substantially amended in the Republic by the Sale of Goods and Supply of Services Act, 1980, which also contains restrictions on the effectiveness of exemption clauses similar to those imposed in Northern Ireland by the Unfair Contract Terms Act, 1977. The 1980 Act also gives statutory force to certain implied terms in contracts for the provision of services, in this respect pre-dating similar provisions in the 1982 Act applicable to Northern Ireland.

Commercial and Company Law

There is substantial similarity in these areas partly as a result of a conscious policy to keep in step with Great Britain and latterly as a result of the EEC policy of harmonisation. Thus, although both jurisdictions have their own legislation (Companies Acts

(N.I.) 1960-1983 and Companies Acts (R.I.) 1963-1983), the provisions of these are broadly similar. As regards negotiable instruments, the main source of the law in both jurisdictions is the Bills of Exchange Act, 1882. The Irish Cheques Act, 1959 broadly corresponds to the Cheques Act (N.I.), 1957. In relation to the law of agency and of partnership, the Factors Act, 1889 and the Partnership Act, 1890 apply in both jurisdictions.

Evidence, Practice and Procedure

This was an area where, during the 19th century, some clearly identifiable Irish traditions developed, and many of these were retained in both jurisdictions after 1920. In particular, both jurisdictions share the "civil bill" as the basis of practice and procedure in the county courts (in Northern Ireland) and the Circuit Court (in the Republic). At the High Court level, both jurisdictions have also retained trial by judge and jury in personal injury actions. However, in more general terms, the Rules of the Supreme Court (N.I.) 1980 mark a conscious departure from previous tradition, and are based explicitly on a determination in future to adhere as closely as possible to the English Rules.

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