



The Judge in Ireland

By

Dr Eamonn G. Hall, Solicitor and Notary Public* (1986)

Justice Cardozo, one of the great judicial helmsmen of the United States noted, extra-judicially, that the “earliest judge was the ruler who uttered the divine command and was king and priest combined”.¹ Professor Heuston, the doyen of judicial biographers, considered that the judge “belongs to a priesthood for ever”.² The judge and the priest have much in common. Members of a priesthood or not, Irish judges play a pivotal role in the affairs of men and in the affairs of state. The uniqueness of the judicial office in Ireland is emphasised by the words uttered by the judge on his or her appointment. The declaration is made “in the presence of Almighty God”.³ God is also invoked to “direct and sustain”⁴ the newly appointed judge. The observations in this paper are offered by one of the uninitiated, a student of the juristic process.

Historical Background

The fons *et* origo of the Judge in Ireland is Bunreacht na hEireann. The 1937 Constitution established a division of labour among the branches of government. The three arms of government were established as the legislature, the executive and the judiciary.⁵ As Professor Kelly noted, the 1937 Constitution was “very largely a re-bottling of wine most of which was by then quite old and of familiar vintages”.⁶ By 1937 the judicial power was classically vintage.

The story of our judges is inextricably intertwined with this island's relationship with its nearest neighbours. On an autumn day, October 17, 1171, Henry II of England landed in Ireland fortified with the Bull *Laudabiliter* and an emerald ring from Pope Adrian IV – the investiture of the right to rule Ireland. Matthew of Paris informs us in his chronicle that Henry held a council at Lismore “when the laws of England, were by all freely received and confirmed with due legal solemnity”.⁷ Historians may doubt that version of history, but Henry did spend Christmas in Dublin and left for Wales on Easter Sunday, having initiated the process of exporting England law to this island and stifling the native Brehon law.

The *Curia Regis* or King's Court of the Norman Kings together with the judicial institution of itinerant justices were the precursors of the Royal Courts. The marking off of the judicial function was a gradual process. By the Middle Ages the judiciary was becoming independent in England. However, in the days of James I (1603-25) the judges still held their office *durante bene placito nostro* (“according to our good pleasure”). At the Revolution of 1688 the independence of the judges had been effectively established.

The Judicature (Ireland) Act of 1877 merged all the higher courts then in existence in Ireland into one court system – “the Supreme Court of Judicature in Ireland”. The Supreme Court of Judicature had two permanent divisions – the High Court of Justice and the Court of Appeal. The Court of Appeal consisted of the Lord Chancellor, the Master of the Rolls, the Lord Chief Justice, the Chief Justice of Common Pleas, the Chief Baron of the Exchequer and two Lord Justices. The new High Court was divided into five divisions, Chancery, Queen's Bench, Common Pleas, Exchequer and Probate and Matrimonial. There were also courts with limited local jurisdiction. By 1921, the higher courts had been reduced to a Court of Appeal and a High Court comprising a King's Bench Division and a Chancery Division.

In the aftermath of the Revolution of 1916-1922 the names of the courts changed, judicial titles changed, the robes of the judges became less colourful, but the radical change in the judicial structure that might have been expected never materialised. Article 73 of the Constitution of the Irish Free State authorised the establishment of a judiciary. The Courts of Justice Act 1924 established the courts as we know them today. The District Court was established with minor civil and criminal jurisdiction. The 1924 Act established a Circuit Court with greater civil jurisdiction and extended criminal jurisdiction, together with a High Court with full civil and criminal jurisdiction, a Court of Criminal Appeal and a Supreme Court. The 1922 Constitution was superseded by the 1937 Constitution, which once again established the judicial power. Article 34 of the 1937 Constitution provided that justice “shall be administered in courts established by law by judges appointed in the manner provided by [the] Constitution”. The Courts (Establishment and Constitution) Act 1961 formally established the hierarchy of courts that we have today. These courts have the same structure as those established pursuant to the 1924 Act.

The Appointment of Judges

Judges are appointed by the President.⁸ However, the President performs this task in accordance with Article 13.9 of the Constitution “only on the advice of the Government”. Accordingly, the appointment of judges by the President is a purely formal function, which leaves no discretion to the President. To be eligible for appointment to the Supreme Court or High Court a person must be a practising barrister of at least 12 years standing. [Note, (EGH 2009). Solicitors became qualified for appointment to the High Court and Supreme Court pursuant to the Courts and Court Officers Act 2002.] In the Circuit Court the requisite period of practice for a barrister is 10 years. [Note, (EGH 2009). The Courts and Court Officers Act 1995 allowed for the appointment of solicitors as judges of the Circuit Court.] In the District Court a barrister or solicitor must have the experience of 10 years practice before being considered eligible for appointment. Supreme and High Court judges must retire at 72, Circuit Court judges at 70 and District Court judges at 65.⁹

A judge may be removed from office for stated misbehaviour or incapacity, but only after resolutions calling for his or her removal have been passed by the Dail and the Senate.¹⁰ There is provision for a judicial enquiry into the conduct or condition of health of a judge of the District Court.¹¹ The Chief Justice is authorised to exercise a disciplinary function over judges of the District Court where he is of the opinion that the conduct of a judge of the District Court has brought the administration of justice into disrepute. The Chief Justice may interview the judge in private and inform him or her of his opinion.¹²

Sir Jonah Barrington, a native of Laois, a judge of the Irish Admiralty Court (1798-1830), is the only Irish judge to date to have been deprived of judicial office for misbehaviour after due process of law. Professor Osborough described Barrington’s character as combining “charm, conviviality and an utter lack of scruple”¹³ Barrington had diverted funds which suitors had paid into his court to alleviate his own financial problems. The House of Lords and the House of Commons presented an address to the Crown for his removal. The Crown directed that he be removed from office.¹⁴

Many factors play a part in the appointment of persons to the Irish Bench.¹⁵ Factors such as age, pre-eminence as a lawyer, holding office as Chairman of the Bar Council and political affiliations have been considerations. Studies on the judiciary in Ireland agree that the political affiliations have played a significant part in the preferment of persons to the Irish Bench.¹⁶

There is a convention that a serving Attorney General is offered any vacancy that occurs in the High Court.¹⁷ It is uncertain whether that convention is observed at present. Truly it must be stated that after appointment to the Bench judges have proved to be independent of the Government of the day and of any party that may have been instrumental in their appointment. Elevation to the Bench does

“emancipate a man from many of the pressures to which he has been subjected. That great corrupter of the conscience, the local constituency is gone, and a man

appointed (to the Bench) need only consult the law, his conscience and his aspirations for his country”¹⁸.

The time has come for a fresh approach to the appointment of judges. It is not that the existing system has failed, but no sense of mystery or obscurity should surround the process of appointment to the judicial arm of government. The method of appointing judges in other jurisdictions merits examination. Our nearest neighbours have recently reviewed their procedures. The Lord Chancellor in England, who has the responsibility for the appointment of Judges up to and including the High Court, in a candid and forthright policy statement in 1985 laid down the criteria for judicial appointments in the United Kingdom. The Lord Chancellor made it clear that the best potential candidate ready and willing to accept the judicial post was appointed. Lord Hailsham stated:

“No considerations of party, politics, sex, religion or race must enter into my calculations and they do not. Personality, integrity, professional ability, experience, standing and capacity are the only criteria, coupled of course with the requirement that the candidate be physically capable of carrying out the duties of the post, and not disqualified by any personal unsuitability.”¹⁹

The Lord Chancellor confirmed that he systematically enlists the “help and advice of numerous serving judges and senior lawyers”.²⁰ The view has been expressed that the judges and the senior members of both legal professions are probably the best judges of who will make good judges.²¹

Only good would come from a clear and forthright policy statement from the Government that no considerations of party, politics, sex or religion would enter into deliberations concerning persons being considered for judicial appointment. The establishment of an advisory judicial appointments committee composed of senior judges, senior members of both professions and senior civil servants may merit consideration. The general body of the judges in a particular court where a vacancy has arisen has also been suggested as an advisory selection body.²² Any such body would advise the Government on the appointment of members of the judiciary and would not infringe the constitutional requirement that judges are appointed on the advice of the Government. The eligibility of solicitors for appointment to the Circuit Court Bench should receive legislative consideration. Solicitors have been for appointment as Circuit Judges in England since 1971.²³ [Note.EGH.(2009). See above concerning the appointment of solicitors to the Circuit, High and Supreme Courts; see also the Courts and Court Officers Act 1995 which altered the system of appointment of judges. A Judicial Appointments Advisory Board was established pursuant to Part IV of the 1995 Act.]

Role of the Judge

Every judge when appointed “solemnly and sincerely” promises that he or she will duly and faithfully to the best of his or her knowledge and power execute the office of judge

“without fear or favour, affection or ill-will towards any man” and that he or she will “uphold the Constitution and the laws”.²⁴ A primary function of the judge is, therefore, “the disinterested application of known law.”²⁵ The judge, at one level, is the umpire who is involved in the resolution of controversies between individual litigants and between the State and its citizens. In criminal cases the trial before a single judge or before a judge and jury has replaced the physical strife of trial by combat. A trial in court still involves strife but it is no longer physical strife. Sir John MacDonnell in his *Historical Trials* rightly observed that

“a trial is in substance a struggle, a battle in a closed arena. It is a shock of contending forces, a contest which may arouse the fiercest passions”.

The pages of the newspapers bear witness to these fierce passions. The judge is often performing the social service to the community of removing a sense of injustice.²⁶ In removing the injustices the decision of the judge may become cloaked with an air of infallibility because in practical terms the decision of the judge is often final. Thus, impartiality and the appearance of impartiality are fundamental qualities which the judge must possess to carry out this essential public service.²⁷

At another level, the judges of the High and Supreme Courts interpret the Constitution. These judges are also invested with jurisdiction to consider the constitutional validity of any law.²⁸ Often this leads the judge in constitutional cases to be involved in reconciling competing social values. The judge, on occasions, almost unconsciously, performs as a social engineer. When interpreting the Constitution, the judge is engaging in an exercise in statecraft.

Law Maker and Law Declarer

Does the Irish judge make law or merely declare what the law is? Much may depend on what we mean by “make” and “law”. The classic Blackstonian view was that judges did not make law but only declared what had always been the law.²⁹ The “felt necessities of the time(s)”³⁰ have forced the dilution of Blackstone’s thesis. Irish judges both declare what the law is and make law - but they make law within narrow confines.

The law springs from three principal sources, the common law, statute law and, towering over both, the Constitution – the written expression of the soul of the State and its People. The State inherited the common law of England – that law formulated, developed and administered by judges in the old common law courts and based originally on the common customs of England and unwritten. In the application of the common law, judges, in the words of Justice Cardozo, often match the “colours of the case at hand against the many samples spread out upon their desk”.³¹ It is when the “colours do not match, when the references in the index fail, where there is no decisive precedent” that the judge makes law. By shaping the law for the parties in the instant case, by interpreting or reinterpreting the principles held in previously decided cases, the judge is determining

the law for others who will follow. Gavan Duffy P., one of the leading judicial figures of our times, put it another way:

“My duty is to apply the living principles that have come down to us in the broader spirit of our own day with due respect to binding authority, but with no undue respect for anachronisms. The law is not a mausoleum.”³²

The interpretation of statutes is an important part of the judicial function. The draftsman works with words. Words are imperfect instruments. The icy degree of certainty and precision found in mathematical formulae cannot easily be achieved with words. The judicial scope for “ironing out the creases”³³ in legislation is because

“... of the inherent frailty of language, the difficulty of foreseeing and providing for all contingencies, the imperfections which must result in some degree from the pressures under which modern legislation has so often to be produced and the difficulties of expressing the finely balanced compromises of competing interests which the draftsman is sometimes called upon to formulate.”³⁴

In litigation, one party may argue that the words of the statute bear a particular meaning. The other party in the action argues the opposite. The judge states what the particular words mean in law. He who is the interpreter, he who breathes life into the words of a statute is often a law maker.

Judges of the High and Supreme Courts interpret the Constitution. The Constitution of 1937, is a dynamic and, in parts, a flexible document which has been expanded by judicial interpretation. The phenomenal changes that have occurred in Ireland since 1937 when the People adopted the 1937 Constitution could not possibly have been foreseen by the framers of the Constitution. The largely rural society of 1937 has been transformed into an industrial society where the State has an equal voice in a commonwealth of rich industrial nations of Western Europe – the European Communities. By its very nature the Constitution contains many vague and nebulous phrases. The meaning of phrases like “equal before the law” (Article 40.1), “in accordance with law” (Article 40.4.1), “the dwelling of every citizen is inviolable” (Article 40.5) to take just a few examples, is capable of being varied according to the tenor of the age when they fall for interpretation or reinterpretation. The nebulous words and phrases of the Constitution are often empty containers into which a resourceful judge can pour an interpretation which can cast the judge in the role of a law giver or law maker. In the words of Walsh J., in his foreword to O’Reilly and Redmond’s *Cases and Materials on the Irish Constitution*, “In constitutional law, there is a general warrant for judicial law making”.³⁵

In a significant judgment in 1965, Kenny J. as a judge of the High Court in *Ryan v Attorney General*³⁶ held that the rights guaranteed in Article 40.3 of the Constitution were not confined to those specifically enumerated. The Supreme Court agreed and thus paved the way for the establishment of many individual rights which had hitherto not been recognised in law. These rights include a right to work,³⁷ a right of access to the courts,³⁸ a right to travel, a right to marital privacy⁴⁰ and the right to communicate.⁴¹

Professor Heuston has commented that the “speed with which new unspecified rights can be recognised and enforced (was) startling.”⁴² The power of the judiciary to declare fresh constitutional rights is judicial law-making – albeit subject to certain restraints which are discussed *infra*.

Judges of the High Court and Supreme Court have the power to unmake laws.⁴³ This power is “of a delicate and awful nature”⁴⁴ because the judges are empowered to strike down statute law passed by the legislature which has been elected by the People. The judicial review clause of the Constitution undoubtedly acts consciously or subconsciously as a restraining influence on the executive and legislative arms of Government. This restraining influence tends to act as a stabilising force. However, there is a limit to judicial law-making. All our ills cannot be cured by the Courts and the Constitution. Perhaps too much is expected from our judges and our Constitution. Justice Harlan’s admonition can be applied to us:

“The Constitution is not a panacea for every blot upon the public welfare; nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements.”⁴⁵

O’Higgins C.J. put the matter firmly in another way in *Norris v Attorney General*.⁴⁶ He also took the opportunity of enunciating jurisprudential orthodoxy in relation to the power to alter “the laws of Ireland”.

“The sole function of this Court, in a case of this nature, (the plaintiff had claimed that sections of the Offences Against the Person Act 1861 were inconsistent with the Constitution), is to interpret the Constitution and the law and to declare with objectivity and impartiality the result of that interpretation on the claim being considered. Judges may, and do, share with other citizens a concern and interest in desirable changes and reform in our laws; but, under the Constitution, they have no function in achieving such by judicial decision. It may be regarded as emphasising the obvious but, nevertheless, I think it proper to remind the plaintiff and others interested in these proceedings that the sole and exclusive power of altering the law of Ireland is, by the Constitution, vested in the Oireachtas. The courts declare what the law is – it is for the Oireachtas to make changes if it so thinks proper”.⁴⁷

Bands of Restraints

The judges do make law – but within narrow confines. The judges exercise their judicial power within a band of restraints – many of them self-imposed. As an introduction to the concept of restraints on the judicial power, it would be difficult to pass over the eloquent words of the philosopher judge, Justice Cardozo:

“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight errant, roaming at will in the pursuit of his own ideal

of beauty or goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodised by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains."⁴⁸

The first restraint on the judge is that there must be a concrete issue to be decided between *bona fide* litigants. An exception is the President's power under Article 26 of the Constitution to refer a Bill passed by both Houses of the Oireachtas to the Supreme Court for a decision as to whether the Bill or any specified provision is repugnant to the Constitution. In any application for judicial review the parties must have "standing".⁴⁹ The litigant's interest must be adversely affected or be in imminent danger of being adversely affected. Where the constitutionality of a statute is challenged there is a judicial doctrine that laws passed by the Oireachtas are presumed to be constitutional unless and until the contrary is clearly established.⁵⁰

The judge in his or her decision is expected to conform to certain well-defined principles. There is above all else in the judicial process a sense of the legal order being determined by reason. The judge invariably gives reasons for his or her decision. Often these reasons are reduced to writing. The conclusion reached by the judge is expected to be based on a process of logical reasoning. The decision of the judge may be the subject of review by a higher court. The decisions of the judges are subject to criticism by the legal profession, including academic lawyers.

A cardinal restraint on judges is the application of the doctrine of *stare decisis* – the almost sacred principle of the common law whereby precedents are binding and must be followed. Each division in the judicial hierarchy considers itself bound by the *ratio decidendi* (the reason or grounds of a judicial decision). The Supreme Court, the apex of the internal judicial pyramid, does not consider itself bound by its former decisions.⁵¹ Many lawyers and judges feel trapped by precedent. Sometimes the impression is given by a judge that the conclusion reached in a case being decided in court might be otherwise but for the binding precedent of a case decided by a higher court. Often in cases the search for avenues of escape from the binding precedents may not have been exhausted. Frequently it is possible to distinguish the case being decided from the essence or *ratio decidendi* of the earlier decision which appears at first reading to be binding. This can be done by narrowing down the essence of the earlier precedent to the minimum to which its reasoning may be reduced. Equally in a suitable case a judge can adopt the widest formulation that the *ratio decidendi* of a precedent will allow.

McCarthy J. is a revealing foreword to Byrne and McCutcheon's *The Irish Legal System: Cases and Materials* blames lawyers in Ireland for "taking refuge in an unthinking and uncritical citation of precedent."⁵² McCarthy J. noted "the degree to which the citation of precedent is made a substitute for reasoned argument and analysis of principle".⁵³ Sometimes there is need for a judicial boldness of spirit. Gavan Duffy J. in 1941 noted that "the absence of precedent would not weigh a feather in the scale" against the

plaintiff's right "to have justice done"⁵⁴ – a case of *fiat justitia ruat coelum* ("let justice be done, though the heavens should fall").

The fertility of our case law, much of it unreported, may ultimately have the effect that the citation of precedent will lose its primacy. Judges may rely less on precedent and more on general principles.

Influences on the Judicial Process

Leaving aside the facts of the instant case, who or what influences the judges in the decision-making process? Walsh J. has observed, extra judicially, that in the context of constitutional law

"there may yet be a field for a fascinating study in how judges choose among the possible solutions to any matter which comes before them... Are their choices influenced by personal values and experience acquired either before or after coming to the Bench and by their relationships with judicial colleagues or other public officials? It may well be that judicial decisions are to some extent affected by the socio-economic background of the judge himself and by the environment in which he lives. It would be unreal to believe that a judge can be kept in a vacuum, isolated from all the currents of public opinion and the cultural and moral values of the people among whom he resides everyday."⁵⁵

Pending that fascinating study – one can only surmise.

The advocate's influence on the judicial process may often be a crucial factor in finely balanced cases in deciding cases one way or the other. In time, in the higher courts, more emphasis will be placed on written submissions in advance of court hearings. At oral hearings, the interaction between the Bench and the advocate can often assist in narrowing the issues which fall for consideration. A Court, in the words of Justice Frankfurter, a judge of the United States Supreme Court, is not "a dozing audience for the reading of soliloquies but acts as a questioning body, utilising oral argument as a means of exposing the difficulties of a case with a view to meeting them."⁵⁶ This view contrasts with the sentiments expressed in the motto which Christopher Palles, the last Lord Chief Baron of the Court of Exchequer in Ireland (1874-1916) was stated to have before him in court which read:

"Keep your mind open and your mouth shut. When you open your mouth, you shut your mind."⁵⁷

There are times for questions and times for silence.

There is the influence of academic writers. The prolificacy of our academics with the publication of textbooks on Irish law and critical articles in the law journals will have an increasing formative influence on the judicial process. The old rule that an academic

writer was not an authority until he was dead – because he could then no longer change his mind – is no longer observed. In theory the legal academic writers have “the freedom ...to differentiate the good growth from the rubbish” and to “mark for (judicial) rejection the diseased anachronism”.⁵⁸ The day is dawning when Irish judges faced with a doubtful point of law will want to know what Irish academic writers have written about the issue. Barristers and solicitors appearing in such cases may be expected to come fortified with the *Irish Jurist*, the *Dublin University Law Journal*, the *Irish Law Times* and perhaps the *Gazette of the Law Society*, together with a pile of Irish textbooks. Alternatively, the lawyers may be expected to research the work of legal writers in their chambers and offices and come fortified with extracts from their comprehensive legal databases!

Intuitive judgment – the informed hunch – may play its part in the process of judgment. Intuitive judgment is often the product of extensive and balanced experience. The revealing insight of Justice Holmes in his lectures on the Common Law powerfully emphasises the role of experience:

“The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt as if it contained only the axioms and corollaries of a book of mathematics.”⁵⁹

Intuition itself, however, cannot represent the essence of the judicial process. To give absolute reign to the jurisprudence of sentiment or feeling would be a mere licence for unfettered self-expression.

Consequentialism – consideration for the consequences that may flow generally if a particular case is decided in a particular way – may exert an influence, or perhaps afford an additional justification for deciding a finely balanced case in a particular way.

Have the religious teachings of the churches influenced the judges in Ireland in their judgments? It is estimated that ninety-five per cent of persons in this jurisdiction profess to be Roman Catholics. This statistic is obviously reflected in the religious persuasion of the judges. Professor Basil Chubb has observed that in the political domain “the impact of Catholic teaching has always been evident in the content of public policy on marriage, on divorce, contraception, censorship, health services and above all, education.”⁶⁰ In the judicial domain, there was considerable scope for the influence of the teachings of the Roman Catholic Church in cases with a moral and social element. Writing in 1954 Vincent Grogan, a barrister and legal commentator, enunciated:

“Our courts and lawyers are not, however, left to the hazards of the unaided application of pure reason. They have judicial knowledge of the Universal Declaration of Human Rights. Further the Constitution recognises the truth of the Christian religion. Divine Revelation in the Old and New Testaments and the

exposition of the Doctors of the Church are their binding precedents. The pronouncements of modern Christian leaders on the application of Divine Teaching to appease human problems are available for their guidance. Finally, in seeking for enlightenment, it is not too much to ask the individual, whatever his personal religious persuasion, to have particular regard to the Social Encyclicals in view both of their intrinsic merit and the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the faith professed by the majority of the citizens.”⁶¹

Today, the official teachings of the Roman Catholic Church are highly unlikely to be the determining influence in any case involving a moral or social issue. The determining influences are more likely to be the spirit and letter of the Constitution, conscience and the aspirations that the judge holds for the nation.

Other influences on the judge are difficult to measure and may lie in the realm of the quasi-spiritual. These influences have been expressed by Evan E.Evans:

“(O)ne of the most potent (of numerous influences) is the presence of a flame that burns within, the strength and constancy of which determines its influence. For want of a better name, we call it our conscience. Still another influence is the desire to justify the faith and confidence and sacrifice of others; the desire to measure up to parental expectations.... There is the determination to adhere to the resolutions and ideals of our youth. And finally, self respect is quite essential to happiness. A judge may get along without the good will and even the respect of others, though he may deeply desire them. But he can hardly live happily with himself without self respect”⁶²

Judicial Style

Men are ruled with words. Pollock C.B. boldly stated that “Judges are philologists of the highest order”.⁶³ Walsh J.’s extra-judicial observations on what may be loosely termed in this context “judicial style” are noteworthy:

“.... the judgment should be clear and unambiguous. When after careful study of all the relevant authorities, the judge feels that he can pronounce a clear decision, it is unnecessary to encumber it by having every step of the reasoning ladder laden with citations of other authorities. There is nothing more irritating to the reader than the rambling judicial opinion which pieces together great numbers of semi-irrelevant propositions of law, wanders through numerous cited cases and ends up by giving the impression that somewhere or other the judgment has said what the law is but leaves unclear what detail of the rule is newly decided.”⁶⁴

The words of the judge have the potential of representing the living embodiment of the law – long after the judge is gone. Even a dissenting judgment can “appeal to the

brooding spirit of the law, to the intelligence of a future day.”⁶⁵ William Hazlitt in his *Table Talk* stated that “words are the only things that last forever.” Bacon put it another way: “Words, when written, crystallise history.” A judge’s claim to immortality may not only rest on the subject matter of any case but also on the manner in which the judgment is expressed. The layman may care little for *elegantia juris*, but an eloquent literary style can preserve a judgment for posterity.

Conclusion

Law, like life, has “its epochs of ebb and flow”.⁶⁶ Each generation thinks that it is in the throes of a flood season. Each generation thinks that it is on the threshold of exciting and challenging times. Our generation is no different. The essence of what is worth preserving is often that which is most constant. The due exercise of reason, intelligibility, analytical solidness and the spirit of integrity and impartiality have been the characteristics of what is best in the judicial process for centuries. These characteristics enable the judge in Ireland to act as a stabilising influence.

Notes

1. “What Medicine can do for the Law”, reprinted in *Selected Writings of B.N. Cardozo* ed. by M.E. Hall, (Matthew Bender, 1938) p.371.
2. R.F.V. Heuston "Lord Denning: The Man and his Times" in *Lord Denning: The Judge and the Law*, J.L. Jowell and J.P.W.B. McAuslan (eds) (Sweet and Maxwell, 1984) p.23.
3. Article 34.5.1. of Bunreach na hEireann hereinafter referred to as "the Constitution".
4. Ibid.
5. Articles 6, 15, 28 and 34 of the Constitution; see a discussion on the judicial power by Kennedy C.J. in *Lynham v Butler* No. 2 [1933] IR 74.
6. Preface to *The Irish Constitution*, (Jurist Publishing Co. Ltd. second edition, 1984) p.xxvi.
7. *Chronica Majora* (Rolls Series) vol. 285.
8. Article 35 of the Constitution.
9. See generally the *Courts (Supplemental) Provisions Act, 1961*.
10. Article 35.4.1 of the Constitution in respect of Judges of the Supreme Court and High Court; Section 39 of the *Courts of Justice Act 1924* and Section 20 of the *Court of Justice (District Court) Act 1946* in respect of judges of the Circuit and District Courts.
11. Section 21 of the *Courts of Justice (District Court) Act 1961*.
12. Section 10(4) of the *Courts (Supplemental Provisions) Act 1961*.
13. "Sir Jonah Barrington" in A.W.B. Simpson (ed.) *Biographical Dictionary of the Common Law*, (Butterworths, 1984) p.35.
14. Todd, *Parliamentary Government in England*, Vol. 2, p.736 et seq.
15. See P. Bartholomew, *The Irish Judiciary*, (I.P.A. 1971); Chapter VIII of V.T.H. Delany (ed. by C. Lysaght) *The Administration of Justice in Ireland* (IPA, 1975);

- S.U. Larsen, *Law and Politics in Ireland: A Comparative Study*; Chapter 5 of G.M. Golding, *George Gavan Duffy*, (Irish Academic Press, 1982) and Anon. "The Recruitment of the Judiciary", *Irish Jurist*, vol. XV1 (1950) p.35.
16. Ibid.
 17. See J.P. Casey *The Office of the Attorney General In Ireland*, (IPA, 1980), pp. 176-178.
 18. J.P. Frank, *Marble Palace* (New York, Knopf, 1958), p.46.
 19. Speech of Lord Chancellor to the Common Law Bar Association in the Inner Temple, July, 1985 reported in *Counsel*, Michaelmas 1985 p.11.
 20. See pamphlet entitled *Judicial Appointments* published in May 1986 by the Judicial Appointments Group, Lord Chancellor's Department, House of Lords, p.1 (iii).
 21. The Master of the Rolls, Sir John Donaldson, in *Counsel*, Trinity/Summer 1986, p.20.
 22. See V.T.H. Delaney (ed. by C. Lysaght) *The Administration of Justice in Ireland*, (IPA 4th edition, 1975) p.77.
 23. *Courts Act 1971*.
 24. Article 34.5 of the Constitution.
 25. Professor Jaffe, *English and American Judges as Lawmakers*, (Clarendon Press, Oxford, 1969), p.13.
 26. See Patrick Devlin, *The Judge*, (Oxford University Press, 1981) p.3.
 27. Ibid.
 28. Article 34.3.2. of the Constitution.
 29. *The Commentaries*, Book 1, pp.88-89: See Hale, *History of the Common Law* p.90.
 30. The words of Justice Holmes of the United States Supreme Court in *Common Law* p.90.
 31. *Nature of the Judicial Process*, (Yale University Press), p.113.
 32. *McInerney v Liddy* [1945] IR 100, 104.
 33. Denning L.J. in *Seaford Court Estates Ltd. V Asher* [1949] 2 KB 481, p.484.
 34. *The Interpretation of Statutes*, The Law Commission (UK) and The Scottish Law Commission (1974) HMSO. p.4.
 35. Inc. Law Society, 1980 p.xi.
 36. [1965] IR 294.
 37. *Murphy v Stewart* [1973] IR 117.
 38. *Maccauley v Minister for Posts and Telegraphs* [1966] IR 345; *O'Brien v Manufacturing Engineering Co. Ltd* [1973] IR 334.
 39. *State (M) v A.G.* [1979] IR 73.
 40. *McGee v. A.G.* [1974] IR 117.
 41. *Attorney General and Minister for Posts & Telegraphs v Paperlink and Others* [1984] ILRM 373.
 42. "Personal Rights under the Irish Constitution". *Irish Jurist* (1976) p.221.
 43. Article 34.3.2. of the Constitution.
 44. The words of Justice Iredell in *Calder v Bull*, 3 Dall 386 (1878) (US).
 45. *Reynolds v Sims* 377 US, 533 (1964) dissenting opinion at 624.
 46. [1984] IR 36.

47. Ibid., at p.53.
48. *The Nature of the Judicial Process*, (Yale University Press), p.141.
49. See *Cahill v Sutton* [1980] IR 269.
50. See *Pigs Marketing Board v Donnelly* [1939] IR 413. This principle has been repeated in many subsequent cases.
51. See *The State (Quinn) v Ryan* [1965] IR 70 and *Attorney General v Ryan's Car Hire Ltd.* [1965] IR 642.
52. Professional Books, 1986 p.iii.
53. Ibid.
54. *O'Doherty v A.G. & O'Donnell* [1941] IR 569.
55. Foreword to O'Reilly and Redmond, *Cases and Materials on the Irish Constitution*, (Inc. Law Society of Ireland 1980), p.xii.
56. "Memorial for Stanley M. Silverberg" in P. Elman (ed.), *Of Law and Men* (New York, Harcourt Brace & Co., 1956), pp.320-21.
57. V.T.H. Delaney, *Christopher Paleas* (A. Figgis & Co. Ltd 1960) p.142.
58. R. Traynor, (Judge of the Californian Supreme Court) "Law and Social Change in a Democratic Society" 1956, *University of Illinois Law Forum*. 230, 233.
59. *Common Law* p.1.
60. *Government and Politics of Ireland*, (Longman, London, Second Edition) p.18
61. V. Grogan, "The Constitution and Natural Law", *Christus Rex VII* (1954) 201 at 218.
62. E.A. Evans "Political Influences in the Selection of Federal Judges", *Wisconsin Law Review* (May 1948).
63. *Ex. P. Davis* (1857) 5 W.R. 522 at 523.
64. Foreword to McMahon and Binchy, *A Casebook on the Irish Law of Torts*, (Professional Books) 1983 p.vi.
65. C. Evan Hughes *The Supreme Court of the United States*,(New York, Columbia University Press, 1928), p.68.
66. H.D. Hazeltine, 1 *Cambridge Law Review* p.1.

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Dr Eamonn G Hall, Solicitor and Notary Public
 Web: www.ehall.ie
 Email: info@ehall.ie
 Tel: 087 322 9480