

Brehon Law & History of the law: 1691 - Present

Brehon Law

Prior to English rule, Ireland had its own indigenous system of law dating from Celtic times, which survived until the 17th century when it was finally supplanted by the English common law. This native system of law, known as the Brehon law, developed from customs which had been passed on orally from one generation to the next. In the 7th century AD the laws were written down for the first time. Brehon law was administered by Brehons (or brithem). They were the successors to Celtic druids and while similar to judges; their role was closer to that of an arbitrator. Their task was to preserve and interpret the law rather than to expand it.

In many respects Brehon law was quite progressive. It recognised divorce and equal rights between the genders and also showed concern for the environment. In criminal law, offences and penalties were defined in great detail. Restitution rather than punishment was prescribed for wrongdoing. Cases of homicide or bodily injury were punishable by means of the eric fine, the exact amount determined by a scale. Capital punishment was not among the range of penalties available to the Brehons. The absence of either a court system or a police force suggests that people had strong respect for the law.

The first encroachment on Brehon law came in 1155, when Pope Adrian IV issued the Bull *Laudabiliter* endorsing King Henry II's plan to conquer Ireland. This was followed by the Anglo-Norman invasion led by the Earl of Pembroke, Richard de Clare (Strongbow) in 1169. In 1171 King Henry II held a Council (known as the Curia Regis or King's Council) at Waterford. It declared that "the laws of England were by all freely received and confirmed." This declaration was more aspirational than realistic. English law was initially applied in most of the province of Leinster, where Henry II had granted feudal land rights to Strongbow. In 1172 Henry appointed Hugh de Lacy as the first Justiciar of Ireland (the king's representative).

In 1204 King John authorised the issuing of writs, essentially directing the Irish courts to apply the common law. In 1226 King Henry III ordered the Justiciar to adhere to the laws and customs of England. A year later, a Register of Writs, containing copies of all the writs issued by the English courts, was sent to Dublin. The first recorded appointment of an Anglo-Norman judge came in 1221. English law declined in influence during the 14th and 15th centuries, during which time the Normans, through inter-marriage with the native Irish, were said to have become 'more Irish than the Irish themselves.'

England sought to re-assert the supremacy of its Parliament and of English law over any Irish Parliament or Irish legislation by enacting the Statutes of Kilkenny in 1366. This was followed by the enactment of two statutes at a Parliament held in Drogheda in 1494, together known as Poyning's Law, which provided that the King's Privy Council must give prior assent to the assembly of an Irish Parliament and to the introduction of any specific legislation in the Irish Parliament, and that all laws passed in England applied to Ireland. Despite this, by 1500 English law was confined to an area known as the Pale, made up of Dublin and the east coast. Beyond the Pale, Brehon law continued to be applied.

It was not until the reign of King Henry VIII in the mid-16th century that English law extended further. He implemented a scheme of 'surrender and re-grant' of the land held by native noble families, which brought them within the feudal system of land tenure. Moreover, the King's break with the Roman Catholic Church led to the dissolution of the monasteries and the re-distribution of church land. English law gained a further foothold following the 'Flight of the Earls' from Ulster in 1607 and the consequent Plantation which saw the land

being granted to Scottish and English settlers. The Flight of the Earls had an added significance in that it removed the Brehons' remaining source of patronage.

In the cases of *Gavelkind* (1605) Dav. 49 and *Tanistry* (1607) Dav. 28, the courts in Ireland rejected the Brehon rules of succession in favour of the English law of succession. In the latter case, the court, applying the rule of recognition, held that the native laws of a country survived if they were reasonable, certain, of immemorial usage and compatible with crown sovereignty. The court held that the native law failed to meet these requirements. The end of the Brehon Law's authority was signalled by the Proclamation of King James I in 1603, which received the Irish people into the King's protection. The country was subsequently divided into counties and English law was administered throughout the country.

History of the Law ~ 1691 - present

Background

The modern Irish legal system is derived from the English common law tradition. Ireland is often described as 'the first adventure of the common law.' The dominance of English law was consolidated by Oliver Cromwell's military campaign (1649-1652), which forced many Irish landowners to resettle in Connaught. The victory of Protestant William of Orange over Catholic King James II at the Battle of the Boyne in 1691 led to brutal repression of Catholics in the form of the penal laws. These enactments, passed during the 18th century, were aimed at disenfranchising Catholics from political and economic power. Catholics were excluded from education and their property rights were heavily restricted.

The English Parliament repealed Poyning's Law under the Irish Appeals Act, 1783. From that time until 1800, the Irish Parliament (known as Grattan's Parliament) sought to improve the situation of Catholics through the enactment of the Roman Catholic Relief Act, 1793, which conferred a limited right to vote and admission to practice at the Bar. However, in light of the French and American revolutions and the failed rebellion of 1798, the Act of Union, 1800 was passed. This Act dissolved the Irish Parliament and established the Westminster Parliament in London as the sole legislative body of the United Kingdom of Great Britain and Ireland. This Act centralised government power in London until the establishment of the Irish Free State in 1922. The Crown's representative in Ireland was the Chief Secretary for Ireland, who was a member of the cabinet. The British administration had its Irish headquarters in Dublin Castle, under the control of the Under-Secretary and the Crown's official representative in Dublin, the Lord Lieutenant.

Reform

In the wake of the industrial revolution and the influential writings of Bentham and Mill, the urgency for reform of legal institutions became increasingly apparent. Reforms were introduced by the Supreme Court of Judicature Act, 1873 and its Irish counterpart in 1877. These Acts merged the administration of common law and equity to create a unified court system. The Supreme Court of Judicature was established, consisting of the High Court of Justice, which had original jurisdiction as well as appellate jurisdiction from courts of local jurisdiction, and the Court of Appeal, which had appellate jurisdiction. The Judicial Committee of the House of Lords remained the ultimate court of appeal for Ireland. The various courts which had developed over the centuries (such as the Court of Exchequer and the Court of Probate) were subsumed into separate divisions of the High Court. The High Court of Justice of Ireland sat in Dublin.

In addition to these superior courts, there were a number of inferior courts. The court of assize was the antecedent to the High Court. It dealt with the most important civil and criminal matters. The most serious criminal offences, such as murder and treason were reserved to the court of assize. It sat on circuit twice a year. Justices of the Peace dealt with

less serious criminal matters. They could exercise their primary criminal jurisdiction, either summarily at petty sessions, or on indictment, where the justices presided with a jury at quarter sessions. They also conducted preliminary hearings for the assizes at petty sessions. If the Justice of the Peace found that there was prima facie evidence to send the accused forward for trial, a 'bill of indictment' was referred to a Grand Jury to decide if the bill was correct in form and was supported by the prima facie evidence. If the Grand Jury so found, the bill of indictment became an indictment and the accused was tried by Petty Jury at the assizes.

On the civil side, the county court dealt with less serious matters than the assizes. Claims were initiated by means of a civil bill, in contrast to the procedure of their English counterparts. This remains the basis for many claims initiated in the county court's successor, the Circuit Court.

Following the Irish Famine (1845-1850), the campaign for land law reform became the focal point in Irish politics. The intensive campaigning of the Land League led to the passing of the Land Law (Ireland) Act, 1881, which established the Irish Land Commission and granted Irish tenant farmers the three Fs - fair rent, freedom of sale and fixity of tenure. Subsequent Acts established land purchase schemes, whereby tenants could obtain long term loans at reduced interest to purchase the freehold title to their land.

Independence

Despite these important reforms, calls for the repeal of the Act of Union amplified. Home rule was the initial objective of Irish nationalists. The Irish Parliamentary Party, led by Charles Stewart Parnell, drew support from the Liberal government on the issue. However, the trenchant opposition of Ulster Unionists and Conservatives meant that home rule was not possible until the passing of the Government of Ireland Act, 1914. The Act was postponed for the duration of World War I but was in any case overtaken by subsequent events. The failed 1916 Rising and the heavy-handed British response to it hardened public attitudes, resulting in a landslide victory for Sinn Féin at the 1918 election, thus signalling the political defeat of home rule and of the Irish Parliamentary Party.

The Sinn Féin deputies abstained from taking their seats at Westminster and instead held the first meeting of Dáil Éireann in January 1919, where they approved the Declaration of Independence, adopted a Provisional Constitution and established a court system. British attempts to suppress what it regarded as a seditious association were met with armed nationalist resistance in the War of Independence. In an effort to resolve the Irish question, Westminster passed the Government of Ireland Act, 1920, which partitioned Ireland into Northern Ireland and Southern Ireland, each with its own parliament. Both parliaments would be ultimately subject to the English Parliament and would be required to send some members to sit in Westminster. The Act reorganised the court system in each jurisdiction to comprise a High Court and Court of Appeal, as well as a High Court of Appeal for Ireland to hear appeals from the respective Courts of Appeal.

Elections for the new parliaments were held in May 1921. Despite having rejected the Act, Sinn Féin declared that the elections were to be regarded as elections to Dáil Éireann. It won 124 of the 128 seats to what in the terms of the 1920 Act - was the House of Commons of Southern Ireland. In Northern Ireland the Act had been accepted and its parliament was opened in June 1921.

A truce with Britain was agreed in July 1921, followed by peace negotiations which resulted in the signing of the Anglo-Irish Treaty on 6th December 1921. It provided for the establishment of the Irish Free State, the possibility of a unified Ireland, albeit with an opt-out clause for Northern Ireland. It would have dominion status within the British Commonwealth,

the Crown would be retained as head of state, represented by a Governor General, and members of the Oireachtas would be required to swear an oath of allegiance to the Crown. Northern Ireland duly opted out of a united Ireland. In January 1922 the Treaty was approved by the Dáil.

New Courts System

Westminster passed the Irish Free State (Constitution) Act, 1922, which repealed the Government of Ireland Act, 1920 in so far as it applied to Southern Ireland. The Dáil enacted the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922, implementing the Irish Free State Constitution, which was based on the terms of the Treaty. The Constitution enshrined the separation of powers between the executive, legislative and judicial arms of government. On the judicial side, a Supreme Court, High Court and courts of local and limited jurisdiction were established. The Constitution provided a right of appeal from Irish courts to the Judicial Committee of the Privy Council.

The transition to the new court system was complicated by the fact that two court systems had been in operation since 1920: the ordinary court system and the 'Dáil courts'. The latter comprised the Parish Court, which dealt with the most minor civil and criminal matters, the District Court, which dealt with more serious civil and criminal matters and which heard appeals from the Parish Court, a Circuit Court composed of four circuits, with unlimited civil and criminal jurisdiction and a Supreme Court, operating as both a court of first instance and an appellate court. While successfully suppressed by the British in Dublin, these courts operated with some success elsewhere. Following the signing of the Treaty, the Dáil wound up these courts and adopted the court system created under the 1920 Act. The courts established pursuant to the Free State Constitution later held that decisions of the Dáil courts were void in law (see *R (Kelly) v Maguire* [1923] 2 I.R. 58).

In January 1923 the Judiciary Committee, chaired by former Lord Chancellor Lord Glenavy, was appointed to advise the Executive Council (Cabinet) on the establishment of a new court system. The Committee's recommendations were substantially adopted in The Courts of Justice Act, 1924. It created a District Court to replace the court of petty sessions and the Justice of the Peace. The Justices of the District Court were professional judges and had jurisdiction over minor civil and criminal matters. The Circuit Court had jurisdiction in more serious civil and criminal matters. On the civil side, it replaced the county court, and on the criminal side, it assumed the former jurisdiction of the court of assize. It had appellate jurisdiction over District Court cases. A High Court exercising the same jurisdiction as that proposed under the 1920 Act was created. On the criminal side, the most serious offences, such as murder, were reserved to it. The court was to be presided over by a President of the High Court. A Court of Criminal Appeal to hear appeals from the Circuit Court and High Court was also established. Provision was made for a further right of appeal to the Supreme Court on a point of law of exceptional public importance. The Supreme Court was created as the final court of appeal, to be presided over by the Chief Justice.

New Constitution

This structure was replicated in the 1937 Constitution and again when the courts were re-established in 1961 (which was necessitated by the enactment of a new Constitution in 1937), and remains the same today. Pre-1922 statute and common law remained in force to the extent that they were consistent with the Constitution.

The 1922 Constitution was amended numerous times up to 1936, to the point where all vestiges of the Treaty had effectively been erased. These amendments included removing the oath of allegiance, abolishing the right of appeal to the Privy Council, removing all references to the Crown, abolishing the Senate and the office of Governor General and conferring upon

the Executive Council the power to enter into international treaties and to appoint diplomatic representatives.

In 1937, under a Fianna Fáil government, a new Constitution was drafted, put to a plebiscite (referendum) and accepted by the electorate. This Constitution largely reflected its 1922 predecessor in its amended state. However, it also espoused the republican ethos of its chief architect, Eamon de Valera, in claiming sovereignty over Northern Ireland and in establishing the President of Ireland as head of state. In addition, it integrated an augmented bill of rights and renamed the state as Ireland. The Republic of Ireland Act, 1948 completed the break with Britain. It provided that the state shall be described as the Republic of Ireland and withdrew it from the Commonwealth.

Further amendment to the Constitution has been necessitated by Ireland's membership of the European Union, which has involved the cession of a degree of sovereignty and the subordination of national law to European law. Moreover, a significant amendment was effected pursuant to the Good Friday Agreement, when Ireland removed its territorial claim to Northern Ireland and replaced it with the principle of unity by consent.

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