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**CONSTITUTIONAL JUSTICE:
FUNCTIONS AND RELATIONSHIP WITH
THE OTHER PUBLIC AUTHORITIES**

*National report prepared for the XVth Congress
of the Conference of European Constitutional Courts by
The Supreme Court of Ireland*

I. THE CONSTITUTIONAL COURT'S RELATIONSHIP TO PARLIAMENT AND GOVERNMENT

Prefatory Note:

The Supreme Court of Ireland is the court of final appeal in all constitutional matters. It hears appeals from the High Court, which under Article 34.3.2 of the Constitution has the power at first instance to determine whether any law is consistent with the provisions of the Constitution. The Supreme Court is also the court of final appeal in all civil matters.

- 1. The role of Parliament (as the case may be, of the Government) in the procedure for appointing judges to the Constitutional Court. Once appointed, can judges of the Constitutional Court be revoked by that same authority? What could be the grounds/ reasons for such revocation?**

(i) The role of Parliament and Government in the appointment of judges

The Oireachtas (national parliament) has no direct role in the appointment of Judges to the Supreme Court.

Under the Constitution it is the function of the Government to appoint judges. The Government, once it has chosen a candidate for appointment, advises the President of Ireland of its nomination and the President formally makes the appointment.

Ireland does not have a system of 'career judges'. Judges are appointed from among legal practitioners of long experience and high standing. Once appointed to a judicial post a judge generally remains in the same court for his/her entire career. Judges may of course be subsequently appointed as President of his/her court or possibly appointed to a higher court but this affects only a small minority of judges.

The appointment process is different depending on whether the person to be appointed to a judicial position is not yet a judge, or is already a judge. (Persons appointed as ordinary judges are generally not yet judges).

A person who is not already a judge, and who wishes to be considered for appointment to a Court, may apply to the Judicial Appointments Advisory Board (JAAB) requesting that he or she be recommended as suitable for such appointment.

The JAAB is an independent Board chaired by the Chief Justice. The three Presidents of each level of jurisdiction (District, Circuit and High Court) are also members of the Board. While a majority of the members are judges, there are two representatives from the legal profession and two non-lawyers. The role of the Board is purely advisory. The JAAB considers all the applications before it in relation to that appointment and draws up a list of persons whom it considers suitably qualified for appointment. This list is

forwarded to the Government. Generally speaking, the Government is confined to appointing persons (other than judges) who have been approved by the Board.

As an exception to the foregoing process the law permits the Government to appoint a person who has not applied to, and has not been considered by, the JAAB. If it does so it must publish in *Iris Oifigiúil* (the Official Gazette) a notice stating that it has made such an appointment outside the JAAB procedure.

Appointment of a serving judge to another judicial position (e.g. where a High Court judge is appointed to the Supreme Court) does not involve the JAAB. It is a matter for the Government alone.

The Government is answerable to parliament for its decisions and, accordingly, members of the parliament may criticise or challenge government decisions on these matters.

(ii) Revocation of appointment

Article 35.4.1 of the Constitution provides that, once appointed, a Judge can only be removed from office for “stated misbehavior or incapacity” if a resolution calling for his or her removal is passed by both Houses of the Oireachtas (national parliament). No other institution, including the Government and President, has the power to remove a judge from office. No judge has ever been removed under this provision.¹

2. To what extent is the Constitutional Court financially autonomous – in the setting up and administration of its own expenditure budget?

The budget of all Courts in Ireland, including the Supreme Court, is determined by the Government and submitted to parliament for approval. The budget is negotiated by a consultative process whereby the Courts Service, an independent statutory body which manages the courts and provides administrative support to the judiciary, makes a submission to the Department of Justice and Law Reform. The Department of Justice then negotiates with the Department of Finance on behalf of the Courts Service, but with the participation of the Courts Service, regarding the level of funding. Arising from this process the level of funding made available to the Courts Service is decided by the Government and submitted to the Oireachtas (the national parliament).

3. Is it customary or possible that Parliament amends the Law on the Organization and Functioning of the Constitutional Court, yet without any consultation with the Court itself?

The essential role and functions of the Supreme Court, which is the constitutional court, are contained in the Constitution and may only be altered on amendment of the Constitution by a referendum of the people. The right of appeal to the Supreme Court

¹ In 2006 a proposal to remove a lower court judge for alleged illegal conduct (unrelated to his judicial functions) was not proceeded with when the judge resigned.

may be regulated by ordinary law, except where there is an issue as to the constitutionality of a statute, in which case the Constitution guarantees a right of appeal.

Otherwise, it is customary that the Supreme Court is consulted regarding any legislative amendment that would affect its organisation or functioning.

4. Is the Constitutional Court vested with review powers as to the constitutionality of Regulations/ Standing Orders of Parliament and, respectively, Government?

The Supreme Court has affirmed in its case law the principle that the courts will not intervene in the right of the Oireachtas (national parliament) to set down its own rules and Standing Orders. However, it may be noted that some Judges of the Supreme Court have previously opined that there may be exceptions to this principle where the rights of an individual citizen are at issue.²

Article 15.10 of the Constitution provides:

“Each House shall make its own rules and standing orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties.”

5. Constitutionality review: specify types / categories of legal acts in regard of which such review is conducted.

- (i) *A priori* review: In Ireland, a Bill passed by both houses of the Oireachtas (national parliament) is submitted to the President for formal signature. Upon being signed, the Bill becomes law. Under Article 26 of the Constitution, before signing a Bill into law the President of Ireland may, after consultation with the Council of State, may refer a Bill to the Supreme Court for a decision as to whether such Bill or specified provision(s) thereof is compatible with the Constitution.

Where the Supreme Court rules that a Bill, or any provision thereof, is unconstitutional, it cannot be promulgated as law by the President. A finding of unconstitutionality ends the legislative process with respect to the Bill. Where the Supreme Court finds the Bill constitutional, its constitutionality cannot be challenged again before the courts.

- (ii) *A posteriori* review: The Supreme Court has the power to review the compatibility of statutes with the Constitution and to judicially review subordinate legislation, decisions or actions of the Government or State bodies with a view to

² De Blacam, *Judicial Review* (2nd ed., Tottel, 2009) p.74, referring to *Maguire v. Ardagh* [2002] 1 IR 385.

determining their compatibility with the Constitution, and principles deriving from the Constitution (e.g. due process). Any person adversely affected by such a law or decision may bring proceedings before the courts.

- 6. Parliament and Government, as the case may be, will proceed without delay to amending the law (or another act declared unconstitutional) in order to bring such into accord with the Constitution, following the constitutional court's decision. If so, what is the term established in that sense? Is there also any special procedure? If not, specify alternatives. Give examples.**

This does not really arise. When a law is condemned as being unconstitutional it ceases to have legal effect from the moment of the decision and is deemed to have been void *ab initio*.

How the Government responds to this situation is a matter for the Government but any response by way of new legislation or administrative action must be in accordance with the Constitution and must have due regard to the decision in question of the Supreme Court. For example the Government could introduce new legislation on the same subject matter as the impugned legislation but in a form which does not conflict with the Constitution. (Any such new legislation would also be subject to constitutional scrutiny by the Supreme Court). Alternatively, the Government may be forced to conclude that no legislation, of the nature impugned by the Supreme Court, can be constitutionally enacted.

- 7. Are there any institutionalized cooperation mechanisms between the Constitutional Court and other bodies? If so, what is the nature of these contacts / what functions and powers shall be exerted on both sides?**

The Supreme Court, as the court of final instance in constitutional matters (and civil matters) is part of, and at the apex of, the judicial system. There are no substantive institutionalised mechanisms for cooperation between the Supreme Court and other, non-judicial, bodies.

The closest parallel in this regard relates to the role and functions of the Attorney General, who is both constitutional adviser to the Government and guardian of the public interest:

- (i) Article 26.2.1 provides that the Attorney General has the special function of addressing arguments in the Supreme Court where the President refers a Bill to the Supreme Court under Article 26 (i.e. the Attorney General's function is to uphold the Bill).³
- (ii) The rules of the Superior Courts hold that the Attorney General must be given notice, by the applicant party, of any court proceedings in which the

³ Hogan and Whyte, *J.M. Kelly: The Irish Constitution* (4th ed, Butterworths, 2003) p. 594.

constitutionality of an Act of the Oireachtas is challenged⁴ or in which any question as to the interpretation of the Constitution arises,⁵ and is entitled to be a party to such proceedings as regards the constitutional question.⁶ In the vast majority of cases, the Attorney General defends the constitutionality of the Act challenged.⁷

- (iii) Beyond the scenarios at (i) and (ii) above, the Attorney General may apply to the Supreme Court to intervene as a party in litigation where a case raises issues of exceptional importance affecting the public interest.⁸

⁴ Order 60, Rule 2 of the Rules of the Superior Courts. See also Hogan, *ibid.*

⁵ Order 60, Rule 2 of the Rules of the Superior Courts. See also Hogan, *Ibid.*

⁶ Order 60, Rule 4 of the Rules of the Superior Courts. See also Hogan, *Ibid.*

⁷ Hogan, *ibid.*, p.595.

⁸ Hogan, *ibid.*

II. RESOLUTION OF ORGANIC LITIGATIONS BY THE CONSTITUTIONAL COURT

Unlike the Constitutional Court of Romania, the Supreme Court of Ireland does not have a specific power under the Constitution to adjudicate on constitutional disputes between public authorities at the request of a prescribed organ of State (it is understood that in Romania such adjudication may be requested by the President, the prime minister, the presidents of the chambers of parliament or the president of the Superior Council of Magistracy). Therefore, no response has been provided to the questions in this Part.

While there is no specific provision providing for litigation between organs of the State, if the Government or any State or public body acts in excess of its constitutional or legal powers such action may be challenged in the courts by any individual adversely affected by the act or acts of that body.

III. ENFORCEMENT OF CONSTITUTIONAL COURT'S DECISIONS

1. The Constitutional Court's decisions are:
 - a) final;
 - b) subject to appeal; if so, please specify which legal entities/subjects are entitled to lodge appeal, the deadlines and procedure;
 - c) binding *erga omnes*;
 - d) binding *inter partes litigantes*.

Article 34.4.6 of the Constitution states: "The decision of the Supreme Court shall in all cases be final and conclusive."

Given that it is the court of final appeal in all constitutional matters (and civil matters), decisions of the Supreme Court of Ireland are (a) final; (c) binding *erga omnes* and (d) binding *inter partes litigantes*. They are not (b) subject to appeal.

2. As from publication of the decision in the Official Gazette/Journal, the legal text declared unconstitutional shall be:
 - a) repealed;
 - b) suspended until when the act/text declared unconstitutional has been accorded with the provisions of the Constitution;
 - c) suspended until when the legislature has invalidated the decision rendered by the Constitutional Court;
 - d) other instances.

(d) Other instances.

The effect of a Supreme Court decision that a law is unconstitutional depends on when the law was enacted: (i) in the case of a law enacted since the Constitution entered into force in 1937, the law is deemed void *ab initio*; (ii) in the case of a law enacted before the Constitution entered into force in 1937, the law is deemed void from the coming into force of the Constitution i.e. it was never a valid law under the present Constitution.

It may be noted that the invalidity of the law does not date from a publication in any official journal but from the date of the pronouncement of the court's decision.

Regarding (a) above: Since the law ceases to be applicable from the date of the Court's decision that it is invalid, the question of a repeal does not arise. It is a matter for the Government and the Oireachtas to decide whether a new law should or can be enacted in a form which avoids conflict with the Constitution, having regard to the Court's decision (any such new law would of course be subject to judicial review).

Regarding (b) above: It is not possible to suspend the operation of a law ruled to be unconstitutional to allow for it to be rendered compatible with the Constitution.

Regarding (c) above: It is not possible for the legislature to invalidate a decision of the Supreme Court. The only way in which the effect of a Supreme Court decision may be altered is by amending the text of the Constitution itself, on foot of a referendum of the People.⁹

3. Once the Constitutional Court has passed a judgment of unconstitutionality, in what way is it binding for the referring court of law and for other courts?

In Ireland, review by the Supreme Court of the constitutionality of a law is not initiated by a referral from another court. The constitutionality of a law may be challenged by bringing proceedings before the High Court at first instance, alleging that the law is unconstitutional. The High Court's decision may be appealed to the Supreme Court by either of the parties.

A judgment of the Supreme Court which finds a law to be unconstitutional, like all other judgments, is binding on all courts.

4. Is it customary that the legislature fulfills, within specified deadlines, the constitutional obligation to eliminate any unconstitutional aspects as may have been found- as a result of a *posteriori* and/or a *priori* review?

See the response to Question I(6) on p.4, above.

It may be noted that, in the case of *a priori* review, where the Supreme Court rules that a legislative Bill, or any provision thereof, is unconstitutional, it cannot be promulgated as law by the President. A Bill found to be unconstitutional is not referred back to the Legislature for amendment; rather, a finding of unconstitutionality ends the legislative process with respect to the Bill. However, it is open to the Government or Legislature to introduce a similar Bill which avoids the unconstitutional aspect(s) identified by the Supreme Court.

5. What happens if the legislature has failed to eliminate unconstitutional flaws within the deadline set by the Constitution and/or legislation? Give examples.

N/A. As stated above, where a law is declared to be unconstitutional it ceases to be in force from the date of the Court's decision.

⁹ E.g. the referendum which inserted Article 40.4.6 into the Constitution, allowing bail to be refused to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission by that person of a serious offence, changed the law previously set out in Supreme Court case-law including (*Attorney General*) v *O' Callaghan* [1966] IR 501 and *Ryan v Director of Public Prosecutions* [1989] IR 399.

- 6. Is legislature allowed to pass again, through another normative act, the same legislative solution which has been declared unconstitutional? Also state the arguments.**

No. The Legislature may not enact a new law to reinstate a law that has been ruled to be unconstitutional by the Supreme Court. See the answer to Question III(2), above.

The Constitution clearly proscribes the promulgation of any law which is unconstitutional. Article 15.4 of the Constitution states:

“The Oireachtas [national parliament] shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof. Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid.”

Article 15.4 operates in tandem with Article 34 of the Constitution, which confers on the High Court and the Supreme Court (on appeal) the exclusive power to review laws as to their constitutionality. In addition, as stated above, Article 34.4.6 of the Constitution states: “The decision of the Supreme Court shall in all cases be final and conclusive.”

- 7. Does the Constitutional Court have a possibility to commission other state agencies with the enforcement of its decisions and/or to stipulate the manner in which they are enforced in a specific case?**

No.