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From the Ashes Arose Justice: The Creation of an Irish Judiciary, 1922-1924

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From the Ashes Arose Justice:
The Creation of an Irish Judiciary, 1922-1924

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2009 Honors Thesis
Carnegie Mellon University
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"In the silent watches, when weariness will sometime cry halt to work, you will ask yourself—For what end must I labour so? The answer comes, which alone can revive you drooping energies, Ireland—the Gael."

Hugh Kennedy
First Chief Justice of the Irish Free State Supreme Court
June 11th, 1924

Introduction: In Ashes

During the Irish Civil War, on the night of April 13th, 1922, anti-government forces occupied the Four Courts. Since the eighteenth century, the Four Courts had been the home of the British created judicial system in Ireland. The executive of the rebel forces used the Four Courts as its main base and fighting between its troops and the fledgling Irish Free State Army began soon after.[1] Having to put down the rebellion, leaders of the Free State decided that they would need to take the building by force under the assumption a siege would prove ineffective since the rebels would find a way to sneak food in and draw public support to their cause.[2]

General Dalton, the Irish Free State Army's Director of Military Operations, believed artillery should be used to dislodge the rebels because "these guns would have a very demoralising effect upon a garrison unused to artillery fire, but I realised that their employment as a destructive agent on the Four Courts buildings would be quite insignificant."[3] The bombardment on the Four Courts began at 4:20 a.m. on June 28th, after the rebels refused an ultimatum to surrender the building by 4:00 a.m. The initial bombardment did little damage to the seat of the British judiciary as the artillery shells being used were not powerful enough to do any real damage and the guns were only being fired at five minute intervals.[4] The two artillery pieces the government forces were using had been recently loaned to them by the British, who were anxious to see the rebels dislodged from the Four Courts. The Free State forces had so few men trained to use this equipment that Dalton himself, who was commanding the attack, had to take over one of the guns as he was one of the few people who knew how to operate it.[5] When it

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[1] Joseph M. Curran, *The Birth of the Irish Free State, 1921-1923* (Alabama: The University of Alabama Press, 1980), 181.
[2] Calton Younger, *Ireland's Civil War* (London: Frederick Muller, 1968), 311.
[3] Ibid.
[4] Ibid., 314-315.
[5] Michael Hopkinson, *Green Against Green: The Irish Civil War* (New York: St. Martin's Press, 1988), 120.

became clear that trying to intimidate the rebels stationed in the Four Courts would not lead to a resolution, Dalton believed that the walls of the building would need to be breached and the building stormed.[6]

The two eighteen-pounders on loan from the British began to fire high explosive shells at the Four Courts at shorter intervals and the walls were breached. One shell, though, hit the nearby Public Records Office where the rebels had placed explosives causing a great blast that created a column of smoke that rose two hundred feet in the air.[7] The resulting fire soon spread to the Four Courts and along with the sustained shelling, one witness remarked that "Blocks of masonry were flying likes leaves in the wind."[8] When the fighting was over, the seat of justice in Ireland for centuries was literally in ashes.

The ruined Four Courts mirrored the state of the Irish judicial system which had been destroyed during the War for Independence and the Civil War. The Free State was without a functional judiciary despite having two in existence. The one that had presided over Ireland during British rule had become so unpopular and ineffective during the War for Independence, largely due to the efforts by men who later became the leaders of the Free State, that it was clearly in its final days. The Dáil Courts, which was the other judiciary and created by the revolutionary government during the uprising, had many members who took the side of the anti-government forces during the Civil War. Thus, the judiciary of Ireland, ravaged by the back-to-back wars, was itself in ashes. Yet, today in the Republic of Ireland, the descendent of the Irish Free State, there is an effective and just court system. How did the judiciary of Ireland rise from the ashes? This thesis will seek to answer this question by analyzing the genesis of the Irish judiciary.

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[6] Calton Younger, *Ireland's Civil War*, 318.
[7] Michael Hopkinson, *Green Against Green: The Irish Civil War*, 122.
[8] Calton Younger, *Ireland's Civil War*, 321.

Inspiration for the Thesis

Since coming to Carnegie Mellon University, I have been interested in doing research. At some point I decided that I wanted to take on a multi-year historical research project. While thinking of what my topic would be, I wanted to work on something that I was really passionate about, which brought to mind two areas of study. One was Irish history and the other was legal history. I am from an Irish-American family that takes great pride in its heritage and the land of our ancestors. I am also from a family of lawyers, which goes back three generations, and I myself will be attending law school after receiving my undergraduate degree. Eventually, I decided to combine these interests by doing a project on Irish legal history.

When I started my research I knew very little about the history of law in Ireland. One thing I did know, though, was that after Irish Independence in 1922, Ireland created a new judiciary for itself, which replaced the British created one. At first, I thought I would trace the development of the judicial system in Ireland since independence, which would have been a historical survey that covered over 80 years. My topic became more focused after my initial research revealed that no substantial work had been done on the genesis of the judicial system in Ireland. I was shocked that such an important event in Irish history had been overlooked, but at the same time thrilled because I knew this would be a far better topic. Instead of a broad survey, I chose to focus on the two year time period when the new judiciary was created.

Research Methodology

I began my research by looking at secondary sources on Irish legal history and Irish Free State politics. It was important to look at existing literature on legal history for two reasons. First, I wanted to see what has already been done on the field to ensure I would be creating new knowledge in my thesis. Second, although I had decided to focus on the creation of the system

from 1922 to 1924, I wanted to put this bit of legal history into historical context. I also felt it was important to look at the political history of the time because the legal system was not created in a political vacuum, but by a piece of legislation that was inevitably influenced by politics. While this part of my research was not adding anything to the field, it took stock of what was already there and helped me develop the framework for the rest of the project.

The next phase of my research was to look at the parliamentary debates over the Courts of Justice Act, 1924, which created the new legal system. I am very fortunate that the Republic of Ireland has invested the resources towards putting the text of all floor speeches in the Irish legislature since 1919 on an easily searchable, free online database. This was probably the least difficult part of my research as I was able to read through hours of debate over the legislation and see where the most prominent politicians stood on various issues. By connecting the politicians' statements to my research on the political landscape of the time, I was able to analyze what stances different political factions were taking and why they were doing so.

While the views of politicians are essential when looking at the creation of legislation, an analysis of their positions without the views of the public would be incomplete. To fill this void, I examined newspapers from the 1910s and 1920s to see what press coverage the genesis of a new judiciary was receiving. Specifically, I looked at *The Irish Times*, the *Irish Bulletin*, *Sinn Fein*, and *The Pioneer*. I also paid special attention to letters written to the editors of the papers. From reading the newspapers, I made two important discoveries. First, as should be the case in a democracy, the people's opinion had an impact on the stances of politicians. Second, the creation of a new court system received a great deal of attention in the public and it was a heated debate.

The final and most difficult phase of gathering information was my archival research. It was clear from reading the parliamentary debates and the newspapers that a lot of the activity in

creating a new judiciary was happening behind closed doors. I felt that my thesis would not be giving a full account without knowing what was said and decided upon in confidential meetings and communications. When I began looking at what archive collections were out there, I had pretty low expectations as to what I would be able to find and have access to as an undergraduate student who would not be able to travel to Ireland to examine the original documents. Fortunately, I was able to locate a collection of documents, the Kennedy Papers, in the University of College Dublin Archive, which provided the information I needed about what happened behind closed doors. After obtaining copies of the necessary documents, I had a complete picture of the process of creating a new judicial system.

My Thesis

In the following pages, I will argue that the Irish Free State government's effort to create an effective, popular, and just judiciary was a success despite the ruinous state of the previous court systems. While both the British created courts and Dáil Courts were being discarded, they were very important in the creation of a new legal system as Free State leaders tried to keep each one's strengths and correct its flaws. The politicians who led the Free State, realizing they lacked the expertise to craft a new court system, assembled a group of legal experts called the Judiciary Committee. This organization and many of its members have been overlooked by historians. Yet the Judiciary Committee put forward recommendations that outlined many of the key features of the court system the Free State created decades ago and is still in existence today in the Republic of Ireland. Finally, both houses of the Irish legislature made a positive contribution by amending the legislation which created the court system. This thesis's central argument is that the combination of the examples set by previous judicial systems in Ireland, the work of the

Judiciary Committee, and the legislative process led to a judicial system that rose from the ashes and has lasted through present times.

This argument is articulated over six chapters. The first two can be seen as providing historical context for the creation of a new judicial system. Chapter One, "Silencing the Gael," provides a history of the British court system in Ireland. Next, "A Revolutionary Judiciary," is a historical overview of the Dáil Courts. Besides providing historical context, these two chapters also highlight the strengths and weaknesses of the two systems used to provide inspiration for a new judiciary. Chapter Three, entitled "Thirteen Men, Two Systems, One Recommendation," is largely based on archive research and gives a detailed description of the work of the Judiciary Committee. After the Committee completed its work, a bill based on its recommendations went through the legislative process. Accordingly, the next two chapters, "Dáil Éireann and the Judiciary Bill" and "Into the Cooling Chamber," provide an account of the legislative battle in the bi-cameral legislature's Dáil Éireann and Seanad Éireann respectively. Finally, "Breaking the Silence" will describe the opening of the new Irish judiciary and challenges historians' common misconception that the Irish judiciary is simply a continuation of its British created predecessor.

Chapter 1: Silencing the Gael

The Irish Free State Government was not operating in a historical vacuum when it created a new judiciary in the 1920's. The fledgling democracy was essentially replacing two court systems when it created a new administration of justice in 1924. These two systems both provided inspiration for the new system as well as warnings of what to avoid. One of these two, the Dáil Courts, will be addressed in the following chapter and its short existence in more recent times makes it far easier to explain. The British-created judiciary, however, which presided over Ireland for seven hundred years, is much more difficult to describe.[1] It is not possible, though, to examine the Irish Free State's efforts to fashion a new judicial system without looking at the British-created system. After all, the Irish judiciary is based on the English common law tradition. Therefore, this chapter will seek to provide a brief history of the British administration of justice in Ireland, beginning with the elimination of the Irish system it replaced, which is commonly referred to as Brehon law. This chapter is not meant to be a chronological history, but will instead highlight the aspects of the judiciary that are relevant to the work done by the Irish Free State.

First, something should be said about the historical work done on the British administration of justice in Ireland. As one historian remarked several decades ago, "Ireland not only still awaits its Reeves or Holdsworth; it even lacks an elementary textbook on Irish legal

[1] The term "British" both here and throughout the chapter is not entirely accurate. When Ireland was brought under colonial rule, Great Britain did not exist yet and the occupiers identified themselves as English, not British. Eventually, this same colonial power would begin to self-identity as British. For sake of avoiding confusion, the term "British" will often be used in lieu of "English" even if it is not the most accurate term.

history."[2] The historical study of law in Ireland has not been done because "Consistently the world 'legal' appears to have less importance attached to it than the social, economic and political emphasis currently in vogue in the study of Irish history."[3] In regards to the work that has been done, historians J.F. McEldowney and Paul O'Higgins, lament that

> Even where there has been research and scholarship in Irish legal history it has been generally restricted to discovering basic information and data. Analysis and theoretical perspectives have been slow in coming. Such research appears not to follow a set plan of investigation but to accord with random selection depending on good luck rather than judgment and on the availability of material rather than its importance and usefulness. Admittedly, if a list of priorities was drawn up, it is doubtful that the research activity involved would guarantee satisfactory results so inexact is our knowledge of the available material.[4]

Thus, the quantity and quality of available literature done on the topic covered in this chapter has been wanting.

That being said, a great deal of time and effort in the research for this thesis has been dedicated to collecting the little work that has been done on this topic to formulate the argument of this chapter. It contends that from the establishment of English judiciary in Ireland during the thirteenth century, the courts of foreign origin were not there to administer justice but were part of a larger British colonial policy. This thesis accepts political scientist John Schmidhauser's claim that interactions "between powerful and less powerful nations often included military conquest, colonialism, and a variety of modes of economic penetration. Manifestations of imposed external influence such as legal imperialism have been concomitants of such systemic

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[2] Francis Headon Newark, "Notes on Irish Legal History," *Northern Ireland Legal Quarterly* VII (1947): 121; quoted in, Alfred Gaston Donaldson, *Some Comparative Aspects of Irish Law* (Durham, North Carolina: Duke University Press, 1957), 3; John Reeves and William Searle Holdsworth were both authoritative figures in the study of the English legal system.
[3] J.F. McEldowney and Paul O'Higgins, "The Common Law Tradition and Irish Legal History," *The Common Law Tradition: Essays in Irish Legal History*, ed. J.F. McEldowney and Paul O'Higgins (Dublin: Irish Academic Press, 1990), 14.
[4] Ibid.

transnational encounters."[5] Schmidhauser makes a convincing case that conquering powers replaced existing legal systems with their own to further their colonial ambitions and uses the British's actions in Ireland as one of his case studies.

Defenders of the British-created system, both historians and policy makers alike, purport that the Irish were in a way lucky to have English common law implemented in Ireland since it is widely regarded as one of the most just and advanced legal systems in the world. This thesis does not seek to tarnish the reputation of English common law; in fact, this thesis accepts that it is a system worthy of the praise it has received. Instead, this chapter will try to reframe the debate because defenders of the British court system in Ireland have been looking at the issue from a different perspective. The question should not be whether English common law is a good legal tradition or not, but rather, was English common law as applied in Ireland just? This thesis backs the Irish Free State Government's view that it was not. Even if English common law was theoretically supposed to be applied in Ireland as in England "in practice it [is] doubtful if the Irish experience of law was shared with England."[6]

There were five major problems in the British created judiciary that existed in varying degrees from the early thirteenth century up through Irish independence in the twentieth century. First, the courts based on the English common law tradition were viewed as foreign and a tool of the colonial occupiers against the Irish people. Second, there is a long history of discrimination in appointments to the bench in Ireland. While this discrimination since the seventeenth century usually manifested in the form of excluding Catholics from judicial posts, Irish-born Protestants often found themselves passed over for appointments in favor of English-born Protestants. Third,

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[5] John R. Schmidhauser, "The European Origins of Legal Imperialism and Its Legacy in Legal Education in Former Colonial Regions," *International Political Science Review* 18, no. 3 (July 1997): 337, http://links.jstor.org/sici?sici=01925121%28199707%2918%3A3%3C337%3ATEOOLI%3E2.0.CO%3B2-4.
[6] J.F. McEldowney and Paul O'Higgins, "The Common Law Tradition and Irish Legal History," 24.

the courts, whether because of the laws on the books or the biases of judges and juries, had a long history of unjust rulings against the Irish people. Fourth, there was no separation between the executive and judicial branches of government in Ireland, which violated a key principle of English common law. Finally, the courts were overcentralized as almost all cases of significance had to be heard in Dublin. Towards the end of British rule in Ireland, some of these were addressed, but many of these gains would be erased during the War for Independence. The Irish Free State Government could not accept the British created system mainly because of these five problems and focused on addressing them when creating a new system.

"Once Upon a Time There Were Irish Ways and Irish Laws"[7]

The English did not bring law to Ireland, but rather replaced a flourishing system that had presided over Ireland for centuries, which was known as Brehon law. The term Brehon is the Anglicization of the Irish word *breitheamh*, which means judge. The term "did not originally define the nature of the law administered" by such a judge, but over time it took on that connotation.[8] Like the English system that would replace it, there is little historical work done on Brehon law. It is unlikely that a thorough account of Brehon law's history will ever be compiled due to the lack of written records. Brehon law was an oral tradition, so it produced very little documentation. Also, the English's efforts to completely suppress Brehon law in the mid-sixteenth century "created a milieu in which Brehon writings would have been concealed and eventually destroyed."[9] Two important points relevant to this thesis are clear: Brehon law was a legal system that fit the needs of the Irish people at the time it existed and the system was

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[7] Taken from a well known Irish song written by John Gibbs and made popular by Christy Moore.
[8] Katherine Simms, "The Brehons of Later Medieval Ireland," *Brehons, Serjeants and Attorneys: Studies in the History of the Irish Legal Profession*, ed. Daire Hogan and W.N. Osborough (Dublin: Irish Academic Press, 1990), 51.
[9] Nerys Patterson, "Brehon Law in Late Medieval Ireland: 'Antiquarian and Obsolete' or 'Traditional and Functional'?" *Cambridge Medieval Celtic Studies* 17 (1989): 47.

accepted by the populace. These two beneficial points of Brehon law stand in stark contrast to its successor.

While Brehon law would have been entirely impractical in the twentieth century, when the Irish Free State Government was creating a new judiciary, it worked very well during its existence centuries earlier. The native system was designed specifically to preside over Irish society. For example, part of Brehon law set forth the rules of business transactions. For braziers, carpenters, smiths, and physicians, brehons would determine what payment they were entitled to for their labor according to the legal code.[10] Also, Brehon law was spoken and studied in the vernacular of the Irish people, which made it accessible to judges and laymen alike.[11]Such procedures made Brehon law a part of everyday life, making it well known and used by the populace.

The system's open-ended and ambiguous means it has often been misinterpreted as primitive, but this was actually intentional and appreciated by the Irish people. Since it was primarily an oral tradition, "As [the judge] was not tied down to very precise written definitions and specifications of legal remedies, he was much freer than a judge in a fully literate jural system to decide what ruling would accord with his sense of where justice lay and how accord might be reached."[12] To be able to provide people with a sense of justice, a judge needed to be well versed "in the community's contemporary social and cultural constitution—which was not written—as well as its oral and written traditions."[13] This was a very different approach to adjudication than English common law's approach where theoretically all are equal under the law and the proper course of action is codified in written text.

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[10] Katherine Simms, "The Brehons of Later Medieval Ireland," 62.
[11] Ibid., 75.
[12] Nerys Patterson, "Brehon Law in Late Medieval Ireland: 'Antiquarian and Obsolete' or 'Traditional and Functional'?," 53.
[13] Ibid.

Another interesting and relevant aspect of this extinct legal system was the impact English common law had on Brehon jurisprudence. Between the thirteenth and sixteenth centuries, instead of being brushed aside by the foreign system, the Irish legal profession evolved its own system by borrowing parts of English common law. This hybrid system "indicates the vitality of the Gaelic legal profession during this period: modification, rather than abandonment of indigenous rules and customs."[14] By the sixteenth century, Brehon law was "riddled with terms and concepts borrowed from common law."[15] It is important to note that this hybrid system flourished before the British suppressed it.[16] This shows that there was nothing inherent in the English common law itself that the Irish found objectionable, which helps prove the point that the problem of English common law in Ireland was not the theory, but its practice.

The brehons, who made their rulings with both the intricacies of legal code and societal rules in mind, were respected members of the community. Church tenants, minor nobility, and pre-Norman professionals were the legal experts and judges in pre-colonial Ireland.[17] Although they came from the upper echelon of society, they were in fact and in the eyes of the people Irish, which is an important distinction in regards to the British appointed judges who would replace them. With the respect of the people and the knowledge of communities' social structures, the judges could bring better resolutions to cases before them by forging compromises as arbitration was central to Brehon law.[18]

The indigenous system had broad public support. The upper echelon of Irish society, mainly comprised of the nobles and the Catholic Church, supported it. Brehons had close ties to

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[14] Ibid., 46.
[15] Katherine Simms, "The Brehons of Later Medieval Ireland," 72.
[16] Nerys Patterson, "Gaelic Law and the Tudor Conquest of Ireland: the Social Background of Sixteenth-Century Recensions of the Pseudo-Historical Prologue to the *Senchas Már*," *Irish Historical Studies* 27, no. 107 (May 1991): 200.
[17] Katherine Simms, "The Brehons of Later Medieval Ireland," 60.
[18] Alfred Gaston Donaldson, *Some Comparative Aspects of Irish Law*, 8.

Irish kings and nobility and even fought alongside Irish political leaders against the British invaders. The Church also supported the Brehon system because there were laws reserved solely for clerics. The native system had the backing of St. Patrick himself, who believed Brehon law was "based on natural law (*recht aicnid*), that is, on God's moral order as intuitively perceived by 'just men' before Faith."[19] The common people were also exceptionally loyal to the Brehon legal system because "the brehons themselves were not socially distant from those whose disputes they adjudicated. The face-to-face quality of Irish law and the position of the jurist as an arbitrator in disputes, imparted an intimacy to the jural process that contrasted sharply with [English common law]."[20]

Suppression and Replacement of Brehon Law

While the Irish held their own legal system in the highest esteem, the British government looked down upon it from the time its military forces arrived in Ireland. In the latter half of the thirteenth century, England's King Edward I declared that "the laws which the Irish use are detestable to God and so contrary to all laws that they ought not to be called laws."[21] Other British sources "depict [brehons] as ultramontanists, practising 'secret and hidden rites', not as administrators with policies."[22] The disparagement of Irish ways did not just apply to law, but to Irish society as a whole, which the British believed was crude and backward.[23]

Colonial officials in Ireland believed that to ensure control over their new land and to create what they viewed as a proper society, English common law would need to replace the indigenous system. One proponent of such sentiments was Edward Walsh, who was an Irish

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[19] Katherine Simms, "The Brehons of Later Medieval Ireland," 71.
[20] Nerys Patterson, "Brehon Law in Late Medieval Ireland: 'Antiquarian and Obsolete' or 'Traditional and Functional'?," 61.
[21] Katherine Simms, "The Brehons of Later Medieval Ireland," 67.
[22] Nerys Patterson, "Gaelic Law and the Tudor Conquest of Ireland: the Social Background of Sixteenth-Century Recensions of the Pseudo-Historical Prologue to the *Senchas Már*," 193.
[23] John R. Schmidhauser, "The European Origins of Legal Imperialism and Its Legacy in Legal Education in Former Colonial Regions," 343.

Protestant and lobbied the British crown to gain further control over Ireland during the sixteenth century. In his writings, "Walsh argued that without justice (English law)… the English settlers would become as wild [as the] Irish."[24]

The time it took the British to suppress Brehon law is relatively long when compared to the efforts of other colonial powers replacing native legal systems for two reasons.[25] First, the Irish people were not willing to have their own system be eliminated. Second, the British did not have the ability to suppress Brehon law for the first several centuries of their occupation of Ireland. From 1169 to 1534, despite their military and economic pressure on Ireland, the British could not gain complete control over the Irish isle due to Irish resistance, internal conflicts in the British government, and military commitments in Europe. The British had firm control over some areas, with Dublin being their center of power, but most of the island was only nominally under foreign rule. Thus, the British government had to begrudgingly accept the practice of Brehon law in the areas it did not control. After 1534, though, "Tudor, Stuart, and Cromwellian military power made [this] accommodation unnecessary and… the British developed theoretical justifications for conquest and legal imperialism in Ireland."[26]

Once the British had full control of Ireland, the status of Brehon law changed drastically and quickly. In the latter half of the sixteenth century, there was an increase of threats against anyone who continued to use Brehon law in lieu of English common law. In 1571, Sir John Perrott, then the Lord President of the province of Munster and later Lord Deputy of Ireland, proclaimed that no person should use Brehon law "upon pain of death, but [should] sue their

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[24] Nerys Patterson, "Gaelic Law and the Tudor Conquest of Ireland: the Social Background of Sixteenth-Century Recensions of the Pseudo-Historical Prologue to the *Senchas Már*," 207.
[25] John R. Schmidhauser, "The European Origins of Legal Imperialism and Its Legacy in Legal Education in Former Colonial Regions," 341.
[26] Ibid., 342.

appeal or other ordinary remedy by her majesty's laws."[27] Some brehons abandoned the Irish system and became part of the system the British implemented, but not all were willing to do so. Some of these determined judges continued to practice Brehon law and as a result were executed by the British, showing the level of devotion they had to a system that had been part of Irish jurisprudence for so long. After centuries of continuing to thrive under British rule, Brehon law would finally be eliminated in 1605 when King James I proclaimed that English common law was the only legal system allowed in Ireland.

The First Extension of Common Law

English Common law had been extended to Ireland in the early thirteenth century, only a few decades after the island was conquered. England's King Henry II is an important figure both in legal history and Irish history, but not in Irish legal history. During his reign (1154-1189), royal courts were established in England. The characteristics of the system he established "endure[d] throughout the middle ages and in its essential features through to present day," making Henry II a key figure in the development of the English common law tradition. [28] In regards to Irish history, it was Henry II who invaded Ireland in 1171 and brought it under foreign rule. Yet, while "the conquest of Ireland and the creation of the English 'lordship' of Ireland began during Henry's reign there is no evidence of any attempt to create royal courts [in Ireland]… during Henry's reign."[29]

In 1210, the British decided to extend English common law to Ireland and courts were established to make this initiative a reality.[30] While the British exported its legal system to its

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[27] Nerys Patterson, "Gaelic Law and the Tudor Conquest of Ireland: the Social Background of Sixteenth-Century Recensions of the Pseudo-Historical Prologue to the *Senchas Már*," 202.
[28] Paul Brand, "The Birth and Early Development of a Colonial Judiciary: The Judges of the Lordship of Ireland, 1210-1377," *Explorations in Law and History: Irish Legal History Society Discourses, 1988-1994*, ed. W.N. Osborough (Dublin: Irish Academic Press, 1995), 3.
[29] Ibid.
[30] Ibid., 5.

future colonies, the case of Ireland is unique since it was England's first colony. By the time the British expanded its empire further, its judiciary had evolved to a form very similar to the present day system. Since Ireland's initial conquest had happened centuries before further expansion, the British's judiciary was still very much in its infancy. Thus, it is "apparent that the Irish courts developed more or less concurrently with their English counterparts."[31]

Although the judiciaries in Ireland and England were developing together simultaneously and were theoretically supposed to be the same, it was very clear from the start this was not the case. As early as the thirteenth century there an "implicit recognition in many of [the] judicial appointments that the law of the lordship [of Ireland] was different from that of England."[32] Judges presiding over courts in Ireland were appointed to hear cases "*secundum legen et consuetudinem Hiberni*," "*secundum legem et consuetudinem Hibernie*," or "*secundum legem et consuetudinem parcium*," respectively meaning "according to the law and custom of Ireland," "according to the law and custom of our land of Ireland," or "according to the law and custom of those parts."[33] The phrase "law and custom of Ireland" was not referring to Brehon law, but the application of English common law in Ireland. This shows that although the Irish and English legal systems were based on the same legal tradition and were presiding over land under the same government's control, they were two distinct systems.

The difference was that the English system was created to provide justice, while the Irish system was a colonial judiciary. This does not mean that the Irish system was specifically created to spread injustice, but

> Its primary role was to serve the needs of the English colony and of English colonialists in Ireland. Ultimate control over the judiciary remained in England

[31] Alfred Gaston Donaldson, *Some Comparative Aspects of Irish Law*, 9-10.
[32] Paul Brand, "The Birth and Early Development of a Colonial Judiciary: The Judges of the Lordship of Ireland, 1210-1377," 21.
[33] Ibid.

> and with the English government… the lordship of Ireland was an English colony, not part of England, and although the courts and judges of the lordship were developed along English lines there were, and remained, significant differences between the two jurisdictions.[34]

The flaws of the system, which plagued Ireland with unfair judicial practices for centuries and that Irish Free State leaders would try to correct, were a result of the British government using the judiciary as a tool of colonialism instead of a protector of rights.

The First Four Centuries

Although the English common law courts operated on a relatively small scale before the suppression of Brehon law, many of the problems the Irish Free State Government had with the colonial judiciary existed since the thirteenth century. One flaw that began out of necessity was the centralization of the Irish judiciary. Without a firm grasp over all of Ireland, it would have been difficult to establish permanent courts in areas where their security was not assured. Even as late as the early seventeenth century, the British did not have sufficient control over Ireland to expand the judiciary. Sir John Davies, the Attorney General in Ireland during the early 1600's, said

> for though the Prince doth beare the title of *Soveraign Lord* of an entire country… yet if there bee… parts of that Countrey wherein he cannot punish Treasons, Murders, or Thefts, unlesse he send an Army to do it; if the Jurisdiction of his ordinary courts of Justice doth not extend into those parts to protect the people from wrong and oppression; … I cannot justly say, that such a Countrey is wholly conquered.[35]

With only limited control over Ireland, the British would base the court system in their stronghold of Dublin, and "The emergence of a common bench sedentary at Dublin seems to

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[34] Ibid., 48.
[35] G.J. Hand, *English Law in Ireland, 1290-1324* (Cambridge: Cambridge University Press, 1967), 37.

have occurred about the middle of the [thirteenth] century."[36] According to surviving records from the time, in the 1260's, the "court [system] evidently settled more and more in Dublin."[37]

Another problem from the early years of the Irish judiciary was the men who sat on the bench. The judges of the English styled courts were drastically different from the brehons they were replacing. Judicial proceedings were carried on in Latin or English, not the Irish language, which was the vernacular of the native Irish population at the time. While the brehons were respected members of Irish society and knew Irish ways and laws, the judges administering English common law were foreign and seemed distant from the society they presided over.

British leaders, both in Ireland and England, appointed people to the bench, leaving the native Irish out of the process. It seems that at first, judicial appointments were made in Ireland by the Irish chancery. It was during the reign of Edward I (1239-1307), that historians "begin to get firm evidence of the issuing of letters of appointment for members of the Irish judiciary and it becomes clear that the responsibility for issuing them was one shared by the English and Irish chanceries."[38] This meant that judges could either be appointed by the colonial government in Ireland or the British government in London, but it is clear that the appointments made in England trumped any decision made in Ireland. There was a pattern of judges who were appointed by the Irish chancery in the thirteenth century seeking confirmation from the English chancery of their appointments.[39]

One of the greatest criticisms Irish Free State leaders had of the English-styled system was the lack of separation between the judiciary and politics. The problems dated back to the earliest years of English common law in Ireland. Judges who sat on the Irish bench were not

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[36] Ibid., 7.
[37] Ibid., 8.
[38] Paul Brand, "The Birth and Early Development of a Colonial Judiciary: The Judges of the Lordship of Ireland, 1210-1377," 17.
[39] Ibid.

independent as they did not have life tenure and were often appointed for political reasons. Most judicial appointments were made *quamdiu nobis placuerit,* meaning "during [the king's] pleasure."[40] Judges could therefore be removed at any time the King of England wished. While the tenure of many judges ended due to death or retirement, there is evidence of judges being removed for political reasons against their will.[41] Of those who were appointed to judicial posts, many of them gained their seats on the bench through political connections to the Irish or English chancery, beginning a long tradition of merit being less of a factor than political ties. There was also the problematic position of the justicar of Ireland. One of the core principles of the English common law tradition, which still exists today in the United Kingdom and the United States of America, is the clear separation of branches. Yet, the justicar was the chief executive in early colonial Ireland and also sat on the judicial bench.[42]

The executive of the English government and colonial government would interfere with the judicial process by transferring certain Irish cases to courts in England. The transfer of certain cases from courts in Ireland to courts in England "can perhaps best be explained on the grounds that the king's interests were involved."[43] Even when cases that involved the British monarch or his allies were left in Ireland, they would often be reviewed on appeal in England if the rulings were unfavorable to the British government. The apex of the appeal system in the Irish judiciary did not lay in Ireland, but in England at the King's Bench. In regards to the Irish cases this English court heard, "probably the safest generalization that can be made concerns, not the legal subject-matter of the cases nor the course of their passage through the Irish judicial

[40] Ibid., 21.
[41] Ibid., 39.
[42] G.J. Hand, *English Law in Ireland, 1290-1324*, 91.
[43] Ibid., 18.

system, but the standing of the interested parties."[44] Most of the Irish cases heard on appeal in England involved some of the wealthiest and most influential members of society who had close ties to the British monarch. The executive would further interfere in the Irish judicial process by issuing protections and pardons, which were issued to those loyal to the British government.[45]

The final major problem of the early judicial system that made it unpalatable to the Irish people was the laws being administered. There were two sets of laws governing Ireland in the thirteenth century, one created by the Irish parliament in Dublin and by the English Parliament in London. In regards to the Irish legislation, it did not discuss technical legal matters and "little of [the legislation] can have been memorable or can have possessed more than transitory importance."[46] As for the statutes passed in England, "there is no suggestion of any need for ratification in [Ireland]."[47] Although the demand for a popularly elected democracy in Ireland did not come until centuries later, there is a significant difference between laws created by Irish leaders who had the loyalty of their people and crafted laws with societal values in mind and the laws created by foreign rulers seeking to benefit themselves.

The way the English law treated the native Irish understandably made the Irish hostile to the English styled courts. People who were formerly treated as free men with rights under Brehon law had their legal status changed when they fell under the jurisdiction of the colonial courts. The native Irish were

> treated as unfree, [and] endured many disabilities. Probably the most important was the inability to bring actions in the king's courts, but it is another, often misunderstood, aspect of the problem that has done the most to drag it into the domain of partisan history: the killing of an Irishman was no felony. It is not

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[44] Ibid., 151.
[45] Ibid., 28.
[46] H.G. Richardson and G.O. Sayles¸ *The Irish Parliament in the Middle Ages* (Philladelphia, University of Pennsylvania Press, 1952), 291-293; quoted in G.J. Hand, *English Law in Ireland, 1290-1324*, 159.
[47] G.J. Hand, *English Law in Ireland, 1290-1324*, 5.

> surprising to find that to say a man was Irish was a defamatory statement, actionable by plaint.[48]

It is important to note that these discriminatory laws existed centuries before the Reformation in England and Ireland occurred, so the prejudice had nothing to do with Catholicism versus Protestantism, but a colonial power and the people it conquered. This distinction would prove to have a longer lasting influence than religion on the bias in appointments to the bench and other matters involving the Irish judiciary.

Irish Perception of the First Four Centuries of English Law

The Irish people rejected the new judiciary because of discrimination and the implementation of a drastically different system than they were accustomed to. At the time, the native Brehon law was far older and more advanced than English common law. So as if the suppression of Brehon law by a foreign power was not difficult enough for the Irish to accept, "the imposition of impersonal statutes (and English judge-made law) was even more painful."[49] Another factor leading the Irish to reject the system was noted by Sir John Davies, who was responsible for extending English common law to all of Ireland after Brehon law was banned in 1605. He believed that the failure to extend the rights to native Irish that were provided to the English people under the common law tradition led to the Irish's hostility towards the system.[50] The first four centuries of British justice in Ireland left the Irish people wanting a different system. Change would come, but it came slowly and was not always for the best.

The Modern Colonial Judiciary in Ireland

James I's 1605 proclamation that banned Brehon law and made the extension of common law to all of Ireland a reality was a significant event in Irish legal history. The judiciary was

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[48] Ibid., 188.
[49] Nerys Patterson, "Brehon Law in Late Medieval Ireland: 'Antiquarian and Obsolete' or 'Traditional and Functional'?," 62.
[50] G.J. Hand, *English Law in Ireland, 1290-1324*, 189.

finally able to operate under normal conditions since the colonial government had firm control over all of Ireland. During the first half of the seventeenth century, the court system evolved into a system that is the direct ancestor of the British courts the Free State politicians were familiar with.

In 1622, towards the end of James I's reign, the king gave his assent to a document entitled "His Majesty's Directions for Ordering and Settling the Courts within His Kingdom of Ireland." This proclamation was the work of a commission that was appointed to examine the state of Ireland at the time. The commission met for the first time in London in April 1622. Its members were English, but some of them had legal expertise and/or had been to Ireland. Nevertheless, this continued the precedent of excluding the Irish from actively participating in the formation of policies that directly impacted them.

The commission did receive some feedback from the Irish nobility and gentry though. Before the group began its deliberations, in 1621, the British government received a list of grievances from Irish lords and nobles about the court system in Ireland. Also, after preliminary recommendations were released in May 1622, the upper echelon of Irish society submitted seven recommendations for the commission to consider. All but two of these proposals were rejected, demonstrating that even when the British were willing to take suggestions from the Irish, the final say always came from London.[51]

While some important changes were made to the system that then presided over Ireland, many problems remained. Excessive court fees, which the British government profited from and were another colonial aspect of the system, were decidedly left unchanged by the commission.[52] Also, the process of reforming the judiciary could not escape politics and "Consequently, where

[51] Geoffrey Joseph Hand, "His Majesty's Directions for Ordering and Settling the Courts Within His Kingdom of Ireland, 1622," *Analecta Hibernica* 26 (1970): 180.
[52] Ibid., 182.

grievances trenched on state policy and were in fact as much matters of politics or administration as of justice, the commissioners trod gingerly and reserved discussion for later, more discreet, occasions."[53] Thus, problems with the system that were created by the judiciary's colonial purpose were left unchanged.

Discrimination in the Judiciary, 1537-1921

For centuries, the topics of religion and nationality were controversial issues in legal affairs and led many Irish to reject the system. From the time of the English Reformation through the time the British government tried to correct previous injustices, one's admission to the legal profession and appointment to the bench was not solely based on merit. Where one prayed and where one was born mattered a great deal. Such policies mainly manifested, both in reality and even more so in the eyes of the people, in the discrimination against Irish Catholics. For over a century, no Catholic held a judicial post, despite Ireland being overwhelmingly Catholic. Irish-born Protestants, many of whom supported colonial rule, benefited from the Catholics' loss. Yet, even the Irish Protestants in the legal profession were frustrated by their inferior status to their English counterparts. Time after time, qualified Irish Protestants were passed over for appointments in favor of English-born Protestants. This once again highlights the distinct difference between the English and Irish judiciaries, where the latter being a colonial judiciary was beneath the English system. In this chapter, the prejudice against Catholics in the legal profession and judicial appointments will be discussed first. This will be followed by a discussion of why Irish Catholics viewed trials as unfair and biased. Finally, there will be a discussion of the discrimination against Irish Protestants. While a serious effort has been made to present the topics in this order, it is unavoidable that there is some mention of unfair trials during the section on religious discrimination in the legal profession.

[53] Ibid.

Religious Discrimination

After the English Reformation, which began in the 1530's under King Henry VIII, religion was no longer just a matter of faith in Ireland, but a symbol of loyalty to the colonial power. The discrimination of Catholics in the legal profession has often been attributed to laws passed at the end of the seventeenth and beginning of the eighteenth centuries, which are commonly referred to as the Penal Laws. These laws not only banned Catholics from practicing law, but were "general provisions which touched all citizens in relation to many aspects of their lives… But from 1537, there were also specific measures aimed at particular groups, including the legal profession."[54] The goal of these laws was to gain conformity amongst the Irish legal profession, which was necessary to enforce all other laws against Catholics. For the colonial government's anti-Catholic agenda to succeed, it needed "to obtain successful prosecutions in the courts," which required Protestants loyal to the British manning the judiciary.[55] The ancestry of today's modern Irish legal profession was literally based in the anti-Catholic policies. King's Inn, which was founded in 1541 making it Ireland's oldest legal education institution, was housed in a confiscated Dominican friary in Dublin.[56] The role of religion in legal affairs was constant from 1537 through the creation of the new Irish Free State judiciary.

The earliest method of forcing conformity was a law passed in 1537 that required all in the legal profession to take an oath of supremacy, which denied the authority of the pope and accepted the British monarch's authority in spiritual matters. Many Irish lawyers of the time who practiced in the English common law courts took this oath not because of theological beliefs, but

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[54] Colum Kenny, "The Exclusion of Catholics from the Legal Profession in Ireland, 1537-1829," *Irish Historical Studies* 25, no. 100 (November 1987): 337.
[55] T.P. Power, "Conversion Among the Legal Profession in Ireland in the Eighteenth Century," *Brehons, Serjeants and Attorneys: Studies in the History of the Irish Legal Profession*, ed. Daire Hogan and W.N. Osborough (Dublin: Irish Academic Press, 1990), 162.
[56] Colum Kenny, "The Exclusion of Catholics from the Legal Profession in Ireland, 1537-1829," 337.

because they "were eager to demonstrate their loyalty and their attachment to English standards of civilised behaviour. They were willing instruments of administrative policy in Ireland."[57] The oath was used sporadically to purge the legal profession of those who would not conform to English ways. There were times when the British sought to have everyone in the legal profession take it, other times it was used only against individuals British officials did not like, and on other occasions it was not used at all.[58]

In the years immediately following the English Reformation, the oath could not be strictly enforced because it was impractical to do so. There were simply not enough Irish Protestants at first to fill the bench or the ranks of the legal profession. This forced the British government to begrudgingly continue appointing Catholics to the bench. Sir John Davies complained of this situation in 1605, stating that to have competent judges on the bench it was necessary to appoint "notorious recusants, and one of them (as we hear) a lay brother of the Jesuits."[59]

Despite the desire of the British and Irish Protestants to remove Catholics from the legal profession, many of them realized this was not the wisest course of action. Two accounts from the early seventeenth century, one by famed traveler and writer Fynes Moryson and the other by an anonymous author, claimed that barring Catholics from legal practice made the overwhelmingly Catholic population of Ireland reject the judicial system. The anonymous author claimed that this was because the Catholic lawyers were talented and had the trust of the people, while lawyers who came from England were less able and came to Ireland because they could not find any business in England.[60] Even Sir John Temple, Ireland's master of the rolls, "a

[57] Ibid., 338.
[58] Ibid., 339, 348.
[59] Ibid., 343.
[60] Ibid., 345-346.

militant protestant, acknowledged grudgingly in 1646 that such 'popish lawyers as were natives… had in regard of their knowledge in the laws of the land very great reputation and trust.'"[61] The ability of Catholic legal professionals and the lack of adequate Protestant replacements helped Catholics remain in the legal profession despite the discriminatory policies against them.

Catholics regained many of the rights they lost during the rule of King James II, a Catholic himself who reigned from 1685 to 1688, but these gains were only temporary. After King James II's defeat at the Battle of the Boyne in 1690, King William III continued to purge the legal profession of Catholics.[62] The Penal Laws soon followed when in 1691, the first piece of legislation seeking to debar all Catholic barristers was passed. This legislative act was not entirely successful, though, as Catholics found loopholes in the laws, frustrating the British government.

Over the following decades, the colonial government, both in London and Dublin, would pass further acts in an attempt to close the loopholes in the original piece of legislation. In 1698, an act was passed to "prevent papists [from] being solicitors," because "it hath always been found that papist solicitors have been and still are the common disturbers of the peace and tranquility of his majesty's subjects in general."[63] Again, there is no claim by the British or their Irish Protestant supporters that Catholics were unable to do their jobs, the problem was that they did not conform to the will of the colonial rulers. The Protestant legal establishment also "played its part in tightening the noose of penal restrictions."[64] King's Inn strictly enforced a 1704 law that required each barrister to "produce an authoritative certificate of his receiving the sacrament

[61] Ibid., 348.
[62] Ibid., 350.
[63] Ibid., 351.
[64] Ibid., 352.

according to the usage of the [Protestant] Church of Ireland as established by law."[65] In 1727, another law was passed that required legal professionals who converted to Protestantism or who had Catholic parents to prove they had been part of the Anglican Church for at least two years.[66] As the number of Penal Laws continued to grow, by the mid-eighteenth century, Catholics had been effectively purged from all levels of the judiciary.

Fate of the Faithful Catholic Legal Professionals

The discrimination against Catholics in the legal profession had a serious impact on the Catholic population of Ireland. Those Catholics who practiced law were among the most learned and wealthy in the Catholic community, but the Penal Laws left them impoverished and without influence. Dr. Nary, a Catholic priest in the first half of the eighteenth century who wrote about the injustices against Catholics, explained that in 1724 "of about an hundred Roman Catholic lawyers and attornies that attended the courts in Dublin and in the country, not one of them is allowed to get a morsel of bread by those studies upon which they spent their youth and their time."[67] Irish legal professionals who wanted to continue to practice both law and their faith, found that their only recourse was to go into the Irish countryside and provide advice to the locals. The poor Catholic farmers living in rural Ireland trusted the Catholic lawyers more than the Protestants whom they viewed as agents of the colonial power.[68]

Religious Conversions

While some Catholic lawyers stayed true to their faith despite the ramifications on their professional careers, others found what they believed to be the ultimate loophole in the Penal

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[65] Ibid.
[66] W.N Osborough, "The Regulation of the Admission of Attorneys and Solicitors in Ireland, 1600-1866," *Brehons, Serjeants and Attorneys: Studies in the History of the Irish Legal Profession*, ed. Daire Hogan and W.N. Osborough (Dublin: Irish Academic Press, 1990), 113.
[67] Cornelius Nary, *Case of the Roman Catholics* (Dublin: 1724), 121, 132; quoted in Colum Kenny, "The Exclusion of Catholics from the Legal Profession in Ireland, 1537-1829," 353.
[68] Colum Kenny, "The Exclusion of Catholics from the Legal Profession in Ireland, 1537-1829," 345.

Laws—conversion. From 1537 to 1720, Catholic legal professionals found ways around the discriminatory laws that sought to "bind them more intimately to the political and religious outlook of the protestant establishment" by forcing them to convert.[69] Few Catholics converted at first since they were able to find loopholes in the Penal Laws. Beginning in the 1720's, though, the Penal Laws were effective enough to drive Catholics out of legal practice, which led to an increase in conversions, but "the expected transformation in religious and political preferences did not necessarily follow."[70]

Many of the conversions were not genuine and these Catholic were only nominally Protestants as they continued to sympathize and associate with Catholics. One British account stated that except "that they sometimes go to [a Protestant] church, they remain in all respects to all appearance the very same men they were before their conversion."[71] Such conversions, which were inspired by practical considerations and not faith, created "a hybrid class of crypto-catholics who had conformed in order to maintain or improve their landed status, career prospects, or political opportunities—a development which gave them an important influence locally and nationally."[72]

This hybrid group defeated the purpose of the Penal Laws because they did not conform as the British had intended them to. One of the most devastating blows to the genuinely Protestant legal profession was that the converts prevented them from gaining a monopoly on the legal profession. Irish Protestant legal professionals, loyal to colonial rule, had hoped they would profit from the Penal Laws since they would experience an increase in business with Catholics being purged from the profession. Instead, their business sometimes even suffered as Irish

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[69] T.P. Power, "Conversion Among the Legal Profession in Ireland in the Eighteenth Century," 157.
[70] Ibid.
[71] Ibid.
[72] Ibid., 153.

Catholics would take their business to the hybrids in the legal profession and these men would only channel business to fellow crypto-catholics.[73] Even more devastating to colonial policies was that these converts fought the Penal Laws in court, preventing the British from making the laws fully enforceable, which was the main impetus behind excluding Catholics from the legal profession in the first place.[74] These convert lawyers and their decedents, which included men such as Edmund Burke and Anthony Malone, would fight against the persecution of Catholics in Ireland.[75]

O'Connell's Liberation

In 1792, the fortunes of Irish Catholics in legal affairs began to change. A piece of legislation passed that year allowed Catholics to become solicitors and junior barristers again, but not to be promoted to the rank of King's Counsel (senior barrister) or be appointed to the bench.[76] Although Catholics were still restricted from reaching the top positions in the legal system, this was enough of an opportunity for Catholics to create further change. One of the first Catholics to practice law after the prohibition was lifted was Daniel O'Connell, who began his studies in 1794.[77] Both in the courtroom and in the political arena, he would be a giant and changed the course of Irish history.

O'Connell became a very successful and prominent barrister, known across Ireland as the Counsellor. This title was bestowed upon him "because of his success as an advocate in defending humble people against laws and court prosecutions which they saw as unjust… It was his skill as a lawyer which made him widely known."[78] Despite his national fame and being

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[73] Ibid., 163.
[74] Ibid., 162-163.
[75] Ibid., 171-173.
[76] W.N Osborough, "The Regulation of the Admission of Attorneys and Solicitors in Ireland, 1600-1866," 125.
[77] Colum Kenny, "The Exclusion of Catholics from the Legal Profession in Ireland, 1537-1829," 356.
[78] Maurice R. O'Connell, "O'Connell: Lawyer and Landlord," *Portrait of a Radical*, ed. Kevin B. Nowlan and Maurice R. O'Connell (New York: Fordham University Press, 1985), 107.

more than qualified for promotion to the rank of King's Counsel, he was not given this honor due to the remaining Penal Laws and "felt keenly about having to remain a junior barrister."[79] O'Connell not only used the court to vindicate his clients, but also as a political pulpit. In his most notable case, O'Connell defended John Magee, the editor and owner of the *Dublin Evening Post*, in 1813. Magee, although a Protestant, advocated for Catholic Emancipation, which was the movement to the revoke the Penal Laws. Robert Peel, then Chief Secretary for Ireland and later the British Prime Minister, put Magee on trial for libel "to cripple the Catholic agitation by silencing the anti-government press in the person of Magee."[80]

O'Connell was at his best in this trial and while the British sought to convict an innocent man, the Counsellor convicted the judiciary in the court of public opinion. O'Connell knew that his client would be found guilty, which he was, by the packed jury assembled for the case. Instead of futilely defending his client, the Counsellor "delivered a stinging indictment of all government in Ireland… Nothing like it for sheer audacity had ever come from an Irish Catholic. His speech was printed and distributed throughout the county. It ranks as one of the great courtroom orations of modern times."[81] O'Connell read the words of the prosecutor, Attorney-General William Saurin, from the time Saurin was accused of libel in 1800. In his own case, Saurin admitted that while political debates may cause "agitations," they were the price "necessarily paid for liberty."[82] Yet, there was Saurin 13 years later prosecuting Magee. After berating the Attorney General for his hypocrisy, O'Connell "concluded with a brilliant sustained appeal-by-role reversal" aimed at the packed jury, saying they should imagine their land ruled by a foreign Catholic power where:

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[79] Ibid.
[80] Ibid., 110.
[81] Ibid.
[82] Oliver MacDonagh, *The Hereditary Bondsman: Daniel O'Connell, 1775-1829* (New York: St. Martin's Press, 1987), 121.

> Your native land shall be to you the country of strangers; you shall be aliens in the soil that gave you birth, and whilst every foreigner may, in the land you forefathers, attain rank, station, emolument, honours, you alone shall be excluded… Only think, gentlemen, of the scandalous injustice of punishing you because you are Protestants. With what scorn—with what contempt—do you not listen to the stale pretences—to the miserable excuses by which, under the name of state reasons and political arguments, your exclusion and degradation are sought to be justified![83]

The speech captured the attention of the Irish people and enraged the colonial rulers. Peel, whose conviction of Magee mattered little in hindering the Catholic Emancipation cause due to the effect O'Connell's speech had, was furious at what the Counsellor had done. Peel summarized the speech in a letter to the Lord-Lieutenant of Ireland:

> O'Connell spoke for four hours, completely but intentionally abandoning the cause of his client (I have no doubt with his client's consent) taking that opportunity of uttering libel even more atrocious than that which he proposed to defend, upon the Government and the administration of justice in Ireland. His abuse of the Attorney-General [Saurin] was more scurrilous and vulgar than was ever permitted within the walls of a court of justice. He insulted the jury individually and collectively, accused the Chief Justice of corruption and prejudice against his client, and avowed himself a traitor, if not to Ireland at least to the British Empire.[84]

When Magee was up for sentencing, O'Connell once again launched an attack on the Attorney-General, whereupon the judges presiding over the trial warned O'Connell of the criminal nature of his speech. O'Connell, continued the attack, but masterfully worded it to avoid being held in contempt. Most of the legal profession condemned O'Connell's brash tactics, but he "had no alternative if he were to raise a people from their knees."[85]

On June 24, 1828, the Counsellor announced that he was entering elected politics and would stand as a candidate for the British House of Commons in a County Clare by-election. Despite the Penal Laws, which prohibited any Catholic from taking a seat in Parliament,

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[83] Ibid.
[84] Maurice R. O'Connell, "O'Connell: Lawyer and Landlord," 110.
[85] Ibid., 111.

O'Connell still stood for election and "lit a fuse that led to a bomb."[86] In his election address, O'Connell appealed to the electorate stating "Electors of the County Clare, choose one who has devoted his early life to your cause—who has consumed his manhood in a struggle for your liberties, and who is ready to die for the Catholic faith."[87] O'Connell's opponent was William Vesey Fitzgerald, a close ally of Peel and a member of a wealth Protestant family. Despite Fitzgerald's pro-Emancipation stance, O'Connell won the election with 2,057 votes to Fitzergerald's 982.[88] Thus, the British government had two choices, Emancipation, which would allow O'Connell to take his seat, or block O'Connell and face a possible rebellion in Ireland. Peel said that in regards to O'Connell's election, "'the instrument of political power' was 'shivered to atoms.'"[89]

While the British Government, under the leadership of Prime Minister Wellesley (The Duke of Wellington), was ready to implement Emancipation, there were many who opposed this course of action. Wellington's Government fundamentally opposed Emancipation, but it was prepared to accept it due to possibility of an uprising if O'Connell was denied his seat. The still overwhelmingly Protestant Irish legal profession, took a stand against Emancipation, "suppl[ying] several of the most articulate and influential defenders of the constitutions against emancipation and reform."[90] Many of these Protestant, Irish-born defenders of the Penal Laws believed that Catholics "had nothing to complain of in their present situation under the British constitution. For it was one of the glories of that constitution that even catholics, whose tenants

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[86] Fergus O'Ferrall, *Catholic Emancipation: Daniel O'Connell and the Birth of Irish Democracy 1820-30* (Dublin: Gill and Macmillam, 1985), 188.
[87] Ibid., 191.
[88] Ibid., 199.
[89] Ibid., 188.
[90] Jacqueline Hill, "The Legal Profession and the Defence of the *Ancien Regime* in Ireland, 1790-1840," *Brehons, Serjeants and Attorneys: Studies in the History of the Irish Legal Profession*, ed. Daire Hogan and W.N. Osborough (Dublin: Irish Academic Press, 1990), 183.

made them a danger to it, enjoyed religious toleration and livery of conscience."[91] Ireland's Attorney General William Saurin, who O'Connell harshly criticized during Magee's trial and was "a narrow, bitter but upright and competent Protestant zealot," believed that Catholics deserved no further rights.[92] He stated that any allegation of injustice by O'Connell and other pro-Emancipation politicians were false and meant to arouse the emotions of the Irish people. Saurin claimed:

> The roman catholics were told while living under a constitution, the freest, and mildest in the world… they were slaves and outlaws. I solemnly declare… if I did not know that they enjoyed the same protection by Magna Carta, the bill of rights, the habeas corpus act, and trial by jury, as I myself… I, myself, would be the foremost to place my hand on that guilty constitution which had done [Catholics] wrong. But this is the jargon of democracy.[93]

There are two aspects of the Protestant argument that should be commented upon. First, the Irish Protestants in the legal profession and other anti-Emancipation politicians did not view themselves as bigots for trying to preserve the Penal Laws. There was indeed a notable shift in the tone and reasons for their stance since the Penal Laws were first passed. Derogatory terms such as "popish" and "papists" had been replaced by "Catholic." Also supporters of the Penal Laws spent less time attacking Catholic beliefs on theological grounds. Thus, the "general protestant view [was] the very fact [opposing Emancipation] did not rest on an indictment of catholic spiritual beliefs meant that its supporters believed themselves to be free from 'bigotry.'"[94] The second point that should be made is that Irish Protestants who opposed Emancipation did attempt to empathize with the Catholic population. These Protestants did not ask themselves how they would feel if there were discriminatory laws towards them just for

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[91] Ibid., 194.
[92] Oliver MacDonagh, *The Hereditary Bondsman: Daniel O'Connell, 1775-1829*, 118.
[93] Jacqueline Hill, "The Legal Profession and the Defence of the *Ancien Regime* in Ireland, 1790-1840," 200.
[94] Ibid., 195.

being Irish-born. So while they claimed the Irish Catholics had the same rights they did, Protestants still saw the Irish Catholics as a different sect of society.

The most difficult obstacle for the Duke of Wellington to get the Emancipation passed was King George IV. Charles Greville, who was responsible for recording the life of the King, described George IV, writing "a more contemptible, cowardly, selfish, unfeeling dog does not exist than this king, on whom such flattery is constantly lavished."[95] George IV had strong anti-Catholic views and according to Greville said "his father would have laid his head on the block rather than yield [to the Emancipation cause], and that he is equally ready to lay his head there in the same cause."[96] Wellington told the King that it was necessary to seat O'Connell in Parliament for the sake of peace, to which George IV replied "Damn it… you mean let [Catholics] into Parliament?" [97] When Wellington assured the King that Catholics would still be barred from being appointed to ecclesial courts, George IV replied in shock, "What, do you mean a Catholic to hold any judicial office? To be a Judge of the King's Bench?"[98]

The King would reluctantly bow to Wellington's Government though because of practical considerations. Robert Peel was Home Secretary at the time and was the primary advocate for Wellington's Government on this issue. He argued that the British Empire could not govern Ireland if Emancipation was denied to the five million Catholics on an island with a total population of seven million. The Government's argument was "based on expediency, not upon a discussion of rights; it was not what was desirable but only what was possible and practical."[99] Despite vocal opposition to the Government's proposal, the legislation allowing for Emancipation was put into effect on April 13th, 1829—O'Connell had won. The man who was

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[95] Fergus O'Ferrall, *Catholic Emancipation: Daniel O'Connell and the Birth of Irish Democracy 1820-30*, 236.
[96] Ibid.
[97] Ibid., 238.
[98] Ibid.
[99] Ibid., 248.

once known as the Counsellor would be immortalized as the Liberator. He wrote to his friend, Edward Dwyer, Emancipation "is one of the greatest triumphs recorded in history—a bloodless revolution more extensive in its operation than any other political change that could take place."[100] With the Penal Laws repealed, Catholics once again could fully participate in the judicial system that presided over their own land.

The Greening of the Judiciary—Like Watching Grass Grow

Although Emancipation allowed Catholics to hold any judicial post in Ireland, except for Lord Chancellor which would be changed years after, it would take some time for Catholics to be promoted through the ranks of the judicial profession. In October 1829, the first group of Irish Catholic barristers was promoted to the rank of King's Counsel. The Irish Protestants, who still had firm control over the legal profession, slighted O'Connell as payback for his successful Emancipation campaign. O'Connell was not among the first to be admitted and the group that was given the rank of King's Counsel, which was "composed entirely of his juniors in years and fame. Even his chief rival Shiel was soon added to the number. No insult could have cut deeper."[101] O'Connell would leave the legal profession in favor of his political career, depriving the Irish Bar of its most talented and prominent Catholic member. Nevertheless, the repeal of the Penal Laws allowed other Catholics to rise through the ranks.

While Catholics were promoted to King's Counsel almost immediately after Emancipation, it took quite some time before they reached the bench. In 1836, seven years after Emancipation, a Catholic was appointed to a judgeship for the first time since the reign of King James II.[102] While this was an important step in terms of healing the wounds created by religious

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[100] Maurice R. O'Connell, ed., *The Correspondence of Daniel O'Connell*, vol. IV (Dublin: Stationary Office, 1977), 45.
[101] Oliver MacDonagh, *The Hereditary Bondsman: Daniel O'Connell, 1775-1829*, 270.
[102] Colum Kenny, "The Exclusion of Catholics from the Legal Profession in Ireland, 1537-1829," 357.

discrimination, further progress would come slowly. By 1892, out of the twenty-one judges of the Supreme Court, High Court, and Land Commission, only three were Catholics. Surely, this imbalance was not solely due to the qualifications of Catholics, because "Apart from the two variables, of religious affiliation and political orientation, the judges and land commissioners had similar social backgrounds and legal training."[103] Prominent barristers, regardless of religion, had come from well-to-do families, were trained at the same schools, and had similar careers.

The change in religious composition of the Irish bench took decades to occur for two reasons. First, the Penal Laws had achieved the colonial government's objective to purge the legal profession of Catholics and to give loyal Protestants more wealth, influence, and power than Catholics. Although Catholics had been allowed back into the legal profession in the late eighteenth century, the struggle to overcome their disadvantaged position would take some time. Even by 1906, Protestants still outnumbered Catholics three to one in the legal profession.[104] The second reason that change occurred so slowly was religious discrimination, which further tarnished the Irish Catholics' perception of a judiciary that had not moved beyond the practices O'Connell hoped to eliminate with Emancipation. When there were vacancies on the bench, Protestants were disproportionately appointed to fill them. This did not go unnoticed by the Catholic people. In an article published by *The Irish Catholic* in 1909, the newspaper claimed "No one, will need to be told that these figures indicate the existence of a scandalous favoritism, a favoritism having its origin in religious prejudice which the present government have given absolutely no earnest desire to correct."[105] This imbalance in a land where the vast majority of

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[103] Lawrence W. McBride, *The Greening of Dublin Castle: The Transformation of Bureaucratic and Judicial Personnel in Ireland, 1892-1922* (Washington D.C.: The Catholic University of America Press, 1991), 31.
[104] Ibid., 36.
[105] Ibid., 36-37.

people were Catholic showed that while religious discrimination was no longer codified in legal statutes, it still existed into the twentieth century.

Starting in 1910, the beginning of Britain's final decade of rule over southern Ireland, the Liberal British Government began to prepare Ireland for independent rule. Under the guidance of Chief Secretary for Ireland Augustine Birrell, this period "marked the greening of the Four Courts."[106] During this time, many vacancies occurred on the Irish bench and Birrell had lined up Catholic successors to replace them.[107] The composition of the bench at all levels of the judiciary clearly shows this shift. As previously mentioned in 1892, out of the twenty-one judges of the Supreme Court, High Court, and Land Commission, there were eighteen Protestants and three Catholics. By 1914, though, this "bench was evenly divided between Catholics and Protestants."[108] Birrell also tried to change the composition of the magisterial level (lowest level) of the judiciary by appointing two Catholics for every Protestant. This led to a significant shift where in 1892 there were four Protestants for every Catholic, but by 1914 the ratio was roughly three to two.[109]Although there were a far higher percentage of Protestants on the bench when compared to their percentage of Ireland's total population, "Catholics were represented in legal positions far beyond what their share might be if the proportion of one Catholic lawyer for every three lawyers in Ireland had dictated these appointments."[110]

Despite the Liberal British administration's best intentions, its efforts were met with criticism from both sides of the issue. Despite significant gains, Irish Nationalists and Catholics "were not mollified."[111] The changes were not drastic enough for them and centuries of

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[106] Ibid., 191.
[107] Ibid., 161.
[108] Ibid., 191.
[109] Ibid.
[110] Ibid.
[111] Ibid., 251.

oppression were not so easily forgotten. Yet, Irish Protestants and Unionists were far more irate as they were losing their monopoly over the judiciary faster than ever before. Edward Carson, the most influential Unionist Protestant leader, said that while he recognized the recent appointment of Catholics to the bench solely because they were made by the British government, "I object to my life and my liberty and my property being subject to a number of people whom I look upon as absolutely unfitted to be put over me in relation to the adjudication of any such judicial matters as may have to come before them."[112] The British government appointed staunch Protestants acceptable to Carson and his supporters in an effort to appease them. This was not beneficial to the administration of justice, though, as Lord Lieutenant of Ireland John French believed "two of the judges recently appointed in the interest of Ulster Unionists [Carson's movement] were said to be the weakest lawyers who ever sat on the bench."[113]

Thus, even though British leaders tried to end centuries of religious discrimination to appease the majority of the Irish people and to improve the quality of the Irish bench they were unsuccessful for two reasons. First, they did not end tensions between Catholics and Protestants because they could not appease both Irish Catholics and Protestants at the same time, so efforts to placate one group led to infuriating the other. Also, the divide between the two communities ran so deep that judicial appoints were not going to change much. Secondly, the quality of the men who served as judges did not improve, if anything it declined. This was because of the policy of selecting judges valuing some other characteristic (in this case religion) of candidates as more important than merit. Ultimately, when the Irish Free State was created, although the most difficult times in Catholic-Protestant relations had passed, religion was not a mute issue.

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[112] Ibid., 173.
[113] Ibid., 250.

Religious Discrimination: Method of Prosecution and Packed Juries

Since Irish law was based on English common law, it "inherited the English system of prosecution and so both jurisdictions shared the same principle that responsibility for prosecutions rested with the private individual."[114] Due to the political and social turmoil in Ireland, though, "Private individuals were unwilling to act as prosecutors because of [the] threat [of secret societies that used violence] and a strong sense of suspicion which surrounded connections with British law in Ireland."[115] By the nineteenth century, "The need for an alternative system was obvious from the serious deficiencies of the private prosecution system."[116] The colonial government took on this responsibility and the Attorney General of Ireland was responsible for deciding whether or not to prosecute criminal cases.[117] Although this change may have been necessary, the Irish people felt that this was just another example of the British using the judiciary as a tool of colonialism.

Another highly regarded aspect of trials under the English common law tradition, trial by jury, was a source of contention in Ireland. A key component of the jury system is the process of jury selection. Both the colonial government prosecutors and the advocates for the accused had the right to challenge jurors. The defendant had the right to challenge a limited number of jurors without giving cause, but after using those challenges cause had to be shown as to why a juror should be blocked. The government prosecutors on the other hand had a significant advantage because they had an unlimited amount of challenges without having to show cause.[118] Thus, the prosecutors could always select a jury it found to be favorable by blocking anyone they did not

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[114] J.F. McEldowney, "Some Aspects of Law and Policy in the Administration of Criminal Justice in Nineteenth-Century Ireland," *The Common Law Tradition: Essays in Irish Legal History*, ed. J.F. McEldowney and Paul O'Higgins (Dublin: Irish Academic Press, 1990), 127.
[115] Ibid., 128.
[116] Ibid., 129.
[117] Ibid.
[118] Ibid., 136.

see as a loyal Protestant. In the nineteenth century, guidelines were put forward in an attempt to stop this unfair advantage, but these efforts proved to be unsuccessful. One supporter of such guidelines, Constantine Malloy, in 1871 claimed that the prosecutors' privilege to block jurors "has been sometime grossly abused there can be no question, and thereby convictions obtained in cases where this right has been abused have lost all that moral weight which is so essentially necessary to give due effect to the administration of law."[119]

Another problem with the jury system was that defendants were not necessarily being tried by a jury of their peers, since Catholics were often kept from serving on a jury. Before 1834, people in Ireland needed to own land to be able to serve on a jury, which few Catholics did. Even after the expansion of jury franchise occurred in 1834 and again in 1871, "Catholic participation was in those circumstances rather slow in coming."[120] Government prosecutors used their ability to challenge jurors without cause to prevent Catholics from serving on juries. Lord Fitzgerald explained this practice:

> By jury-packing was popularly meant the exclusion of Roman Catholics who were returned on the panel from taking part in trials… But Roman Catholics were excluded from the jury box, not because they were Roman Catholics but because they happened to belong to a class whose sympathies were with the accused[121]

Despite the British's defense of their practice of excluding Catholics for non-religious reasons, "In the popular mind it was the fact that a Catholic was challenged which was important. It did not matter whether or not there were reasons irrespective of his religion."[122]

While Catholics had no faith in the jury system because of packed juries, staunch Protestants had little respect for it. Protestants who opposed Ireland's independence, known as Orangemen, "felt a sense of immunity from the law because they had large influence in the

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[119] Ibid., 153.
[120] Ibid., 122.
[121] Ibid., 145-146.
[122] Ibid., 146.

system of justice" and because of the sympathetic juries that tried them.[123] Hereward Senior, a historian of Orangemen, explains that:

> Instances of Orangemen evading justice through their influence in law courts especially on juries are too numerous to recount… Grand juries were known to sit in court wearing Orange ribbons and a defendant accused by a Catholic might hope to intimidate a jury by announcing himself as an Orangeman.[124]

With one sect of the community feeling persecuted by the law and the other feeling immune to it, this was clearly a judiciary that did not serve the purpose a court system should.

Preventing Religious Discrimination: The Criminal Evidence Act 1898

Irish Catholics' distrust of the judicial system can be seen in Irish MPs opposing the extension of the Criminal Evidence Act 1898 to Ireland. Before this legislation, the accused and the spouse of the accused could not testify in a criminal case in the United Kingdom. This legislation allowed them to do so and this has "proved so beneficial that since [its] enactment their propriety had not been seriously questioned and they now constitute an integral part of the contemporary criminal processes in the United Kingdom and Ireland."[125] Yet, the Criminal Evidence Act 1898 did not extend the right to testify on behalf the behalf of oneself or one's spouse to the people of Ireland because Irish Nationalist MPs "argued that on the merits Ireland was not a suitable candidate for the application of such a reform."[126]

Irish MPs believed that since the judiciary was so biased in Ireland, giving the accused the right to testify would ultimately hurt his or her defense more than help it. Under the leadership of MP T.M. Healy, a member of the Irish legal profession himself, the Irish

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[123] Ibid., 125.
[124] Hereward Senior, *Orangeism in Ireland and Britain 1795-1836* (London, 1966), 185-185; quoted in, J.F. McEldowney, "Some Aspects of Law and Policy in the Administration of Criminal Justice in Nineteenth-Century Ireland," 125.
[125] Claire Jackson, "Irish Political Opposition to the Passage of Criminal Evidence Reform at Westminster, 1883-98," *The Common Law Tradition: Essays in Irish Legal History*, ed. J.F. McEldowney and Paul O'Higgins (Dublin: Irish Academic Press, 1990), 185.
[126] Ibid., 186.

Nationalist MPs opposed having Ireland included in the legislation.[127] They believed that criminal cases in Ireland and England were not comparable due to "the difference between the atmosphere in the courts on either side of the Irish Sea. In support of the contention that whereas in England sympathy was shown for the plight of the accused in Ireland he met only with hostility."[128] John Dillon, an Irish Nationalist MP, said that the judges were always opposed to defendants and believed that if the legislation extended to Ireland that of "every man who came into Court accused of a crime [the judges] would say 'Are you going to be examined? If not you are guilty.'"[129] Irish MPs used obstructionist tactics until the legislation was amended so it would not allow defendants or their spouses to testify in Irish criminal cases. It was not until after the creation of a new judicial system in the Irish Free State, that the Irish people had enough faith in the courts to extend the right to testify on one's own behalf to Ireland.

Discrimination Against Irish Protestants

While Irish Protestants were favored over their Catholic counterparts, they were still looked down upon by the British. Irish Protestants, who had conformed to British standards, were not fully accepted by the colonial power. This discrimination manifested largely in the preferential treatment of English Protestants in appointments to the Irish bench. Although the British preference for their own legal professionals seems insignificant when compared to the treatment Irish Catholic received, it is important because it goes back to the point that British discriminatory policies were not just about religion. Instead, they were about a colonial power's view of the people in its colony. Although most Irish Protestants were loyal to the British government and were treated better than Irish Catholics, they were still Irish and not English. To illustrate the discrimination against Irish Protestants, an account of events that show the British

[127] Ibid., 192.
[128] Ibid., 187.
[129] Ibid., 188.

saw themselves being superior will be given followed by a case study from the nineteenth century.

F. Elrington Ball, who is the author of the most comprehensive history of the Irish bench, wrote that "the history of the Irish judiciary is a history of rivalry for office between England and Ireland."[130] As alluded to earlier, the British government in the early years of establishing a judiciary sought to appoint only English-born men to the bench. This policy changed solely "through the failures on the part of Englishmen to assume office that judicial seats began to be filled by the Anglo-Irish, and at first an Anglo-Irish holder of judicial office was expected to make way for an English-man when circumstances permitted of his arrival in Ireland."[131] By the fifteenth century, with Englishmen still refusing to sit on the Irish bench, Irish-born judges "gained the predominance."[132]

Despite being appointed to the bench in their own land, Irish legal professionals were still considered inferior to their English counterparts. To become a practicing barrister, Irish-born lawyers had to travel to England "to spend a period of residency at one of the English inns of court before starting to practise at home."[133] After the English Reformation, life was uncomfortable for Irish-born Protestants serving their residencies in England as the English were suspicious of all Irish.[134] With not enough Irish Protestants to fill the Irish bench after the English Reformation, Englishmen were brought in to make up for the loss of Catholic judges. Once again those loyal to the colonial power that were born in Ireland found themselves brushed aside. According to Sir John Davies, the Irish Protestants in the legal profession "considered

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[130] F. Elrington Ball, *The Judges in Ireland, 1221-1921*, vol. 1 (London: John Murray, 1926), viii.
[131] Ibid., x.
[132] Ibid., vii.
[133] Colum Kenny, "The Exclusion of Catholics from the Legal Profession in Ireland, 1537-1829," 340.
[134] Ibid., 341.

themselves 'disregarded.'"[135] Even in the eighteenth century, over a hundred years after the English Reformation, many English-born barristers were being appointed to the Irish bench with over a fifth of judicial appointments being given to Englishmen who had never practiced law in Ireland.[136]

Discrimination Against Irish Protestants: Nineteenth Century Case Study

Before O'Connell and Emancipation, one of the greatest champions of Catholic and Irish rights was William Conyngham Plunket. Plunket, an Irish-born Protestant, "was sensitive to the fact that he enjoyed considerable personal success while most of his countrymen were prevented by religious discrimination from advancing professionally," and was thus a supporter of Emancipation.[137] He became a barrister in 1784, a time when Catholics were still barred from the profession, and was instantly successful.[138] By the end of the eighteenth century, Plunket had been promoted to King's Counsel and was elected to the Parliament.[139] In 1803, despite his Catholic sympathies, Plunket prosecuted Robert Emmet. In this case, Plunket was able to get Emmet, a leader of a rebellion that never materialized but a hero in the eyes of the Irish people nevertheless, sentenced to death. Shortly after Emmet's trial, Plunket was appointed Solicitor General and became Attorney General of Ireland in 1805.Plunket's first stint as Attorney General lasted until 1807, but he served in this post again from 1822 until 1827.[140] In 1827, after a change in government, it was believed that Plunket would become Lord Chancellor of Ireland,

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[135] Ibid., 339.
[136] R.B. McDowell, "The Irish Courts of Law, 1801-1914," *Irish Historical Studies* 10 (1957): 366.
[137] Colum Kenny, "Irish Ambition and English Preference in Chancery Appointments, 1827-1841: The Fate of William Conyngham Plunket," *Explorations in Law and History: Irish Legal History Society Discourses, 1988-1994*, ed. W.N. Osborough (Dublin: Irish Academic Press, 1995), 133.
[138] Ibid., 134.
[139] Ibid., 136; Plunket was first elected to the Irish Parliament and then to the British Parliament after the Act of Union abolished the Irish legislature.
[140] Ibid.

the highest post in the Irish judiciary, and he even "resigned his seat in the commons, a prerequisite of his moving to the house of lords as chancellor."[141]

Plunket could not be appointed to highest judicial post in his native land, though, because King George IV would not accept the resignation of Thomas Manners, the man Plunket was going to replace. Although Plunket was a Protestant, George IV was not going to appoint someone who was a supporter of Emancipation and wanted "a proper Protestant successor."[142] Plunket having already resigned his seat in the House of Commons, British Prime Minister Canning tried to appoint him to the position of Master of the Rolls in the English judiciary as a consolation prize. Plunket was prepared to accept the position, but would decline the post after the English legal profession was adamantly opposed to an Irish-born judge sitting on the English bench.[143] To replace Manners as Lord Chancellor, the British government selected Sir Anthony Hart who was serving as Vice-Chancellor of England. The Protestant Irish legal profession was insulted that Hart, who was born in the West Indian colonies and educated in England, was selected over qualified Irish-born barristers and judges.[144] Irish Protestants had conformed to the British's standards and were loyal to the colonial power, yet as their reward for only 30 years in the 140 years after the Battle of the Boyne did an Irish Protestant serve as Lord Chancellor.[145] They were so inferior that the English bar would not allow Plunket to be appointed to their bench and someone born in another colony was appointed to the highest seat on the Irish bench.

Finally, in 1830, after Emancipation and the death of George IV, Plunket was appointed Lord Chancellor of Ireland. This was a concession to the Irish Protestant legal profession after

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[141] Ibid., 137.
[142] Ibid.
[143] Ibid., 140.
[144] Ibid., 146.
[145] Ibid., 148.

the insult of Hart's appointment.[146] This gain for the Irish Protestants was to be short lived, though, as a government change in 1834 led to Plunket's resignation. His replacement was Edward Burtenshaw Sugden. Sugden was a much younger man, being only three years old when Plunket was called to the Bar, and was English-born.[147] Although Sugden came from humble origins, being the son of a barber, he was an incredibly successful barrister in the English courts. Despite his ability, there could have been no more insulting replacement in the eyes of Plunket, the Irish legal profession, and Catholics. Besides being English-born, Sugden also was the one who led the charge against Plunket's appointment to the English bench and had made it as difficult as possible for Daniel O'Connell to take his seat in Parliament after Emancipation.[148] Sugden would only hold office for a short time due to another change in government at which time Plunket became Lord Chancellor again.

In 1841, Plunket was forced into retirement by the British government. The Liberal administration of the time, which was in its final days, wanted Plunket to retire so it could appoint John Campbell to the post solely as a political reward. This action once again showed the inferior status of the Irish judiciary as its top post was treated with such little respect, being nothing more than a political prize. Making the situation even worse, Campbell was Scottish-born.[149] Campbell served only a few days on the bench before there was another change in government and although Sugden did not want to go back to Ireland and the Irish bar wanted one of its own in the top post, Sugden was once again Lord Chancellor of Ireland.[150] This would be the last time an English-born man would be appointed to the post, but certainly not the end of Irish-born Protestants being slighted by the colonial government they were loyal to.

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[146] Ibid.
[147] Ibid., 134.
[148] Ibid., 149.
[149] Ibid., 156-159.
[150] Ibid., 163.

The Executive and the Judiciary—One Branch of Government

Although the English common law judiciary in Ireland should have been independent of the colonial executive, the two branches of government were fused together. The Irish people observed that "Legal devices and institutions did not operate in Ireland in a political vacuum."[151] The head of the judiciary, originally referred to as the justicar and later the Lord Chancellor, was a member of the executive. The Lord Chancellor not only was a judge, "but also a member of the Irish administration, advising the [executive] on issues of the day and not necessarily on their legal aspects alone. Unlike other judges he ceased to hold office when the government changed, indicating the mixed political and legal nature of the position."[152] When there were vacancies on the bench, protocol called for the Executive to appoint members of the executive to fill the posts. Also, the lowest judicial posts of the court system at the time of Irish Independence, the resident magistrates, were part agent of the executive and part judge. Without judicial independence:

> The Irish population failed to distinguish between the different elements of the Executive and the judiciary in Ireland. The result was to see the law in terms of political ideology and the product of the Protestant ascendancy. Belief in the virtues of common law system was difficult when the practicable results of the administration of justice in Ireland were clear for all to see.[153]

To show why the Irish did not believe the judiciary was independent, the process of appointments to the bench will be explained. This will be followed by a case study from the nineteenth century, demonstrating the role politics had on judicial appointments. The case study will also show the problematic nature of life tenure for judges. Further explanation of the role of Lord Chancellor will not be given due to the self-explanatory and obvious breach of judicial

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[151] J.F. McEldowney, "Some Aspects of Law and Policy in the Administration of Criminal Justice in Nineteenth-Century Ireland," 154.
[152] Daire Hogan, "'Vacancies for Their Friends': Judicial Appointments in Ireland, 1866-1867," *Brehons, Serjeants and Attorneys: Studies in the History of the Irish Legal Profession*, ed. Daire Hogan and W.N. Osborough (Dublin: Irish Academic Press, 1990), 214.
[153] J.F. McEldowney, "Some Aspects of Law and Policy in the Administration of Criminal Justice in Nineteenth-Century Ireland," 155.

independence in regards to this position, but the position will be mentioned in the case study. Finally, the history of the post of resident magistrate will be given. Irish Free State leaders were very cognizant of this problem and spent a great deal of time trying to correct it.

From an Executive Post to the Bench

The vast majority of those who were appointed to high judicial posts were directly promoted to the bench from positions in the executive. By the early eighteenth century, it was protocol for the British government to offer any vacant judicial post to the attorney general, solicitor general, first serjeant (also known as prime serjeant), second serjeant, and third serjeants, in that order. For example, if there was an available seat on the bench, it would first be offered to the attorney general. If he declined, the post would be offered to the solicitor general, and so on until a person accepted. There some instances, though, where the British government deviated from the traditional pecking order, but that does not change the fact that judicial posts generally went to members of the executive.

The tradition of appointing members of the executive to the bench dates back to the first century of British rule. The first legal post created in the colonial executive was that of king's serjeant, which occurred sometime between 1261 and 1265, when the King of England began to pay a lawyer to represent his interests in Ireland.[154] This post quickly became a path to the bench and between 1313 and 1377, six king serjeants were appointed to the bench.[155] In 1627, for unknown reasons, the post of second serjeant was created. In 1681, the post of third serjeant was created, not because another advocate for the crown was needed, but "purely as a consolation prize… [for its] first holder."[156] By the end of the seventeenth, "the positions of prime serjeant,

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[154] A.R. Hart, "The King's Serjeants at Law in Ireland: A Short History," *Explorations in Law and History: Irish Legal History Society Discourses, 1988-1994*, ed. W.N. Osborough (Dublin: Irish Academic Press, 1995), 50.
[155] Ibid., 51.
[156] Ibid., 54.

second and third serjeant were recognized as almost inevitably leading to a seat on the bench."[157] The positions of attorney general and solicitor general, which were created after the serjeants posts, would become more prestigious than the three serjeant positions and likewise a path to the bench.

The men appointed to legal posts in the executive were not just lawyers, they were also politicians. Many of the men who held these positions in the executive were members of Parliament. When the British government had to decide whom to appoint to these posts, "party considerations clearly played a dominant role."[158] Many politicians lobbied to be appointed to these positions, not only for their prestige, but for the lucrative financial compensation. Since appointment to one of the executive posts was more dependent on politics than legal ability and their job was to act as the advocates of the colonial rulers meant that those who sat on the bench often brought their political bias to the bench and were not the most able legal minds.

Case Study—Replacing an Elderly Judge

In August 1885, Thomas Lefroy, a Conservative and the chief justice in the Irish court system, mispronounced a sentence of death in a murder trial. At the time, the chief justice was 89 years old and "certain reports of infirmity and feebleness had been brought up."[159] By this time, judges on the high court had life tenure, which did make them more independent since they no longer served at the pleasure of the king. There were disadvantages of life tenure, though, as elderly judges could not be removed if they began to physically or mentally deteriorate due to old age. Lefroy would not retire because John Russell, a Liberal, was prime minister and would be the one to select who would take Lefroy's seat on the bench. Lefroy was determined to stay on until a Conservative became prime minister, which would keep the seat in his party's hands.

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[157] Ibid., 55.
[158] Ibid., 57.
[159] Daire Hogan, "'Vacancies for Their Friends': Judicial Appointments in Ireland, 1866-1867," 211.

In April 1866, Lefroy's mistake became a political issue and all but entirely eliminated the distinction between legal affairs and party politics. In the House of Lords, the Marquess of Clanricarde, a Liberal, questioned whether Lefroy, then 90, should continue to sit on the bench due to mistakes caused by his old age. By early May, members of the House of Commons also began to question whether Lefroy should remain on the bench. Eventually, this spiraled into a full blown debate whether a current judge was fit for his post. Liberal politicians, anxious to get Lefroy off the bench so they could choose his replacement, said Lefroy "showed 'notorious incompetence', 'imbecility', 'a hopeless confusion of intellect' and 'the utter breakdown of his mental powers.'"[160] Not surprisingly, Conservatives who were hoping Lefroy could hold on until they took power, called the chief justice "the best judge we have."[161] This was an embarrassing, but not unprecedented, moment in the history of the Irish judiciary as the British legislature was publicly debating whether a judge was competent while the judge held on solely for political reasons although his best days were clearly behind him.

Only a few weeks after the debates over Lefroy's competence, in June 1866, Russell's Liberal Government collapsed. By the end of the month Lord Derby, a Conservative, was asked by the Queen to be the next prime minister. After Derby took office, the nonagenarian Lefroy stepped down. With Lefroy's resignation from the position of chief justice and the opening of the lord chancellor's position due to the change in government, Derby could fill two high level posts on the bench with loyal Conservative party members. Although many political leaders would envy the opportunity Derby had, the process of filling these two posts became a political fiasco.

Lord Naas, Derby's chief advisor on Irish affairs, recommended that Abraham Brewster be appointed as Lord Chancellor. Brewster had previously served as solicitor general and

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[160] Ibid., 212.
[161] Ibid.

attorney general of Ireland. He was a King's Counsel and was a respected member of the legal community. While Brewster was a Conservative, since the split of the party in 1846 he was known to support Liberals. When it became known that Brewster was being considered for the post, many Conservative MPs told Derby that they would never serve under Brewster and that his appointment, in the words of Conservative MP James Whiteside, "would be fatal to the Conservative party in Ireland."[162]At the same time, Derby was receiving requests from other Conservative politicians asking to be appointed to one of the vacant posts. For example, Francis Macdonagh, former MP for Sligo, asked to be appointed as Lord Chancellor because of "my position at the bar and my services to the Conservative party."[163] Clearly, all who wanted the post knew that politics were part of Derby's consideration. The political mess these vacancies caused led to a delay in filling the posts as Derby informed Queen Victoria that "'mutual personal jealousies' among the candidates for office [had] delayed his proposals for Irish judicial appointments."[164]

The politically expedient solution Derby came up with did not benefit the Irish people, just the unity of his political party. Derby still wanted to appoint Brewster, but since this was not possible for political reasons he decided to appoint Francis Blackburne to hold the post until the political climate allowed for Brewster to be appointed. Blackburne was a close ally of Derby and a respected member of the Conservative Party. He had previously held the posts of Attorney General and Lord Chancellor in Ireland, so he had the credentials for the post. Blackburne, though, was 83 years old at the time and in 1858 had rejected an offer to be Lord Chancellor due to his poor health.[165] His appointment was debated in both houses of the British legislature,

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[162] Ibid., 217.
[163] Ibid., 215.
[164] Ibid., 219.
[165] Ibid., 220.

where politicians were once again questioning a judge's capability of fulfilling his role. Derby's replacement for Lefroy's post was even more controversial. He selected Joseph Napier who was one of the politicians to oppose Brewster's appointment, had briefly served as Lord Chancellor of Ireland, and was a staunch Conservative.[166] Napier, while only in his early sixties, "had long suffered from a degree of deafness."[167] Napier admitted that he would not hear everything said in court, but claimed that hearing arguments was not significant in the court he would be presiding over. Brewster and his allies criticized the appointment until Derby was forced to put enough pressure on Napier to resign. This shows how judges were not independent of politics or the British executive even once they had life tenure in a judicial post. To replace Napier, over significant opposition, Derby appointed Brewster to the post.[168]

As if filling the two vacant posts in the judiciary in 1866 did not prove to be troublesome enough for Derby, his strife that year was not over. Another high level post in the Irish judiciary, master of the rolls, was vacated by the judge's death. John Edward Walsh, the Attorney General for Ireland wrote to Derby asking to be appointed to the vacant seat. Although Walsh had only held the post for a few weeks, Derby recognized his claim to the seat as a result of his legal position in the executive and appointed him to the bench.[169] While this saga would continue into 1867 as the elderly Blackburne's health declined, enough has been said to demonstrate how British politics and the Irish bench were intertwined.

"Removable" Magistrates

The position of magistrate was the lowest judicial post in the Irish judiciary. Magistrates were spread throughout Ireland and dealt with cases involving small amounts of money and

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[166] Ibid., 212, 216-217.
[167] Ibid., 221.
[168] Ibid., 222.
[169] Ibid., 225.

criminal offenses that would require minimal prison time if the accused was convicted. The magisterial role was originally filled by men who held the title Justice of the Peace (JP). Those who were appointed Justices of the Peace rarely had any legal training or qualifications, but were appointed due to their place in society. Often, country gentlemen and clergy from the Church of Ireland were made JPs. They commanded even less respect from the Irish people than the judges in high judicial posts because they "were often lacking in any sense of duty or concern for the public good. It was suspected that they were motivated by self-interest and in hope of benefiting financially from their appointment."[170] Members from both major parties in Britain believed that the JPs were inactive, inefficient, and would abandon their posts in times of trouble when they were most needed.[171]

To address this problem, the British government created the post of Resident Magistrate (RM). Although the term was not officially used until 1853, the position dates back to 1814 when the Lord Lieutenant of Ireland was given the power to appoint magistrates during times of trouble.[172] RMs were appointed and could be removed at any time by the colonial executive. Unlike the JP position, RMs were responsible for much more than adjudicating over minor cases. RMs were also expected to accompany police to political meetings or other public gatherings as well as send reports to the colonial executive describing the state of their assigned jurisdiction. Thus, the RMs "formed part of the intelligence network," once again demonstrating the lack of separation between the executive and judicial branches of government. [173]

Those who held the post of Resident Magistrate were often no more qualified than the JPs they were replacing. Before 1836, RMs were required to be barristers, but afterwards there

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[170] Penny Bonsall, *The Irish RMs: The Resident Magistrates in the British Administration of Ireland* (Dublin: Four Courts Press, 1997), 11.
[171] Ibid., 11-12,
[172] Ibid., 12.
[173] Ibid., 13.

was no such stipulation.[174] Like JPs, many of the RMs were from the upper echelon of society. Although they were appointed "officially on the basis of appropriate legal or administrative experience… there were recurring complaints that the resident magistracy was staffed by relatives and friends of men of influence, regardless of individual competence or suitability."[175] RMs were often impoverished aristocrats whose income was not enough to support their style of living who wanted the salary to supplement their current finances.[176]

An example of the type of person appointed to the post of Resident Magistrate is Christopher Lynch-Robinson, who was one of the last men to be appointed to the position. His father was a prominent political figure being Privy Councilor and head of a Local Government Board. Lynch-Robinson was attracted to the position of Resident Magistrate because the salary was "good for those days," and he did not like his position on a Local Government Board because the work was "fearfully technical, and required a lot of legal knowledge and training."[177] Although it seems strange that someone with little legal knowledge would seek a judgeship, "A lack of legal expertise was, of course, no bar to becoming a resident magistrate."[178]

The performance of the RMs in their judicial functions was insulting to the English common law tradition as they were "often corrupt, partisan and incompetent."[179] Resident Magistrates received criticism from across the political spectrum as they were "Criticised by some Unionists, landowners and Conservatives as inefficient and too lenient, they were castigated in turn by Nationalists, Liberals, and other opponents of coercion in Ireland for being

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[174] Ibid., 16.
[175] Ibid.
[176] Ibid., 22.
[177] Ibid., 63.
[178] Ibid.
[179] J.F. McEldowney, "Some Aspects of Law and Policy in the Administration of Criminal Justice in Nineteenth-Century Ireland," 132.

tools of oppression."[180] One example of the political bias of those who held the post occurred in 1902, when 50 to 60 people, including several Irish Members of Parliament, were convicted by RMs. One of the RMs who convicted and sentenced an MP was Alfred Harrell who was the son of Sir David Harrell, the Under-Secretary for Ireland who had initiated the prosecution.[181] Since these men were under the control of the Lord Lieutenant stationed in Dublin Castle, the words of Chief Secretary for Ireland John Morely come to mind. He said "is not the castle after all the best machine that has ever been invented for governing a country against its will?"[182] Such incidents made a mockery of the idea of impartial justice and led the vast majority of Irish people to deride the post.

The aspect of the post that attracted the most ire from Irish Free State leaders as well as Nationalists since the creation of the post was the tenure of a Resident Magistrate. Since RMs "served 'at the pleasure' of the Lord Lieutenant and were potentially subject to instant dismissal… [their] independence was, of course, always disputed."[183] Instead of calling RMs Resident Magistrates, they "were mockingly known among nationalists as the 'Removable Magistrates.'"[184] Unsurprisingly, this post would be eliminated by the Free State Government after Irish independence.

Overcentralization of the Irish Judiciary

Ireland was an agricultural country in which the vast majority of people lived in the countryside, where travelling to the capital city of Dublin was neither affordable nor convenient. Yet the Irish judiciary had become so centralized in Dublin that it led "to the absence of a

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[180] Penny Bonsall, *The Irish RMs: The Resident Magistrates in the British Administration of Ireland*, 31.
[181] Ibid., 71-72.
[182] J.F. McEldowney, "Some Aspects of Law and Policy in the Administration of Criminal Justice in Nineteenth-Century Ireland," 123.
[183] Penny Bonsall, *The Irish RMs: The Resident Magistrates in the British Administration of Ireland*, 40.
[184] Ibid.

general system of local civil jurisdiction."[185] With most of the court system in Dublin, there were many cases where the cost of going to Dublin and pressing one's case would be greater than the amount the litigant was seeking. This arrangement was not the aim of an English common law judiciary because "The wisdom of Common law was that men should not be troubled for suits of small value in the King's Courts [located in Dublin], but that they should be heard and determined in the country with small charge and little or no travel and loss of time."[186]

The British response to the overcentalization of the courts was to implement assize courts, where judges from the High Court in Dublin would travel to each county in Ireland to hear cases. This system left much to be desired though as these assize courts were "restricted to one city or town in each county, met briefly only twice a year (and then to hear many other types of cases as well), and from which there was an appeal process [located in Dublin] open to abuse."[187] A British created commission found in 1799 these courts, due to the overwhelming amount of business that had to be handled in a short period of time, were "necessarily productive of hurry, irregularity, and consequent confusion, and the administration of justice thus impeded suffered in its effect as well as dignity."[188]

Other efforts by the British government to provide justice at a more local level proved to be as unsuccessful as the assize courts. At the most local level there were the previously discussed JPs and the RMs. Since these posts have already been discussed, only one additional point needs to be made. The jurisdictional powers of the JPs and RMs were so limited that cases of any significance could not be heard at the magisterial level. The British government also created the jurisdictional level of County Courts, presided over by County Court Judges. This

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[185] D.S. Greer, "The Development of Civil Bill Procedure in Ireland," *The Common Law Tradition: Essays in Irish Legal History*, ed. J.F. McEldowney and Paul O'Higgins (Dublin: Irish Academic Press, 1990), 28.
[186] Ibid., 29.
[187] Ibid., 55.
[188] Ibid., 54.

position had only slightly more jurisdictional power than RMs and JPs. It was an addition that happened in the final decades of British rule and had such little impact on decentralizing the administration of justice that it does not merit further explanation.

Conclusion

At the time of Irish independence in 1922, Free State leaders were left in a difficult position. They inherited the court system the British had created, which had been derided as a colonial judiciary for centuries. Despite the failures of the Irish court system, the English common law tradition was a brilliant and well developed school of legal thought. The way it was implemented in England itself and had served as a model for the judiciaries of other democracies such as the United States of America and Canada, demonstrated that English common law worked.

What were Irish Free State leaders supposed to do? They could not discard the English common law tradition, especially since that was the system all Irish legal professionals were accustomed to. Yet, these politicians could not keep the British created courts they themselves and their constituents had criticized before independence. There was no easy answer to this question. What made this conundrum even more difficult was that before independence, the revolutionary Irish government created a successful and popular alternative to the colonial judiciary—the Dáil Courts.

Chapter 2: A Revolutionary Judiciary

The great Irish poet and rebel, Padraig Pearse, said at his court martial in 1916 that sentenced him to death, "You cannot conquer Ireland; you cannot extinguish the Irish passion for freedom; if our deed has not been sufficient to win freedom then our children will win it with a better deed."[1] Pearse's statement was not without historical evidence nor foresight. Despite centuries of colonial rule, the majority of Irish people were not willing to become accustomed or apathetic towards foreign occupation. There were several unsuccessful violent rebellions against British military and political forces during Ireland's colonial years, including the one in 1916 Pearse was executed for.

While Irishmen struggled for freedom generation after generation, it was not won by violence alone. As historian Emmet Larkin controversially argued, "by 1886 an Irish state was not merely virtual—as a generation of Fenians had sworn—but 'real'."[2] While the establishment of the Irish Free State in 1922 created *de jure* self-governance for southern Ireland, the colony had already achieved *de facto* independence years earlier. Starting in the nineteenth century, Irish leaders, from what Larkin called "the party of Constitution," used non-violent methods to assert control over Ireland.[3] By replacing official British government institutions with Irish alternatives, the Irish might govern themselves even if Britain nominally ruled Ireland.

As discussed in the previous chapter, since the Irish people viewed the British-created courts as a tool of colonialism, revolutionary Irish leaders put forward alternatives to English common law. Starting in the mid-eighteenth century, with Whiteboyism courts, Irish leaders had created alternative courts for the Irish people to go to. Eventually, the British courts in Ireland

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[1] Max Caulfield, *The Easter Rebellion* (New York: Holt, Rinehart, and Winston, 1963), 361.
[2] Stewart J. Brown and David W. Miller, "Introduction," *Piety and Power in Ireland, 1760-1960: Essays in Honour of Emmet Larkin*, ed. Stewart J. Brown and David W. Miller (Belfast: The Institute of Irish Studies, 2000), 3.
[3] Ibid.

had been effectively replaced by a judiciary known as the Dáil Courts, which have also been referred to as Sinn Féin Courts, I.R.A. Courts, and Republican Courts. The Dáil Courts, which began in 1919, proved to be one of the most effective ways the Irish Nationalist movement achieved its aims and will be the focus of this chapter.

In one of the larger works on Irish legal history, *Studies in Irish Legal History*, historian W.N. Osborough gives an important critique of the Dáil Courts. He writes that

> Apart from serving as a training ground for future judges of the Free State, the only other legacy of the Dáil Courts was the creation in the Free State in 1924 of the circuit court jurisdiction. So limited an impact raises the question of the precise significance of the courts in the legal history of the period. It would seem that they are more important to political history.[4]

This thesis accepts two of the points Osborough makes in the preceding quotation. First, the Dáil Courts did in fact provide useful experience to some of the men who would later serve as judges on the bench of the Irish Free State. Secondly, far more importantly, and greatly understated by Osborough, the Dáil Courts provided a model of a decentralized court system that was more popular and effective than the British's Dublin based judiciary. The circuit court jurisdictional level was a key component of the Dáil Courts and later proved to be one of the major innovations of the Irish Free State's court system.

This thesis rejects his claim, though, that the Dáil Courts had a limited impact on legal history of the time. In terms of the development of jurisprudence and case law in Ireland, it is true that the Dáil Courts had almost no effect. But as discussed in the previous chapter, most of the Irish population was not concerned about case law, but the colonial and foreign nature of the judiciary. Also, Osborough is making a distinction between legal affairs and political affairs. But as demonstrated in the previous chapter, these are not separate fields as politics inevitability shapes the judiciary.

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[4] W.N. Osborough, *Studies in Irish Legal History* (Dublin: Four Courts Press, 1999), 271.

This thesis, having already argued that the British created courts were a key component of implementing colonial rule, supports the view of scholar Heather Laird who argues that "throughout the nineteenth and early twentieth centuries the concept of an alternative system of law capable of supplanting the despised official legal system was a fundamental component of Irish anti-colonial resistance."[5] The Dáil Courts, as well as their predecessors, showed the Irish could adjudicate over their own society and that Irish independence would surely lead to the replacement of the British created system in one form or another. Thus, the Dáil Courts' impact on Irish legal history was enormous.

Alternative Courts Predeceasing the Dáil Courts

While the Dáil Courts were a key component of the effort that led to the creation of the Irish Free State and had an impact on Irish legal history, the idea of having alternative courts was not a new idea when they were created. There is evidence "of alternative courts and other subversive legal practices," that were "a fundamental component of Irish agrarian agitation since at least Whiteboyism in the 1760's."[6] Later, in the 1840's, Daniel O'Connell "had urged the setting-up of secessionist courts during the Repeal Agitation."[7] The Ribbon Society, which was an Irish Catholic response to Orangemen and worked towards preventing the evictions of poor farmers, also established its own courts.[8] The rationalization behind the creation of such courts was straightforward—the British system was seen as unfair and did not fit the needs of the Irish people; therefore, the Irish would create their own system. While these courts had little impact on the course of history, the idea of creating a subversive judiciary would prove to be significant.

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[5] Heather Laird, *Subversive Law in Ireland, 1879-1920* (Dublin: Four Courts Press, 2005), 127.
[6] Ibid., 25; Whiteboyism was a secret society movement in Ireland that used violent methods to protect the rights of poor Catholic farmers. The term comes from the white clothing members used in their violent raids.
[7] Mary Kotsonouris, "The Courts of Dáil Éireann," *The Creation of the Dail: A Volume of Essays from the Thomas Davis Lectures*, ed. Brian Farrell (Dublin: Blackwater Press, 1994), 91.
[8] Heather Laird, *Subversive Law in Ireland, 1879-1920*, 25-26.

The British were not oblivious to the alternative legal systems, in fact they were very concerned about what these illegal courts represented. One British official who was especially concerned about subversive courts was George Campbell, a Scotsman who had served in several British colonies. He believed that the way the official British courts "whose legal frameworks did not always correspond to the realities of Irish life," in fact weakened colonial rule as the Irish created their own courts as a response.[9] Campbell believed that the situation the British found themselves in was a direct result of their attempt to entirely eliminate Brehon law, which represented the Irish people's sense of justice, and entirely replace it with England's view of legality.[10]

Could the ideas behind the Brehon judiciary still be in the minds of the Irish people in the nineteenth century, generations after it had been suppressed, and have led to the creation of alternative courts? While this idea may seem farfetched, the British government did not think so and in the mid-nineteenth century it funded studies of the ancient Irish judicial system it had eradicated centuries ago to see if there was a connection between Brehon law and subversive law in nineteenth century Ireland. These studies found that "in Ireland was, perhaps, less a tangible system of law directly derived from the Brehon laws, than a space outside official law that this legal system had once inhabited. Throughout the nineteenth and early twentieth centuries, this space was filled by various alternative courts."[11] While the British may have found where the support for subversive judiciaries was coming from, they could do little to stop them.

The final and most effective subversive judiciary system before the creation of the Dáil Courts was the court system created by the Irish National Land League. This organization, like some of the previously mentioned movements, was founded in 1887 to change the way people

[9] Ibid., 21.
[10] Ibid.
[11] Ibid., 23.

owned property in Ireland by seeking to eliminate landlords and have the poor Irish farmers who actually worked the land have ownership of it. The group was under the leadership of some of the most prominent Nationalist Irish leaders of the time, such as Charles Stewart Parnell, Andrew Kettle, Thomas Brennan, and Michael Davitt. While the land league used many tactics to achieve its aims, including violence, its most effective strategy was the establishment of alternatives to British institutions. Anna Parnell, Charles Stewart Parnell's younger sister, believed that by providing institutions in the 1880's, such as courts, the Land League was able to reduce the British's power over the people. She claimed that after establishing alternative institutions the Land League became the "government *de facto*."[12]

How could the Land League, a group with little financial or military resources when compared to the official power they were challenging, usurp the British Empire in Ireland? It did so by getting the Irish to boycott British institutions. Clifford Lloyd, a British official in Ireland, wrote that "people no more sought redress at the magistrate's court, but applied to that of the Land League for the adjustment of their disputes and the redress of their grievances, real and imaginary."[13] Those who used the British created courts would "be publicly denounced as transgressors and dealt with as criminals under the 'unwritten law', while it was almost impossible to punish those who defied the official law under the ordinary administration of that law."[14]

Since the Land League had no prison system, it reverted to a different form of punishment for those who were considered criminals or supporters of the British—boycott. Charles Stewart Parnell explained the way boycotting an individual worked, saying that when someone broke the Land League's laws

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[12] Ibid., 38.
[13] Ibid., 26.
[14] Ibid., 26-27.

> you must show him on the roadside when you meet him, you must show him in the streets of the town, you must show him at the shop-counter, you must show him in the fair and at the marketplace, and even in the house of worship, by leaving him severely alone, by putting him into a sort of moral Coventry, by isolating him from the rest of his kind as if he were a leper of old, you must show him your detestation of the crime he has committed, and you may depend upon it if the population of Ireland carry on this doctrine that there will be no man so full of avarice, so lost to shame, as to dare the public opinion of all right-thinking men within the country and to transgress your unwritten code of laws.[15]

This method was accepted by enough Irish people that it proved to be extremely effective. The British, recognizing its impact wanted to prohibit the practice, but both Liberal and Conservative governments could not find a way to do so. The British accepted that everyone had a right to determine who they associated with. Even as laws were passed to prevent communal boycotting, the British could not find a way to distinguish between the act of boycotting by an individual and the community.[16]

The Land League's non-violent method of boycotting "was effectively paralyzing the judicial process in many parts of the country."[17] Many Irish people brought their cases to the Land League Courts and when cases were brought to British created courts, witnesses would often not come to the trial to give needed evidence. The official courts with that backing of police and the military were able to remain powerful, but "The refusal of the majority of the Irish populace to participate in British law proceedings was to demonstrate the extent to which the successful administration of 'ordinary law' requires the cooperation of the people."[18] With a subversive judiciary having so much power, Larkin's thesis is supported, as there is a celar distinction between a "*de jure* and a *de facto* government: an English administration that was the rightful yet ineffectual, government of Ireland and a rival authority that may not have right on its

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[15] Ibid., 29-30.
[16] Ibid., 34.
[17] Ibid., 40.
[18] Ibid., 41.

side, but was effectively in charge in many parts of the country."[19] The courts of the Land League, and later the Irish National League which succeeded it, were almost entirely gone by the turn of the twentieth century because they had largely achieved their goals in terms of property ownership. Nevertheless, it showed that a popular alternative system whose only method of enforcement was boycotting, could replace the courts backed by the might and resources of the British Empire—this would prove to be an important lesson.

Rise of Sinn Féin

During World War I, an organization known as Sinn Féin became the most powerful political movement in Ireland and was finally able to end British rule over most of it. Sinn Féin had been founded in 1905 by Arthur Griffith and advocated for a "complete parliamentary separation" between Britain and Ireland, but the two nations would still have the same monarch.[20] Sinn Féin would eventually take the position that there should be a complete separation between Ireland and Britain. In 1918, the party ran a nation wide campaign in the parliamentary elections, which challenged the Irish Parliamentary Party that had been the dominant force in Irish politics for decades. Although many of Sinn Féin leaders were imprisoned on bogus charges and "there were never elections fought under so many difficulties the result was astonishing even to experienced observers of Irish politics… Almost 75 per cent. of the representation of all Ireland was in the hands of [Sinn Féin]."[21] This party refused to take its seats in the British House of Commons and instead formed its own government led by President Eamon de Valera. The party would lead the Irish people during their fight for freedom and although they could not defeat the British Empire on the battlefield alone, by using both

[19] Ibid., 37.
[20] David Hogan, "Dail Éireann," *Parliamentary Affairs* 8 (1954-1955): 216.
[21] Ibid., 219.

military force and boycotting methods used by previous Nationalist groups, Sinn Féin brought the British government to the negotiating table.

Sinn Féin's Vision of Subversive Courts

Arthur Griffith had hoped, even before his organization gained significant power, to take away the power of the official British courts by creating Irish courts of arbitration. In fact, he was so passionate about the power these arbitration courts would have, he was the "onlie-begetter of the theory that arbitration could and would replace the hierarchy of courts and adversarial trials whose fulcrum was the Bench and Bar."[22] In his 1907 book, *Resurrection of Hungary*, Griffith wrote

> The prestige, the dignity, the strength of such a national legal movement would confer upon a movement for national independence is obvious… but in addition, it would deprive the corrupt Bar of Ireland of much of its incentives for corruption, save the pockets of our people, and materially assist in bringing about the spirit of brotherhood, of national oneness in Ireland… I say to my countrymen as the 'Nation' said to them in 1843, 'You have it in your power to resume popular courts and to fix laws and it is your duty to do so… It is the duty of every Irishman to himself, to his family, to his neighbor, his boundless duty to his country to carry every legal dispute to the arbitrators, and obey the decision.[23]

It is clear by Griffith's words that the idea of subversive law was not a new innovation put forward by Sinn Féin, but based on the success and ideals of previous alternative courts.

After Sinn Féin rose to power in 1918, the movement still supported the idea of arbitration courts, but did not have the same radical vision as Griffith did. The revolutionary legislative body the party formed, the Dáil Éireann, supported Griffith's assessment that the British system was corrupt. In a Dáil floor speech, Minister for Industry Eoin MacNeill, said "For nearly four centuries now Dublin Castle has been the forcing house of such a growth of

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[22] Mary Kotsonouris, "The Courts of Dáil Éireann," 91.
[23] Arthur Griffith, *The Resurrection of Hungary* (Dublin, 1907) 156-157, 161-163; quoted in David Foxton, *Revolutionary Lawyers: Sinn Fein and Crown Courts in Ireland and Britain, 1916-1923* (Dublin: Four Courts Press, 2008), 188.

legal corruption, chicanery, systematic perjury, judicial murder, confiscation, and oppression through forms of law as cannot be paralleled in the history of any other country."[24]

Despite support for arbitration courts and condemnation for the official courts, the idea of having alternative courts was "not intended as a complete replacement for the existing structure of Crown courts. Dáil policy was to make use of available institutions and procedures where no sacrifice of national scruples were involved."[25] The revolutionary government proclaimed it would create courts of arbitration and a committee, chaired by Arthur Griffith in his capacity of Minister of Home Affairs, was created in 1919 to create a plan to make this a reality.[26] While these courts had great potential for legitimizing the power of the revolutionary government, for a year the Dáil "fumbled about with their committees and reports," without implementing a system.[27]

Grassroots Justice

While the Sinn Féin government in Dublin failed to promptly establish subversive courts, "there occurred a sea-change in the administration of justice in Ireland which was a source of fascination and bewilderment to international observers."[28] The Irish people in the rural west of Ireland started their own arbitration courts, thus the Dáil Courts were not actually created by the Dáil. Instead, *ad hoc* tribunals were established, starting in County Clare, to settle property disputes, as were the Whiteboy, Ribbon, and Land League courts that preceded them. [29] These tribunals would be fully brought under the Dáil's control on August 9, 1921, when Minister for

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[24] Dáil Éireann, *Dáil Debates—Faisneisi Ar Stad Na hEireann*, May 9, 1919, http://www.oireachtas-debates.gov.ie/D/DT/D.F.O.191905090004.html.
[25] W.N. Osborough, *Studies in Irish Legal History*, 271.
[26] Mary Kotsonouris, "The Courts of Dáil Éireann," 92.
[27] Ibid.
[28] Ibid.
[29] Mary Kotsonouris, "Revolutionary Justice—The Dáil Éireann Courts," *History Ireland* 2, no. 3 (Autumn 1994): 33.

Home Affairs Austin Stack sent instructions to all the grassroots courts declaring "This is the golden hour."[30]

At first, these subversive courts, in line with the policy of using existing British institutions, were only suppose to handle land disputes in the rural areas, which were not served well by the centralized British system. Nevertheless, there was such a popular demand to replace the British courts altogether that the Dáil expanded the jurisdictional powers of the Dáil Courts to handle all matters.[31] While these courts came under the Dáil's control, their grassroots origins show how great the demand was for an alternative to the British system.

Structure of the Dáil Courts

Unlike the colonial court system, the Dáil Courts were decentralized, providing justice to the rural population of Ireland. The locally based component of the Dáil Courts were comprised of Parish Courts and District Courts, the latter being the more powerful of the two. The Parish Courts were far more numerous than the British magisterial courts they replaced, with the aim of having one in every Roman Catholic parish. Instead of the often incompetent and socially distant JPs and RMs, each court had three judges on it that were elected by a convention of Nationalist political parties, the Irish Volunteers, and trade councils. There was no requirement for these judges to have any legal training and the president of each of the Parish Courts, "was more often than not the local Catholic curate."[32] The Dáil Courts alternative to the ineffective British County Courts was the jurisdictional level of District Court. Besides dealing with civil cases of up to £100, these courts also heard appeals of decisions made by Parish Courts. Each District Court had five judges on the bench, who were elected by the judges of the Parish Courts that it heard

[30] Ibid., 32.
[31] Ibid., 33-34.
[32] Mary Kotsonouris, *Retreat from Revolution: The Dáil Courts, 1920-24* (Dublin: Irish Academic Press, 1994), 31.

appeals from. District Court judges also were not required to have any legal training, although some were solicitors.[33]

These lower level courts were a significant improvement and innovation when compared to the British judiciary. In the effort to decentralize, "Whatever its faults—and there were many—the parish court provided cheap and immediate access to justice."[34] While these lower level courts were not flawless, neither were the British institutions they were replacing. An important distinction between the official and subversive judiciaries, though, was that the colonial power did not listen to the Irish people's demand for change, while the Dáil Courts were "'consumer driven' in a way no court could possibly be today."[35] Since the revolutionary government wanted people to choose its courts over the British ones, it made a concerted effort to listen to complaints about the system. Minister for Home Affairs Austin Stack launched many investigations after hearing complaints about the courts to make sure that the courts originally created by the people were serving them adequately under the revolutionary government's administration.[36]

The upper level courts of the Dáil Courts also accommodated the agricultural colony better than the official courts. The highest level court in the alternative system was the Supreme Court, which was based in Dublin. According to the Dáil's directive establishing the courts, judges on this court were appointed by the revolutionary government, had to be barristers, and there needed to be at least three Supreme Court judges. In the subversive judiciary, "The novel element, judicially speaking, was the introduction of a circuit tier to the District Court. Each was to have three 'Circuit' sittings a year which would presided over by a professional judge and

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[33] Ibid.
[34] Mary Kotsonouris, "Revolutionary Justice—The Dáil Éireann Courts," 33.
[35] Ibid.
[36] Ibid.

would have unlimited jurisdiction both in civil and criminal cases."[37] The success of the Circuit Courts would heavily influence Irish Free State leaders while they were creating a new judicial system after Irish independence. With the Circuit Courts, most matters could theoretically be handled on a more local level instead of having to go to a British administered court in Dublin. The Dáil ordered that there be at least four Circuit Court judges and that they too would have to be barristers.

Personnel of the Subversive Courts

The judges of the Parish and District Courts made up the vast majority of the total Dáil Courts' bench. While few of these judges had any legal training, this was not a radical departure from the British system since most Resident Magistrates also had no legal education. Unlike the RMs, though, the judges of the lower Dáil Courts "were representative of the local people, and, therefore, answerable to them in a way the Resident Magistrate could never be. It was considered a great honor to be elected, and for the most part, they appeared to have taken their duties seriously."[38] With little financial funding for the courts, the judges of the Parish and District Courts served out of a sense of patriotism and responsibility, instead of for financial reward as the magistrates did. Since these revolutionary judges were respected members of the community and people perceived their motives as noble, they inspired confidence in the fledgling court system.

While the Dáil Courts had the support of the vast majority of Irish people and were in almost every area of Ireland, the Dáil government had problems recruiting trained legal personnel to join the upper level of the subversive system.[39] It was difficult to get barristers and

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[37] Mary Kotsonouris, *Retreat from Revolution: The Dáil Courts, 1920-24*, 30.
[38] Mary Kotsonouris, "Revolutionary Justice—The Dáil Éireann Courts," 33.
[39] David Foxton, *Revolutionary Lawyers: Sinn Fein and Crown Courts in Ireland and Britain, 1916-1923*, 189; The Dáil Courts were operating everywhere in Ireland except in County Antrim and the city of Belfast.

solicitors to leave their lucrative practices in the official system to come join the Dáil Courts, which dealt mainly with poor people in rural Ireland. Furthermore, the Bar Council of Ireland, passed a resolution in June 1920, stating that barristers who became involved with the Dáil Courts were guilty of professional misconduct.[40] The Law Society, which was the professional organization of solicitors, took a different view believing that it was proper for its members to protect their clients' interests regardless of what judiciary system they dealt with.[41]

The stance of barristers led to many of them being without any business as the Irish people began to utilize the subversive system instead of the official one. A comical scene that illustrates the effect the Dáil Courts had on the business of the legal profession was when a judge presided over a colonial court session in County Mayo and "sat with solicitors, counsel, court officials and police assembled before him—and no one else!"[42] As each case was called, a legal professional rose to tell the court that the case had been settled or transferred to another jurisdiction, which meant it had been sent to a Dáil Court, although no one would explicitly say so.

Without barristers, though, the Dáil Courts had problems filling the required seven judicial posts on the Circuit Court and Supreme Court. Highly respected Nationalist barristers, such as T.M. Healy and Hugh Kennedy, chose to continue protecting their cause's interests in the official court system instead of joining the alternative one. The subversive law system was only able to muster four barristers to serve as judges, two for the Supreme Court and two for the Circuit Court. James Creed Meredith, who was a King's Counsel and a distinguished scholar, was appointed to the Supreme Court and served as its president. Joining him was Arthur Cleary,

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[40] Mary Kotsonouris, *Retreat from Revolution: The Dáil Courts, 1920-24*, 33.
[41] Ibid.
[42] Ibid.

a law professor at University College Dublin.[43] Diarmuid Crowley and Cahir Davitt, both men being far less distinguished than Meredith and Cleary, were appointed to the Circuit Court. Crowley, who was just as old as the Supreme Court judges, was still relatively inexperienced when he was appointed to the Circuit bench. He had originally been a customs official, but retired early and started a second career as a barrister in 1916.[44] Davitt would prove to be the most interesting figure of the four. He was considerably younger than the other three as he was only 26 when his former law professor, Arthur Cleary, asked him to become a Circuit Court Judge in the subversive system.[45] Davitt was more than willing to become a judge as his successful early career in the official courts had been hindered by business going to the Dáil Courts. Also, it was a perfect opportunity for the son of the Land League's Michael Davitt to continue his Nationalist family's tradition of providing alternative institutions.[46] Besides acting as a Circuit Court Judge, Davitt would also sit on the Supreme Court so it would have the required minimum of three judges.

Enforcement Power

Like its Irish subversive law predecessors, the revolutionary government did not have a police force or prison system, which left it without the means the British judiciary used to enforce its decisions. Any judiciary would be almost entirely ineffective without a mechanism to enforce rulings, so the Dáil government used the resources available to it. Since the revolutionary government did not have a police force, its paramilitary force took on police responsibilities. The Irish Volunteers and later the Irish Republican Army (I.R.A.) "took on themselves the role of village constable, 'arresting' persons who breached the peace or stole property: they even

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[43] Ibid., 31.
[44] Mary Kotsonouris, *The Winding-up of the Dáil Courts, 1922-1925: An Obvious Duty* (Dublin: Four Courts Press, 2004), 248.
[45] Mary Kotsonouris, *Retreat from Revolution: The Dáil Courts, 1920-24*, 32.
[46] Mary Kotsonouris, "The Courts of Dáil Éireann," 94.

investigated crimes which were reported to them."[47] While the Volunteers were not as well organized and did not have the same resources as the British police and military force in Ireland, they had their own advantages—knowledge of their own communities and the support of the people.

To make up for the lack of a prison system, the Dáil Courts used a tried and true method of previous Irish subversive law systems, boycotting the official system, as well as banishing those convicted of certain criminal offenses or for disobeying the orders of the Dáil Courts. For less serious crimes, a person would be banished from their town or county, having to go to a different part of Ireland, for varying periods of time. This would leave the convicted without their family, friends, and resources. For more serious offenders, the convicted would be banished from Ireland and sent to England. The British government was especially concerned over the latter practice as Members of Parliament objected to the "'use of England as a sort of convict settlement for men deported by Sinn Féin.' It was felt that the Irish Attorney General did not intervene because it suited him to have such unsavory persons out of his jurisdiction."[48] It is interesting to see how England opposed criminals from its colonies being deported to its land after deporting so many of its own convicts to British colonies.

As the primary form of punishment the Dáil Courts were relying on to enforce its rulings, banishment "had the advantage of being severe, inexpensive and primitive."[49] Yet like the method of boycotting, banishment could not just be enforced by a police force. Banishment required the broad support of the Irish people and it did have such a backing. An example of two men who were banished in 1920 demonstrates how much support the Dáil Courts and their form of punishment had. These men had previously been convicted by a Dáil Court for demolishing a

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[47] Mary Kotsonouris, "Revolutionary Justice—The Dáil Éireann Courts," 33.
[48] Mary Kotsonouris, *Retreat from Revolution: The Dáil Courts, 1920-24*, 21.
[49] Ibid.

wall and their sentence was to rebuild it. They disobeyed the court and as a result were banished for three weeks to an island off the coast of County Clare. When British police heard of this, they travelled by boat to rescue the men. But to the surprise of the British, the two men refused assistance and the police "were pelted with stones and abused. The castaways proudly declared that they were citizens of the Irish Republic and the police had no right to interfere!"[50] With such strong public support, even from those convicted, the Dáil Courts made themselves at the very least the co-*de facto* judicial system in Ireland.

The Dáil Courts' Jurisprudence

If there was any single aspect of the Dáil Courts that ensured that they would not be adopted later as the *de jure* judiciary of an independent Ireland, it was the system's jurisprudence or lack there of. All legal professionals in Ireland were trained in the tradition of English common law and were well versed in British statutes and case law. But to the revolutionaries, this jurisprudence was that of the colonial power they were fighting against and thus banned from being used in the Dáil Courts. Instead, "Brehon, Roman, French and other law codes could be cited, but not any legal text cited in [Great] Britain, an inexplicable piece of mean-mindedness, which reflected little credit on eminient legal persons who were immured in the Common Law and English traditions."[51] While this policy was consistent with Sinn Féin's nationalist views, it was entirely impractical. Almost no one in Ireland, which included both legal professionals and laymen, knew anything about Brehon, French, and Roman law, except for the fact that it was not English. While this policy helped raise national pride, it made it almost impossible for judge's to make rulings in line with any legal code.

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[50] Ibid., 20.
[51] Ibid., 30.

Due to the rejection of the legal code all were familiar with, the lack of trained legal personnel willing to sit on the subversive bench, and their short existence, the Dáil Courts were not able to "develop any substantive jurisprudence."[52] In lieu of rulings that were consistent with a comprehensive jurisprudence, the judges of the Dáil Courts came up with "more homespun rulings."[53] For example, there was a case before a Dáil Court where two brothers were disputing the inheritance of an estate. If handled in the British Court system, the judges trained in English common law's advanced probate field would dictate how the estate would be split. In this Dáil Court, the ruling instructed that one of the brothers divide the estate into two shares and the other brother would get to pick which one he received. Such Solomon-like wisdom is surely intriguing, but could not possibly replace English common law after Irish Independence. Yet, during the short existence of the Dáil Courts, such rulings "caught the public imagination," and helped the subversive system gain the support of the people.[54]

Irish Perception of British Jurisprudence During the War

While the Irish courts may have lacked a complex jurisprudence, at least they were perceived as being just as opposed to the official system. During the War for Independence the Dáil government published a weekly newsletter called the *Irish Bulletin*. Publishing began in 1919 to chronicle what were perceived to be acts of aggression and injustice by British forces towards the Irish people. This publication did not editorialize or analyze any of the cases it reported, it simply gave the facts of each one. Yet, the instances that were selected would surely give any reader the impression that the colonial judiciary was not protecting rights, but trying to quash a rebellion.

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[52] David Foxton, *Revolutionary Lawyers: Sinn Fein and Crown Courts in Ireland and Britain, 1916-1923*, 190.
[53] Ibid.
[54] Ibid.

This chapter does not seek to analyze or pass judgment on the official judiciary of the time, but it is important to note the impact stories in the *Irish Bulletin* had on the people. To address this point without dwelling on the actions of the colonial judiciary, the following example is offered to illustrate the point that actions of the official courts were seen as unjust regardless of how advanced that legal system may have been. In a County Meath case, a Mr. G. O'Reilly who was 70 years old at the time, was accused of taking part in an Irish language festival. These events were illegal as the British believed such public assemblies were aiding the revolutionary cause. The only evidence that O'Reilly was at the festival was given by Constable Dohney of the Royal Irish Constabulary, while an overabundance of evidence proved O'Reilly was not at the festival. The court ruled that "The bench feels that the right people have not been charged but we cannot overlook Constable Dohney's evidence and we will put defendants on bail to be of good behavior."[55] The feisty old man, being found innocent yet still being punished, refused the bail and was imprisoned for one month. When comparing this version of justice to the more homespun type, it is not surprising why the Dáil Courts attracted so much support and business.

Initial British Response to The Dáil Courts

While the courts may have lacked the advanced jurisprudence that English common law had, it fulfilled one of the most important roles of a court system—it kept the peace. During a time of revolution, when tensions between various factions in Ireland were very high and the official system was rejected as politically biased, the Dáil Courts won almost universal praise for their fairness and ability to settle matters between neighbors to avoid further conflict. Lord Monteagle, in County Limerick, commented that the Dáil Courts were "dispensing justice even-handed between man and man, Catholic and Protestant, farmer and shopkeeper, grazier and cattle

[55] *Irish Bulletin*, "Monday, September 8th, 1919: Sentences," September 13, 1919.

driver landlord and tenant."[56] Another account, from Resident Magistrate Herries Crosbie, noted "whatever one's sympathies might be, one realized that, so far as these courts were concerned, their object had been almost consistently to show that they were intended to do justice."[57] Both the revolutionary and colonial governments benefitted from the Dáil Courts fairly keeping the peace. The Dáil government proved that they could create institutions and govern if it came to power. On the other side, the British government did not have to commit resources to small local matters and could instead focus on quelling the rebellion.

Interestingly, in the beginning of their existence, the subversive courts were not illegal. Arbitration of non-criminal matters was entirely legal, and even strongly backed by the English common law tradition. Thus, the British adopted the policy of leaving the Dáil Courts alone if they only acted as arbitration courts. To achieve this, parties coming before the alternative courts had to sign an agreement that read:

> I hereby undertake, promise and agree (1) to abide by any Award or Decision of this Court on the matter submitted for determination in this case; (2) to comply with any Orders of Obligations which the Court in its Award or Decision may impose; (3) not to submit to any Alien Tribunal any matter whereon this Court shall pronounce a decision or make any Award.[58]

The wording was "consciously adopted, both to emphasize that this was a justice chosen by the people rather than imposed by the state, and to provide some measure of protection against interference from crown forces."[59] Since the Dáil Courts, when acting strictly as arbitration courts, were legal and benefitting both those sympathetic and unsympathetic to the rebellion, the

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[56] David Foxton, *Revolutionary Lawyers: Sinn Fein and Crown Courts in Ireland and Britain, 1916-1923*, 191.
[57] Ibid.
[58] Ibid., 194.
[59] Ibid.

British "in one of their rare fits of common sense, treated them as extra-legal arbitration councils and left them alone."[60]

The British Government Changes Course

While the Dáil Courts provided justice, as demonstrated in the previous chapter, that was not the primary concern of the British legal system in Ireland. The official courts were there to help enforce and protect colonial rule over Ireland and the British government believed Dáil Courts were doing just the opposite. Andy Cope, the Assistant Under-Secretary for Ireland, "warned the British cabinet [in 1920] that the courts were doing more harm to the prestige of their government than all the assassinations."[61] While the revolutionaries' violent tactics did help their cause, the alternative courts were doing more to weaken the British's position and devastated the official courts. Through civil disobedience, the colonial courts were rendered almost entirely ineffective in enforcing colonial rule as Justices of the Peace resigned their commissions, jury members refused to show up, and litigants took their cases to the subversive courts.[62]

Lord Dunraven, a staunch Unionist, provided an excellent summary of the situation in Ireland in the London *Times*. He commented that:

> An illegal Government has become the *de facto* Government. Its jurisdiction is recognised. It administers justice promptly and equably and we are in this curious dilemma that the civil administration of the country is carried on under a system the existence of which the *de jure* Government does not and cannot acknowledge and is carried on very well. The logical deduction is that profound dissatisfaction with the origin of the law, not with law and order, is the cause of the trouble.[63]

Besides the threat the courts posed to British rule, after the Dáil Courts took on criminal jurisdiction, they were no longer civil arbitration courts and were thus illegal under British law.

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[60] Tom Garvin, *1922: The Birth of Irish Democracy* (Dublin: Gill & Macmillan, 1996), 170.
[61] Mary Kotsonouris, "The Courts of Dáil Éireann," 94.
[62] Ibid., 94.
[63] Mary Kotsonouris, *Retreat from Revolution: The Dáil Courts, 1920-24*, 22.

By mid-July 1920, the British government, regardless of the benefits the Dáil Courts provided, was determined to eliminate one of the major sources of its weakened position.

British forces raided many of the Parish and District Courts in an effort to disrupt the localized justice. In August 1920, the British arrested the Lord Mayor of Cork, Terrence McSwiney as he was presiding over a District Court. McSwiney would die 74 days later on a hunger strike.[64] In Wexford, the British arrested its mayor for acting as a judge. To show their disapproval for this action, the aldermen and councilors of the city went to the jail their mayor was confined to and ran the city from there until he was released.[65] A report from a Parish Court in County Kerry shows how severe the British response to the Dáil Courts was by the end of 1920, writing:

> At the time appointed for the sitting of the court a party of four or five police and military officers drove up in a motor car and pulled up in front of the house wherein the court was to be held. Soon afterwards a large posse of police and military arrived in lorries from different points and surrounded the place of the intended sitting. Happily the Justices and litigants had not assembled at the time but had the Crown forces delayed half-an-hour longer, they would have caught the whole court sitting and what the consequences may be no one could tell. The house wherein the court was to be held was burned to the ground and four or five persons in the vicinity of the place placed under arrest. Those persons were released after a few hours, with the exception of a man named John O'Connor a litigant having a case, was taken away on a lorry by the Crown forces and when some distance away was thrown from the tender and badly wounded. The unfortunate man was taken to a farmhouse near by but the British forces again came back and dispatched him with revolvers.[66]

This incident shows how drastically British government changed its tactics, from tacit acceptance to violent suppression, when it felt its rule was threatened.

The upper courts, already with few judges to spare, also came under British attack. Crowley, although far older than Davitt, was "emotional and headstrong. It was not only that he

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[64] Ibid., 41.
[65] Ibid.
[66] Ibid., 45.

refused to take precautions, he invited confrontation with Crown forces."[67] The British accepted Crowley's invitation and when he refused an order from British police to disperse his illegal court, he was arrested and sentenced to two years of hard labor. While he showed courage during this ordeal, his actions left only Davitt to go on circuit across all of Ireland and to fill the third spot on the Supreme Court.

With the fate of the Dáil Courts on the back of a 26 year old, Davitt rose to the occasion and became "the kingpin of the fledgling judicial system."[68] Davitt knew if he was as brash as Crowley, he would be arrested and that could doom the subversive system. At the same time, he needed to preside over Circuit Court hearings to show the upper level of the alternative judiciary could reach every area of Ireland more effectively than the British system had. Despite having to travel in secret, being a wanted man, and "the incongruity of the makeshift courtrooms, [Davitt] brought in his person the *magisterium* of the law and showed the high seriousness with which local disputes and difficulties were regarded… he carried out the task he was given with commendable grace and common sense."[69]

His youth proved beneficial as he had to travel on donkeys or on carts and even had to escape a British ambush. Even in Dublin, where the British forces were most concentrated, Davitt managed to hold hearings. The most embarrassing incident for the British was when Davitt managed to preside over a hearing in the Four Courts, the home of the official judiciary, under the guise of a routine legal consultation.[70] Even after there was a truce between colonial and revolutionary forces in 1921, Davitt had to disperse a hearing to avoid arrest after informing the British police he was presiding over a Court of the Republic and not an arbitration court.

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[67] Ibid., 43.
[68] Ibid., 42.
[69] Ibid., 43.
[70] Ibid., 48.

After consulting with the Dáil government, it was decided that if the British threatened to arrest him again, Davitt should confront the police. When such an opportunity presented itself, Davitt boldly continued the hearing and the British police did not interfere further. [71] Cahir, although far less known in Irish history and legend than his father, played a significant role in the fight for Irish independence.

The Dáil Courts proved to be indomitable despite the concentrated efforts of the British government to suppress them. How did these courts survive? Even without British pressure, they were underfunded, had no proper courtroom facilities, no jurisprudence, a potentially unreliable enforcement mechanism, and too few trained legal personnel. The answer lies in the one thing the subversive judiciary had an abundance of and the British court had lacked—the support of the Irish people. The public supported the court system that they themselves had created, rejecting the one of foreign origin. With such broad public support, many naturally assumed that after Irish Independence the Dáil Courts would not only be the *de facto* judiciary, but *de jure* as well.[72]

A Fragmenting Victory

The Dáil government achieving *de facto* status along with the military campaign of the I.R.A. brought the British to the negotiating table. The result of the negotiations with the British fractured the Sinn Féin party into two, leading to a civil war and wounds that have still not fully healed. The Anglo-Irish Treaty ("the Treaty") that was signed in December 1921, was the result of negotiations between Prime Minister Lloyd George's British government and a Sinn Féin delegation lead by Arthur Griffith and war hero turned politician Michael Collins. The Treaty did not make Ireland the independent republic Sinn Féin wanted, but a dominion in the British

[71] Ibid., 58.
[72] Ibid., 61.

Commonwealth, which required all those who served in the Irish legislature to take an oath to the British Crown.

Although Griffith and Collins wanted more, they recognized that this was the best deal they could get and that their revolutionary government could not fight British military forces much longer. When the legislature Sinn Féin had established voted to ratify the Treaty after three weeks of debate, it passed 64 to 57. President Eamon De Valera, opposed the Treaty and resigned in protest. Many deputies who also opposed the treaty followed his example and the pro-Treaty Griffith became president.[73] The treaty had exposed a rift that existed and continued to exist in the Irish nationalist movement between those who sought to pursue their goals through political means and those who turned to violence to gain independence. To avert a looming civil war, de Valera and Collins were able to agree to a pact where the anti-Treaty and pro-Treaty members of Sinn Féin would run on the same ticket in the 1922 elections for the Third Dáil with a proportional representation of pro-Treaty and anti-Treaty candidates based on the ratio that existed before the election.[74]

The election for deputies to the Third Dáil, where the Sinn Féin ticket would once again romp to victory, ended the uneasy alliance between the anti-Treaty and pro-Treaty camps. While the majority of the Irish people did not want to live under British rule, they did not want to live in constant violence and uncertainty either. By 1921, many Irish longed for peace "as much, or even more, than they longed for freedom… no argument against the Treaty could overcome its strongest appeal—it meant peace."[75] The election was a clear victory for pro-Treaty supporters

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[73] David Hogan, "Dail Éireann," 224.
[74] Ibid., 224-225.
[75] Joseph M. Curran, "The Consolidation of the Irish Revolution, 1921-1923: The Free Staters," *University Review* 5 (1968): 38.

and even de Valera admitted that his camp had been defeated.[76] Despite the victory by the combined camps of Sinn Féin, "one-third of the electorate had nonetheless pronounced a plague on both Sinn Féin houses," which was a significant step backwards from the 1918 election.[77]

After the election, most of the candidates who did not run on the Sinn Féin ticket came out supporting the Treaty. This meant that the anti-Treaty camp would only have their own 36 deputies to oppose the Treaty in a Dáil of 128 total members.[78] De Valera and others felt tricked by the electoral pact since they would have far fewer seats than expected.[79] The anti-Treaty wing of the nationalist movement decided to abstain from the Dáil and the dreaded possibility of a civil war became a reality. The Third Dáil would be baptized by fire as they governed the young nation that "suffered more death and destruction in the Civil War of 1922-23 than it had in the struggle against England from 1916 to 1921."[80] The hardship caused by the Civil War is lamentable, but the Irish Free State under the Third Dáil was able to hold the young nation together, winning the fight several months before it dissolved itself to have another election.

Irish Suppression of Irish Courts

The Treaty and the political split caused by it would lead to the elimination of the popular Dáil Courts. After the Irish Free State was established, the newly recognized Dáil government was left with two judiciaries, the British created one and the Dáil Courts, both legally presiding over the same jurisdiction. This was an unusual situation, one which was impractical and would have to be addressed at some point as the Irish Free State Constitution required it to create a new judicial system. In the end, the Dáil Courts, which had once been so popular and the creation of

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[76] J.J. Lee, *Ireland: 1912-1985* (Cambridge: Cambridge University Press, 1990), 62.
[77] Ibid., 94.
[78] Out of the 128 deputies elected to the Third Dáil, there were 58 pro-Treaty Sinn Féin, 36 anti-Treaty Sinn Féin, 17 from the Labour Party, 7 from the Farmers Party, and 10 Independents.
[79] Cornelius O'Leary, *Irish Elections, 1918-77: Parties, Voters and Proportional Representation* (New York: St. Martin's Press, 1979), 12.
[80] Joseph M. Curran, "The Consolidation of the Irish Revolution, 1921-1923: The Free Staters," 46.

the Dáil government, would be eliminated. This was the direct result of the shift in the political landscape after the signing of the Treaty. The Irish Free State was no longer in a battle between Irish rebels and British colonialists, but pro-Treaty and anti-Treaty forces. When the Dáil Courts were perceived as being sympathetic toward the anti-Treaty camp, the Dáil government would turn against its own creation.

This change, "Historically… has been seen as the direct consequence of Crowley's warrant for the arrest of General Mulcahy."[81] This incident began with the detainment of George Plunkett, one of the rebels occupying the Four Courts. Judge Crowley, who had since been released by the British, granted an order of *habeas corpus*, which required the Minister of Defense, General Mulcahy, to show cause for Plunkett's imprisonment. For reasons that are still not entirely known, the Dáil government's executive "chose to make this single case into a *cause célèbre*."[82] Why the anti-Treaty forces captured in the Four Courts were being held was widely publicized and "The most junior barrister could have drafted the replying affidavit that a state of emergency existed and that the matter was outside civil powers."[83] Instead, the Dáil executive without consulting the legislature, ignored Crowley's order and on July 24 1922, rescinded its own order creating the Dáil Courts. Crowley, still being his brash self, made the *habeas corpus* order absolute and issued a warrant for General Mulcahy's arrest. Crowley "was to suffer for his judicial insolence; he was plucked off O'Connell Street three weeks later and thrown into jail without trial—his second spell of incarceration for acting as a Dáil Judge!"[84]

While the Free State government tried to rationalize their decision to the public, its explanations were not convincing. The Free State's stance was that the Dáil Courts were no

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[81] Mary Kotsonouris, *The Winding-up of the Dáil Courts, 1922-1925: An Obvious Duty*, 21.
[82] Mary Kotsonouris, "The Courts of Dáil Éireann," 99.
[83] Ibid.
[84] Ibid., 100.

longer necessary since the British created courts, supported by taxpayer money, was part of the Dáil government now and that the Dáil Courts posed a potential threat to national security during the Civil War. Only months earlier during the War for Independence, the Dáil government was calling the British created courts biased and not accommodating to the needs of Irish society. Nothing had changed about these courts, though, as they were manned by the same judges and had the same structure. Yet, the Free State government strongly backed these courts, who were supportive of the pro-Treaty government, over the courts it had created only a few years before. Furthermore, "Perhaps a more interesting question is why a government, fighting for its very survival at the outbreak of a civil war, thought that the sideline distraction of court proceedings merited so much attention: where were the big battalions to enforce Crowley's grandiose direction?"[85] The Free State government could have ignored the incident, instead they arrested a judge of a court system that was at the time legal, which was a clear breach of judicial independence.

The public and opposition politicians alike condemned the arrest of Crowley and the shutting down of the popular and effective Dáil Courts. The public showed their anger in "astonished protests, resolutions of county councils and letters to the papers."[86] Anti-treaty forces would later condemn the arrest of Crowley writing in *Sinn Féin*, its official publication, that a legal system's "integrity depends on its independence of the executive [and] is the people's only guarantee against tyranny. What becomes of the guarantee when the judiciary itself is menaced and imprisoned? Ireland has led the way in the coercion of the judiciary subjecting its judges to arrest."[87] One member of the legislature criticized the executive for putting the Free State government in a "humiliating position" by infringing on judicial independence, a principle they

[85] Mary Kotsonouris, *The Winding-up of the Dáil Courts, 1922-1925: An Obvious Duty*, 23.
[86] Mary Kotsonouris, "Revolutionary Justice—The Dáil Éireann Courts," 36.
[87] *Sinn Féin*, "Only Safeguard Gone," August 7, 1923.

had advocated for as revolutionaries.[88] President Cosgrave, responding to the criticism, dismissed it by calling Crowley "an old cod" instead of addressing the larger issue of judicial independence.[89] This incident even caused the four members of the Dáil's Circuit and Supreme Courts to take different sides. Crowley obviously opposed the government on his own detainment and the abolishment of the court system. Arthur Cleary also opposed the actions of the Free State and continued to hold court after the order eliminating the Dáil Courts was issued. Meredith and Davitt on the other hand, while they were not necessarily pleased by the government's actions, continued to support the Free State.

Result of the End of the Dáil Courts

Besides the political fallout over Crowley's detainment and the shutting down of the Dáil Courts, these actions effectively paralyzed the administration of justice in the Irish Free State. While the top courts based in Dublin could still operate, it was difficult to do so after the destruction of the Four Courts. Most of the British created courts, though, due to the impact of the Dáil Courts and the raging civil war "were not in a state of readiness."[90] As a result, "There were no courts to which offenders could be sent for trial, nor juries willing to serve."[91] Furthermore, there were thousands of cases pending before the Dáil Courts when they were abolished and it was unclear how they would be resolved. This led to "a bureaucratic crisis and the necessity of yet another judicial layer being added to the rickety legal structures of the developing state."[92]

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[88] Dáil Éireann, *Dáil Debates—Executive Action*, September 14, 1922, http://www.oireachtas-debates.gov.ie/D/0001/D.0001.192209140015.html.
[89] Ibid.
[90] Mary Kotsonouris, "Revolutionary Justice—The Dáil Éireann Courts," 36.
[91] Ibid.
[92] Mary Kotsonouris, *The Winding-up of the Dáil Courts, 1922-1925: An Obvious Duty*, 23.

The Irish Free State created the Winding-up Commission to deal with the remaining cases. This would prove to be the most powerful legal body ever to exist in Ireland as all of its decisions were final and not subject to appeal. It handled the roughly 5,000 cases which were still pending when the Dáil Courts were abolished.[93] Meredith was appointed chief commissioner of the Winding-up Commission as he was

> well placed to plan and direct a scheme to deal with the mass of legal ganglia left askew by the abrupt closure of the Dáil Courts, of which he had been a founding father and later the apex. It is a measure of his character and perhaps his Quaker sense of responsibility that he allowed no understandable resentment even to delay his cooperation.[94]

While the Winding-up Commission fixed the short-term problem of the backlog of unresolved cases, the long-term problem of having no effective judiciary remained.

[93] Mary Kotsonouris, "Revolutionary Justice—The Dáil Éireann Courts," 36.
[94] Mary Kotsonouris, *The Winding-up of the Dáil Courts, 1922-1925: An Obvious Duty*, 26.

Chapter 3: Thirteen Men, Two Systems, One Recommendation

In the midst of the Irish Civil War, left with the unpopular and ineffective British created system and having recently abolished the popular Dáil Courts, the Irish Free State government began to create its own judicial system. Although the Irish people were for the first time living in a true democracy, where the will of the people should govern, the ideas that were the foundations of the new system were created behind closed doors by some of the most elite members of society. Yet, the committee members were citizens of the Free State and met in Ireland, representing a change from the judiciary being structured by British government officials meeting in England. These thirteen men deliberated for six months until a unanimous report was released, which did not simply draw inspiration from the colonial courts. Instead, the Committee made a concerted effort to correct many of the flaws of the British created judiciary, drew inspiration from the Dáil Courts, and sought to fashion a system that met the needs of the Free State and its people. The resulting judiciary has withstood eight decades of change including a civil war, two constitutional changes of government, and the modernization and globalization of Ireland.

Members of the Committee

The Committee's membership included men of varied backgrounds. The Executive of the Irish Free State government could have chosen a Committee solely of loyal party members, but instead it decided to convene a group of some of Ireland's greatest legal minds from the various levels of judicial positions and advocates. Although there were no members who were supportive of DeValera's anti-treaty views, the Committee did include members of the British judiciary system in Ireland and members of the Dáil Court system. This eclectic group of trained legal

personnel created a new system that was an effective hybrid of the British courts and Dáil courts, with the addition of a few new ideas.

The Executive Council appointed the members of the Committee, but they were selected by Hugh Kennedy, then the Attorney General of the Irish Free State. After the Committee released its report, District Justice Louis Walsh, one of the Committee members, wrote Kennedy to praise him because while the work of the Committee "is going to be one of the best feathers in the Government Cap. The credit is especially your's, because your's was the selection of the committee."[1] While little is known of how the members were selected and what the criteria was, Walsh noted the difficulty in his letter to Kennedy, that "In making your selections you had to avoid on the one hand, 'freaks' on the other 'stick-in-the-muds'. You managed to get together a team at once progressive and practical."[2]

Not surprisingly, the Free State government had several of its great legal minds with political connections on the Committee, with Kennedy himself being first among them. Kennedy had been an advisor to and the law officer of the Provisional Government and was the first Attorney General of the Irish Free State.[3] He was a strong nationalist, but "his nationalism was primarily cultural—'he apparently never identified himself with the cause of Sinn Féin, but he took a large part in connection with Catholic, philanthropic and Irish national movements.'"[4] During the war with the British, Kennedy challenged the detainment of Irish rebels in court. He believed that the old English system in Ireland was unacceptable in the eyes of the people and that there was no separation between the supposedly independent judiciary and the British executive. Kennedy wanted for Ireland what the British Constitution called for but failed to

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[1] UCD Archives, Kennedy Papers, P4/1104, Walsh to Kennedy, July 10, 1923.
[2] Ibid.
[3] Mary Kotsonouris, *The Winding-up of the Dáil Courts, 1922-1925: An Obvious Duty*, 251.
[4] David Foxton, *Revolutionary Lawyers: Sinn Fein and Crown Courts in Ireland and Britain, 1916-1923*, 31.

deliver to Ireland—an independent judiciary. In a letter to President Cosgrave, Kennedy explained that "A judge might drop into the [Dublin] Castle in the morning on his way to Court as part of the Executive make an Order in Council, and then go on to the Bench and try an issue between the executive and the people."[5] If the Irish public was to have faith in the Irish Free State's judiciary, it would need to appear to be a clean break from centuries of appearing as what Kennedy described as "an enemy institution in the eyes of the people."[6]

Joining Kennedy as a strong supporter of the Irish Free State executive was John O'Byrne. Like Kennedy, he was a legal advisor for the Irish government as they negotiated the treaty with the British government and helped draft the constitution of the Irish Free State. He also had closer political ties to the executive than Kennedy as he was a close friend of President Cosgrave. He was an early supporter of Sinn Féin and had been in the inner circle of Michael's Collins' Irish Republican Brotherhood since 1905.[7] Being a trusted member of the Free State Government who shared Kennedy's views about the need for a new judiciary system, it is not surprising that he was selected.

Another trusted member of the Irish Free State government was Timothy Sullivan. His family ties connected him to three Nationalist political families in Ireland—the Sullivan's, the Healy's, and the O'Higgin's. He was the son of Timothy David Sullivan who was a Nationalist MP, journalist, and composer of 'God Save Ireland.' Sullivan (the son) married one of the daughters of Tim Healy, the first Governor-General of the Irish Free State, but the families were so intermarried that Healy was not just Sullivan's father-in-law, but also his great-uncle.[8]

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[5] Thomas Towey, "Hugh Kennedy and the Constitutional Development of the Irish Free State," *The Irish Jurist* (1977): 366.
[6] Ibid., 365.
[7] David Foxton, *Revolutionary Lawyers: Sinn Fein and Crown Courts in Ireland and Britain*, 28.
[8] Kenneth Ferguson, ed., *King's Inns Barristers, 1868-2004* (Dublin: The Honorable Society of the King's Inns, 2005), 109.

Through his relationship to the Healy family, Sullivan was also related to Kevin O'Higgins, who was the Vice-President of the Executive Council and Minister of Home Affairs in the Irish Free State. With all his Nationalist political ties through his familial relations and being a King's Counsel himself, Sullivan possessed an understanding of the judiciary and the political system making him a valuable addition to the Judiciary Committee.

The aforementioned Louis Walsh, one of the first District Justices in the Irish Free State, was also appointed to the Committee. Walsh was a student acquaintance of Kennedy's and the two corresponded with each other regularly starting in 1922.[9] Like Kennedy, Walsh believed it was imperative that the Irish people not associate the Free State's judiciary with the foreign system the British implemented or they would reject it. He also brought experience to the Committee as a local judge who recognized the needs of the lower level courts. Throughout the time the Committee was at work, Walsh was a strong supporter of Kennedy and his efforts.

To chair the Committee, Lord Glenavy, then Chairman of the Irish Free State Seanad, was selected. Under the British administration, Glenavy was a Conservative and held several high posts in Ireland including Attorney General, Chief Justice, and Lord Chancellor.[10] He had been a staunch Unionist and helped Sir Edward Carson secure arms for the Ulster Volunteer Force, a Protestant Unionist paramilitary group, in 1913.[11] In choosing Glenavy, Kennedy picked a man who was extraordinarily knowledgeable about the old legal system's structure and workings who would be able to help guide the legislation based on the report through the Seanad. Also, the decision to place a high-ranking member of the *ancien regime* in the chairmanship of the Committee provided some reassurance to Unionist members of the legal profession that the recommendations would not be too radical.

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[9] Mary Kotsonouris, *Retreat from Revolution: The Dáil Courts, 1920-24*, 112.
[10] F. Elrington Ball, *The Judges in Ireland, 1221-1921*, Vol. 2, (London: John Murray, 1926), 385.
[11] David Foxton, *Revolutionary Lawyers: Sinn Fein and Crown Courts in Ireland and Britain*, 296.

Although Glenavy had a long history of supporting Unionist and Protestant interests, he had been cooperative with the new government even before the establishment of the Irish Free State. In 1920, as Lord Chancellor, Glenavy wrote to Prime Minister Lloyd George to ask him to spare the life of Kevin Barry, a hero in the eyes of the Irish people who was sentenced to death for killing British soldiers.[12] Although Glenavy's request was denied and Barry was executed, this request represented the beginning of a transition that many high ranking officials of the British regime underwent after realizing that the days of English rule in Ireland were coming to an end. In a letter to Lloyd George, Lord French, the Viceroy of Ireland, criticized several officials including Glenavy as being "stifled by the atmosphere in which they live, and apparently they only think of surrender."[13] Mark Sturgis, an English official in Dublin Castle, said that Glenavy as Lord Chancellor, "did nothing and apparently thought of nothing but the best way to show Sinn Féin that he was neutral and passive."[14]

Regardless of what Glenavy was truly thinking, the British government removed him from his post shortly before the Irish Free State was established and he was willing to serve as president of the Seanad making him acceptable enough to Kennedy. His selection though should not be viewed as an indication that Kennedy liked or respected Glenavy. The Attorney General believed that Glenavy achieved his appointments under British rule not because of merit as a barrister, but because of "his work in collaboration with Carson and his bitter diatribes on English Tory platforms against his own people, diatribes most wicked because he did not believe

[12] Ibid., 230.
[13] Ibid., 284.
[14] Ibid., 284.

them but delivered them as the price paid for judicial promotion."[15] On multiple occasions throughout the process of creating a new judiciary, Kennedy and Glenavy would be adversaries.

Another high ranking judge of the old regime joining Glenavy on the Committee was Charles O'Connor, who was also a supporter of the old system. O'Connor had served in the positions of serjeant, solicitor general, attorney general, and as Master of the Rolls under the British regime. O'Connor could not boast the same conservative Unionist credentials that Glenavy had as he was a Roman Catholic and a Liberal.[16] Although O'Connor may not have been as reassuring a figure to the defeated Unionist cause, as the person who ran the Chancery Division since 1912, members of the legal community who wanted to keep the status quo knew that O'Connor would be as supportive of their cause as Glenavy.

He was an acceptable choice to the Irish Free State Government because he had been even more lenient towards those who were fighting for Ireland's independence than Glenavy had been. O'Connor had a reputation as being one of the judges more likely to grant a writ of *habeas corpus* for Irish rebels during the time martial law was in effect. In April 1921, O'Connor had granted writs for two men, infuriating British military officials. Unfortunately, the British military decided the legal system its own country established had no authority over its actions and ignored the decision executing the men only a few days after the writ was issued.[17] In a July 1921 *habeas corpus* case before O'Connor, Hugh Kennedy was representing John Egan, who was accused of carrying a parcel containing ammunition. O'Connor was receptive to Kennedy's argument and ordered that the British military produce Egan before him.[18] O'Connor was criticized by General Macready, who was commander of British forces in Ireland at the time, but

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[15] UCD Archives, Kennedy Papers, P4/B/30, Kennedy to Cosgrave August 13, 1923; quoted in, Thomas Towey, "Hugh Kennedy and the Constitutional Development of the Irish Free State," 365.
[16] F. Elrington Ball, *The Judges in Ireland, 1221-1921*, Vol. 2, 383.
[17] David Foxton, *Revolutionary Lawyers: Sinn Fein and Crown Courts in Ireland and Britain*, 279.
[18] Ibid., 288-291.

gained favor with the Irish Free State and with Kennedy as demonstrated by being appointed to the Committee and one of three judges from the British regime who was given a judicial position in the Free State.[19]

The third judge of the *ancien regime* was William John Johnston, a county court judge. He was the son of a Belfast merchant, a Liberal, a King's Counsel, and had been the editor of two legal publications in Ireland. In 1910, he was appointed county court judge for Monaghan and Louth.[20] Soon after the treaty was signed, Johnston wrote to the Minister of Home Affairs of the Irish Free State, Eamonn Duggan, saying "I cordially and unreservedly tender to the President and yourself my services for any particular purposes for which they may be required in the great work of transferring and reconstruction that now that lies in your hands."[21] Given his willingness and experience, the government took him up on his offer and appointed him to the Committee.

To ensure that the Dáil Courts were represented on the Committee, Kennedy selected James Creed Meredith and Cahir Davitt. These two were the logical choices to be on the Committee since they were two of the top four judges of the Dáil Court system and the other two were not in good standing with the Free State Government. Arthur Cleary, opposed the treaty and ignored requests and instructions from the Free State Government. After he continued to sit as a judge for a period of time after the Dáil Court system was abolished, Cleary returned to teaching at University of College Dublin.[22] As for Diarmuid Crowley, he was still furious with

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[19] Ibid., 292.
[20] Kenneth Ferguson, ed., *King's Inns Barristers, 1868*-2004, 214; After 1921, his jurisdiction was changed to Monaghan and Fermanagh
[21] Johnston to Duggan, January 16, 1922, quoted in Mary Kotsonouris, *Retreat from Revolution: The Dáil Courts, 1920-24*, 161, note 76.
[22] Mary Kotsonouris, *The Winding-up of the Dáil Courts, 1922-1925: An Obvious Duty*, 248.

the Free State government for imprisoning him and President Cosgrave did not feel the "old cod" could make a useful contribution to the fledgling nation.[23]

While Cleary and Crowley were butting heads with the government, Meredith and Davitt loyally served it. Meredith was serving as chief commissioner of the Winding-up Commission when he was asked to join the Judiciary Committee.[24] Davitt was made the first Judge Advocate General in the Irish Free State after Kennedy had recommended him for the position and Michael Collins ensured that he was able to assume the post as soon as possible.[25] These two men, with their strong Nationalist credentials and knowledge of the system that was the British system's rival, would provide balance to Glenavy, O'Connor's, and Johnston's *ancien regime* backgrounds.

With the Free State Executive, *ancien regime*, and Dáil Courts represented, the remaining members were meant to represent various groups with interest in the judicial system. Micheal Smidic, the secretary of the Committee, was a junior member of the bar. Patrick Brady, Esq., was a solicitor and at one time was President of the Incorporated Law Society, which was the association of solicitors in Ireland. Henry Murphy, Esq., was also a solicitor and had served as Crown Solicitor for County Monaghan.[26] Finally, William Hewat, President of the Dublin Chamber of Commerce, was the one selection who was not a member of the legal community and was appointed to represent commercial interests. In *Retreat from Revolution*, Mary

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[23] Dáil Éireann, *Dáil Debates—Executive Action*, September 14, 1922.
[24] Mary Kotsonouris, *Retreat from Revolution: The Dáil Courts, 1920-24*, 101.
[25] Ibid., 87.
[26] UCD Archives, Kennedy Papers, P4/1096, *Report of Judiciary Committee*, 1923; UCD Archives, Kennedy Papers, P4/1084, "List of those who have accepted the invitation to act upon the Judiciary Committee;" Henry Murphy was not on the list of those who accepted the invitation to join the group, but was listed as a member on the final report released by the Judiciary Committee. Every account found in the research for this thesis, including statements by Lord Glenavy, put the number of committee members at twelve. This could be due to the fact that they do not count Murhpy or Smidic, the group's secretary, as a member. This thesis holds that since Murhpy merited mention as a member in the final report and Smidic's efforts were essential to the committee functioning, it I s counting both as members of the committee, making a total of 13.

Kotsonouris claims that the idea of having a representative of business was based on the advice of Meredith.[27] Kotsonouris says that Declan Howard was appointed after Meredith's choice of James Douglas was not selected.[28] However, on both the list of people on the Committee at the commencement of its work and on the final report produced by the Committee, Hewat was listed as a member and Howard was not.[29] Interestingly, no other interest group besides business was given a place on the Committee alongside the representatives of the legal community.

Work of the Committee

It is difficult to piece together the work of this important group because its meetings were not public and the minutes that were kept do not give a clear picture of the debates that occurred. Fortunately, enough memos produced by members of the Committee and powerful interest groups have survived and the pieces of this historical puzzle can be put together. So although records do not exist to show that one person said one point in a meeting and another member responded with another point, it is clear where the different parties stood as they went about their important task. These documents, which outline positions that are the fundamental building blocks of Ireland's judiciary system, have for the most part been overlooked by historians and legal scholars and this thesis seeks to address this oversight.

The Free State Executive's Position

On January 29th, 1923, a letter written by Kennedy and signed by President Cosgrave, was sent to the members of the newly formed Judiciary Committee that recognized the value and important work of the Committee.[30] "This task," he wrote, "calls for grave consideration and

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[27] Mary Kotsonouris, *Retreat from Revolution: The Dáil Courts, 1920-24*, 109.
[28] Ibid., p. 158, note 5.
[29] UCD Archives, Kennedy Papers, P4/1084, "List of those who have accepted the invitation to act upon the Judiciary Committee;" UCD Archives, Kennedy Papers, P4/1096, *Report of Judiciary Committee*, 1923.
[30] Thomas Towey, "Hugh Kennedy and the Constitutional Development of the Irish Free State," 364; J.J. Lee, *Ireland: 1912-1985*, 128; both sources assert that the letter signed by Cosgrave was in fact written by Kennedy.

much help in expert advice and suggestion drawn from diverse experience and varied knowledge."[31] The Committee's terms of reference were:

> To advise the executive Council of Saorstát Éireann in relation to the establishment in accordance with the Constitution of Courts for the exercise of the judicial power and administration of justice in Saorstát Éireann and the setting up of the offices and other machinery necessary or expedient for the efficient conduct of legal business.[32]

The government wanted a system that would best be suited to the current Irish situation regardless of what the status quo was, so it asked the Committee "to approach the matters referred to them untrammeled by any regard to any of the existing systems of judicature in this country."[33] While the letter did lay out some of the issues the Committee had to address, it did not provide much detail nor offer recommendations to the members. The only other instruction given to the Committee was an expressed desire that it move quickly to produce recommendations so the government establish the new system as soon as possible.

While the letter did not give specific policy recommendation from the Government, it did give insight into the Free State Executive's view of the administration of justice under British rule in Ireland. The letter provided a harsh condemnation of the British system that had presided over Ireland since it replaced Brehon law centuries ago stating:

> 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 till then a part of the living national organism. The body of laws and the system of judicature so imposed upon this Nation were English (not even British) in their seed, English in their growth, English in their vitality. Their ritual, their nomenclature, were only understood by the student of history of the people of Southern Britain. A remarkable characteristic product of the genius of that people, the manner of their

[31] UCD Archives, Kennedy Papers, P4/1083, Cosgrave's Draft Letter to Members of the Judiciary Committee, 1923.
[32] Ibid.
[33] Ibid.

> administration prevented them from striking root in the fertile soil of this Nation.[34]

While the Free State lamented the centuries of what it perceived as politically motivated oppression from the bench, it also showed great optimism about the opportunity for the infant nation. Cosgrave wrote "Thus it comes that there is nothing more prized among our new liberties than the liberty to construct a system of judiciary and an administration of law and justice according to the dictates of our own needs and after a pattern of our own designing."[35] The Executive's stance was clear: the status quo was not an acceptable option and a new system would have to be created.

Holding onto Foreign Ways

Opposing any significant departure from the English system were the judges who served in that system, Committee members Glenavy and O'Connor, and the associations of barristers and solicitors, many of whom were Protestants and Unionists. While some reforms were put forward by members of the *ancien regime*, the system they envisioned would essentially be a continuation of the British system. Memos submitted to the Committee from Lord Justice James O'Connor (not to be confused with the Committee member Charles O'Connor), the Bar Council, which was backed by solicitors, and a letter from Glenavy provide insight into and explanations for their position.

James O'Connor was appointed Lord Justice of Appeal in 1918 and was a staunch defender of the *ancien regime*. Like all the other judges who made it to the High Court under British rule, he had served in a variety of positions in the executive including solicitor general and attorney general. Like Charles O'Connor he was a Roman Catholic and a Liberal.[36]

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[34] Ibid.
[35] Ibid.
[36] F. Elrington Ball, *The Judges in Ireland, 1221-1921*, Vol. 2, 386.

Although he was not appointed to the Committee he was a powerful and well known figure in the legal profession, thus his detailed memorandum carried a great deal of weight. In what appears to be a direct response to the accusations set forth in the January 29th letter signed by Cosgrave, Lord Justice O'Connor defends the administration of justice under British rule in his memorandum written soon after the Committee was formed. He believed that:

> The existing Irish judicial system has good points. The administration of justice, whether on the civil or criminal side, is dignified; the bench and bar have a fine heritage in the additions to a great jurisprudence contributed by members of their body, personal corruption is unknown, and the intrusion of political bias has been less common than popular opinion supposes.[37]

Regardless of whether the Free State Government's or O'Connor's interpretation of history is correct, it is not surprising that O'Connor did not believe that much reform needed to occur since the system in place was fundamentally sound in his opinion. O'Connor simply dismissed the belief many Irish people had of the system as mistaken and never explained how the Government could present the colonial system as an acceptable judiciary in Ireland after independence.

O'Connor recommended that the three principles he believed were the foundation of the English system, from which the system in Ireland was modeled, should be part of the new judiciary in the Irish Free State. First, a judge must be independent of the executive government, which is a point by O'Connor that ignores the fact that in the past the judges were often part of the British executive. Nevertheless, he believed "this [judicial independence] is the essence of liberty; therefore the judges hold office for life, and are removable only for misconduct on a vote of both Houses of Parliament."[38]

The second pillar upon which justice stood according to O'Connor was that a "judge must be independent of pecuniary temptation; he must be a personage in the land, able to

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[37] UCD Archives, Kennedy Papers, P4/1090, Memo 10, Memorandum by the Right Hon. Lord Justice O'Connor on Suggested Changes in Ireland's Judicial System., February/March, 1923.
[38] Ibid.

surround himself with things that make for repose, dignity, and culture; therefore he is well paid."[39] The Lord Justice believed paying judges well was important for a very practical reason. He thought that "If Irish judges are poorly paid the result will be that many of Ireland's most promising young men will be driven across the Channel to seek at the English bar the greater rewards it holds out for success."[40] The proposed pay for judges of the High Court under his plan was comparable to that of the British administration. O'Connor suggested that judges should be paid at least £3,500 a year, which was the lowest pay grade for judges on the High Court prior to Irish independence.

O'Connor's third principle that he believed to be a pillar of the English judiciary, although he said he personally did not like it, was that "as the populace are impressed by pomp and show of power, public money may legitimately be spent for that purpose; the courts are noble structures, the proceedings decorous, with ceremonial trappings benefiting a solemn occasion."[41] While O'Connor's aim of gaining the respect of the people is understandable, it is difficult to see how the traditions of the courts, which were strictly English in their origins such as wigs and judicial robes, would impress a populace where the majority had recently struggled to get the British out of Ireland. Unfortunately, O'Connor did not elaborate further on this principle.

Along with maintaining the general structure of a court system based on his three stated principles, O'Connor believed that the jurisprudence from the English system should be carried over into the Irish Free State. Although statutory changes could be made, to him there was no choice in regards to changing jurisprudence since it was impossible to make any change. Anyone who thought differently did not understand what the law was in O'Connor's eyes because "case

[39] Ibid.
[40] Ibid.
[41] Ibid.

law is merely common sense reduced to rule by the trained intellects of our judges."[42] Whether or not the jurisprudence was alien in its nature mattered little because "common sense is independent of locality, it follows that legal principles, so far as they are the result of case law, must be the same everywhere."[43] This claim directly challenges the Free State Government's belief that the foreign nature of the judicial system in Ireland meant it needed to be changed. The two sides come to a different conclusion by approaching the situation in two different ways. O'Connor was looking at the issue from a more theoretical perspective, ignoring the history and the current situation in Ireland. On the other hand, Cosgrave and Kennedy were not considering the theoretical idea that common sense is universal, but strictly looked at the fact that the English system was viewed by the majority of people as an entity that is unacceptable in a free Ireland. Regardless of which approach holds merit, it is interesting that such divergent views were represented on the Committee.

Though a staunch defender of the English system, O'Connor did believe there were changes that could be made to improve the system. Although he did not believe the problems with the system originated from their foreign origin or its political bias as Kennedy and other Nationalists believed. Instead, "The complaints that may be justly made against the Irish system of administration of justice may also justly be made, in more or less measure, against the system of any country, that it is too costly and too slow."[44] While O'Connor believed this problem should be addressed, he believed only so much could be done since a good legal system would naturally require money to attract the skilled personnel and time for them to reach just decisions.

The most drastic reform O'Connor suggested was a change in the way the system handled appeals. He felt that appeals took too long and in turn ended up being extremely costly.

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[42] Ibid.
[43] Ibid.
[44] Ibid.

To address this problem, he wanted a court of appeal for appeals to go to, a reduction in the number of pleadings, and a curtailment of the time for appeal. He also saw an opportunity to reduce costs by making the High Court more efficient by reducing the number of judges. "There are too many High Court judges," he wrote, who "were working hardly more than half the time."[45] O'Connor believed that seven High Court judges, instead of the twelve under the colonial system, could sufficiently do the job in the Free State and these judges would be working more if the notoriously long vacations of the courts were reduced to ten weeks or less per year as he also recommended. These are clearly not the drastic reforms the Nationalist rhetoric called for, but they would lower costs and save time. O'Connor wanted to tweak, not replace, the old system.

In his memorandum, O'Connor put forward a system that remained centralized and its proposals to provide expanded powers at the local level were not acceptable to Nationalists. At the lowest level of jurisdiction, he hoped that resident magistrates would not be abolished as most of the Irish people wanted. O'Connor believed that although the position had its shortcomings, "in [his] view its faults were not inherent in it, but flowed very largely from the want of a civic sense and of a better education in the magistrates."[46] Thus, the problem was not the position but the men who were appointed by the British. So instead of the Free State government recruiting "ex-army officers, solicitors or barristers who had no success," as the British had done, it should "look for competent men."[47] To attract these more able judges, O'Connor recommended paying them more than under the British administration. Interestingly, O'Connor believed that the people serving as RMs, which the Irish people disdainfully referred to as removable magistrates, should remain removable at the will of the executive. He believed

[45] Ibid.
[46] Ibid
[47] Ibid.

that "This is wrong in principle; but country life habits have a lowering effect on the morale of people of a certain temperament, and I fear that a check of some sort is essential."[48] The *ancien regime*, possibly because they knew their comments behind closed doors were not available for public scrutiny, showed a condescending view towards most of Irish society and believed that the elite who lived in Dublin should have extensive power even if it seemed wrong in principle and the majority of people were against it.

O'Connor hesitated to give increased powered to county court judges and district judges in the Irish Free State. He did acknowledge that there were advantages to having more powerful judicial positions at the local level, but said "on the whole, I am not sure that the scheme is practicable."[49] While settling on the idea that county court judges should not be given increased powers, he did believe there was room for improvement at that jurisdictional level. First, as with the number of High Court judges, he felt there were too many County Court judges. He figured that currently the men in these positions had "only four months work in the year. This should be more than doubled. The number [of judges], can therefore, be diminished by say 60 percent."[50] With the reduction in numbers, O'Connor wanted an increase in the abilities of judges manning these positions. To him, "Many county courts judges are men who at the Bar had scarcely more than a nominal practice… I should like to attract really good men, and that, too, before they are worn out, in the county court class."[51] To attract qualified individuals, O'Connor applied what he saw as the second principle of the English system—pay them well. With money being saved by eliminating positions, the savings could be applied to increase the pay of more qualified individuals to the remaining positions.

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[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] Ibid.

Joining O'Connor's hesitation to decentralize was the Bar Council who opposed it even more strongly and explicitly. The Bar said it wanted to cooperate with the Free State government and its plan "which was believed to be the desire… namely, the establishment of District High Courts throughout the Country, and the decentralization of official administration of law and of the Bar."[52] The council claimed that it wanted to put the public interest first and after researching example of decentralization, such as in the United States, that there would be too many difficulties trying to implement such a system. The council felt that a decentralized system would fragment the Bar by spreading barristers throughout the country and thereby reducing the experience and knowledge that a barrister would gain at a central court located in Dublin with a law library that could not possibly be reproduced in every county. Along with a reduction in the efficiency and abilities of barristers, the new nation would have a lower caliber of judges since members of the judicial bench were recruited from the ranks of the bar. The council believed this would be damaging to the Irish people because "A poor judiciary is the worst fate that can befall any country as the foundation of the State is Law, and its administration."[53]

Although over half of the Bar's memorandum was dedicated to criticizing decentralization, the council did put forward a proposal on how the judiciary in the Irish Free State should be structured. It joined O'Connor in recommending "a Court of Appeal that by its number and weight shall carry with its decisions an impression of legal stability that has been wanting in the Court of Appeal in Ireland for many years."[54] The judiciary would remain highly centralized with the lower courts being given only slightly more power. A High Court, with as many judges as might be necessary, would be based in Dublin. There would be no establishment

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[52] UCD Archives, Kennedy Papers, P4/1099, Report of the Bar Sub-Committee on Judiciary Reform, February 1923.
[53] Ibid.
[54] Ibid.

of a circuit court system, but instead the High Court would go out on circuit three times a year. Essentially, the general structure of the colonial system would remain with both bench and bar being concentrated in Dublin. The barristers had the support of the other half of the legal profession as the solicitors said that they supported and were part of the formation of the barrister's recommendations at a meeting of the Incorporated Law Society of Ireland.[55]

Given the views of the other supporters of the *ancien regime*, it comes as no surprise that Glenavy strongly opposed the trend towards decentralization. In a March 1923 letter to Kennedy, he noted the Free State Executive's desire to decentralize the judicial system given what he thought were High Court powers to lower level courts. Touching on the traditions that O'Connor mentioned and the effect decentralization would have on the bar, Glenavy said that decentralization "would practically destroy the dignity [and] traditions of the Bar and reduce it to a body of [illegible] and provincial practitioners."[56] Thus, the highest ranking member of the *ancien regime* involved in the process of establishing the new judiciary joined the others by making clear that while some changes needed to occur they wanted the judiciary to remain centralized and the English traditions to remain.

Revolutionary Law in the New State

After risking their own liberties and lives by sitting as judges on the Dáil Courts, Meredith and Davitt took a stand against the old regime and advocated that the new judiciary be structured around the principles that were embodied in the courts the Irish people established and supported during their fight for independence. The knowledge gained from the Dáil Court system experiment was articulated in memorandums submitted to the Committee by Judge Meredith, while Davitt's memorandums were more concerned with issues that related to his role as Judge

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[55] *The Irish Times*, "The Law Society," May 17, 1923.
[56] UCD Archives, Kennedy Papers, P4/1087, Glenavy to Kennedy, March 1923.

Advocate General. There were issues that Meredith and those of the *ancien regime* agreed on, but on the issue of decentralization the two parties had a fundamental disagreement.

The revolutionary judge agreed with the judges of the old regime that the appeal system needed to be changed. Meredith believed that the appeal process was inefficient and took too much time. He did not specifically suggest the creation of an appeals court, but did mention different ways the system could be structured to hear appeals alluding to a supreme court, which was an innovation of the Dáil Courts and not part of the old regime's system. Like O'Connor, he believed that the number of appeals needed to be limited so there was not a seemingly endless process. A change Meredith wanted that the British appointed judges did not mention, possibly because they were part of the problem, was a change in attitude of high court judges handling appeals. He believed that judges on the high court in the past approached a case with the attitude that they were far wiser than judges on lower courts. As a result,

> a case that has taken an hour or two before a careful and conscientious County Court Judge has been 'polished off' in half an hour by a High Court Judge. The confidence of the latter in his boundless superiority to the learned County Court Judge is not always acquiesced in by the litigants or the general public.[57]

So while both the revolutionary and the *ancien regime* courts agreed the appeal process had to be changed, the major point of disagreement between the two parties was already apparent. While the British appointed judges believed that experienced judges under the older regime who were a result of centralization were the foundation of the system, Meredith saw these centralized judges as part of the problem because of their superior attitude and condescending view of the Irish people which was apparent in some of their previously mentioned comments to the Committee.

Surprisingly, Meredith did not object to resident magistrates being part of a judicial system under the new Irish government. If they were to remain though, he believed that RMs

[57] UCD Archives, Kennedy Papers, P4/1090, Memo 6, Memorandum by Judge Meredith being Preliminary Memorandum on Reconstruction of Judiciary, February/March 1923.

should report to no government agency other than the judiciary. Meredith believed that RMs should be appointed to a district and then be assigned to a sub-district for a period of time. In his memo, he envisioned the position replacing that of the Republican Parish Courts. While the RMs as described in O'Connor's recommendation would be open to the same criticism they received while under British rule, Meredith put forward an important change that would change the perception of the position. He recommended that "the magistrates of a District should be brought directly under the District Judges and receive their directions from them rather than from the Executive."[58] He did not explain if the RMs would remain removable at the will of the Executive, but at least they would no longer be functioning as its agents in addition to their judicial responsibilities.

Meredith also wanted to see the chance for promotion from the lower courts to the higher courts. To the revolutionary judge, if the judiciary was to be truly independent of politics, the appointments to the High Court should not just be given to loyal party members who served in posts in the executive. While Meredith did not object to O'Connor's proposal that judges on the lower courts should be paid more to attract higher quality men, he also believed that to attract capable legal professionals there must be a chance to be promoted to higher judicial positions. Meredith recognized that the English system disallowed promotions to maintain judicial independence by removing a temptation to favor the views of the executive, but he believed that "the old system has not prevented servility and it certainly has deprived those appointed of any incentive to achieve marked success."[59] Under his plan, promotion while not guaranteed, was a possibility, which provided incentive for the judges on the lower courts to excel in their positions.

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[58] Ibid.
[59] Ibid.

Harkening back to the Sinn Féin ideas that led to the court system Meredith had led, he proposed the creation of an arbitration system. Without referring to the proposals Griffith had put forward previously, which could be tied to Nationalist politics, Meredith instead referred to how the English had some form of arbitration set forth in their statutes. While trying to avoid Unionist opposition to a system by tying the idea of arbitration to the judicial system they wished they were still part of, Meredith proposed an important change to the system. In England, the parties involved in a dispute had to find an arbitrator that they could all agree was impartial. As Meredith pointed out though, "One of the chief difficulties in Arbitration is the selection of a genuinely independent arbitrator."[60] He wanted to have parties seek the Court's guidance in selecting an independent third party to settle dispute because "If members of the Bar were appointed by the Court difficulty might be surmounted."[61] With the Court appointing arbitrators, more cases would go to arbitration instead of before a judge and jury, reducing the workload of the new system.

Meredith, whose court respected and considered legal decisions of multiple legal systems but ignored British precedents, did not want the new system to be bound by *ancien regime* decisions. He recommended that the new judiciary "should start with a fresh slate and that while decisions of the old courts might be cited and should be treated with respect, the decisions of the old Courts and of the British Courts should not be of binding authority any more than the decisions of the American Courts."[62] Meredith viewed the English jurisprudence as being "marred by a number of almost inextricable legal tangle resulting from unfortunate decisions," which could be untangled by starting anew.[63] Legal decisions would no longer need to be long

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[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] Ibid.

documents that had to touch on every previous decision related to a case and could instead focus on the issue at hand.

Meredith also believed that the appeals process, which ultimately ended in the English Privy Council under Article 66 of the Irish Free State Constitution, needed to be considered.[64] Since appeals would no longer being going to the House of Lords, but solely to the Privy Council which he believed was "not as reputable," the decisions sent to them would have to be kept as simple as possible for them to understand.[65] Furthermore, if court rulings were mainly based on the facts of the case and not centuries of case law, then the Privy Council's decision "would tend to become only decisions on the particular case, and their influence on the trend of Irish case law would tend to become minimal."[66] This would satisfy Nationalists and even de Valera who objected to judicial appeals going to the Privy Council.

While all of Meredith's recommendations would represent major changes to the judiciary if enacted, none was more significant or directly opposed to the stance of the *ancien regime* than his proposal to decentralize the judiciary. The head of the revolutionary court system, which was anything but centralized, believed that the structure of the old system prevented the people in the countryside to have access to sufficient legal services. In his memorandum he stated "It may be gathered from the experience of the Republican Courts during the last nine months that there is a large mass of legal business in the country which has been kept out of Court by reason of

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[64] Irish Free State (Saorstát Éireann), *Constitution of the Irish Free State (Saorstát Éireann) Act, 1922*, Acts of the Oireachtas, http://acts.oireachtas.ie/zza1y1922.1.html; Article 66 provided that no piece of legislation by the Irish Free State could prohibit a person from appealing the final decision of the highest Irish court to the English Privy Council. The relevant part of the article reads "The decision of the Supreme Court shall in all cases be final and conclusive… Provided that nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave."

[65] UCD Archives, Kennedy Papers, P4/1090, Memo 6, Memorandum by Judge Meredith being Preliminary Memorandum on Reconstruction of Judiciary, February/March 1923.

[66] Ibid.

expense and delay."[67] After the Irish people had experienced the Dáil Courts, which provided accessible, efficient, and cheap justice around Ireland, how could the new government ask them to return to a system that did not provide for their needs? In an effort to appease those opposed to decentralization, he suggested all appeals would be heard in Dublin and not on the circuit to "compensate for the loss of business occasioned by giving larger jurisdiction to [local courts]."[68] Given the Free State Executive's views and the position of those representing the Dáil Courts, a recommendation towards some form of decentralization seemed certain from this Committee.

From the "Official" Opposition

As the official opposition in the Dáil Éireann, the Labour Party submitted a memorandum to the Judiciary Committee although legal matters were not the party's forte.[69] The party's recommendations were not submitted to the Committee until May 1923, which was fairly late in the process. Labour knew it could provide little assistance in suggesting what the organization of the new system should be and did not have the same knowledge and experience in legal affairs as Committee members, but it wanted to "suggest that consideration might be given from the point of view of promoting impartiality, cheapness and efficiency."[70] The recommendations of this political party are interesting because while they address some of the issues already mentioned they do so with a different thought process and they also address issues overlooked by the great legal minds of Ireland.

The representatives of the *ancien regime*, Dáil Courts, and the Free State Executive did not consider the issue of courts for juvenile offenders in their recommendations to the

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[67] Ibid.
[68] UCD Archives, Kennedy Papers, P4/1090, Memo 7, Memorandum by Judge Meredith Being Further Memorandum on Reconstruction of Judiciary, February/March 1923.
[69] The role and history of the Labour Party will be discussed in the following chapter.
[70] UCD Archives, Kennedy Papers, P4/1092, National Executive of the Irish Labour Party and Trade Union Congress, Memorandum on the Reform of the Judicial System, 1923.

Committee, but Labour strongly pushed for the issue to be addressed seriously. Although the Children Act of 1908 created a system in Ireland where there would be a separate court for children, Labour believed that this legislation had "been operated in only a half-hearted kind of way."[71] The party believed having a provision creating separate courts for juveniles did not fully address the problem because "The special needs of these cases require to be dealt with by special officers and by a special procedure distinct from those of the ordinary courts."[72] With the young nation creating a new judicial system, it was the appropriate and necessary to create a judicial system that provided for its young citizens.

Although it did not mention Meredith's arbitration system, the Labour Party felt the creation of such a system should be looked into. The opposition party felt this might be outside the scope of the Judiciary Committee's work, but that an arbitration system would help make legal affairs cheaper and more efficient for many. It stated that "Suggestions as to methods of cheapening legal action would involve an investigation… for the settlement of disputes by conciliation rather than by litigation."[73] While it supported the idea of arbitration, Labour could not settle on how the system would operate. It did not suggest that barristers be appointed by the Court as Meredith had, but put forward two systems that both had self admitted shortcomings. The first would be a full time position where a person with legal knowledge and suitable character would be the arbitrator for cases in a given geographical area. The problem with this plan in the eyes of Labour was "their districts would have to be large and the consequence might be that they would appear as remote and official personages rather than friendly helpers of the plain man."[74] The alternative to such a system would be to appoint people who were respected

[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Ibid.

figures in their communities, but the party did not feel this could be safely done at the time, probably due to the Civil War. The Labour Party would refine its position on this issue over time, but not before the Judiciary Committee released its report.

In what could be considered Labour's most radical or out of the box ideas, the official opposition party put forward three proposals to ensure the judiciary would be independent of the Executive. The most drastic proposal, which the party was aware could probably not be implemented, was to separate the professions of judge and advocate, which was comprised of barristers and solicitors. Labour believed that appointing advocates as judges was a unique aspect of English speaking countries as many Continental European countries had separated the two professions. Labour believed that appointing judges from the ranks of barristers had depended on a condition that was present in England where the success of the system relied on "a long and well-established tradition of judicial impartiality and independence, and upon such a division and alteration of power between political parties as will prevent judicial appointments becoming the monopoly of those holding one kind of political views."[75] The leaders of Labour did not see these factors present at the time in Ireland as judges appointed under the British, regardless of political party, were largely Unionists and while the structure of the Irish political party system was still uncertain, it seemed all but certain Labour would never be the largest party. The party realized that its proposal would not entirely eliminate political influence and that it would probably be impractical to implement, so would likely not be accepted by the Committee.

The second proposal to depoliticize the process of judicial appointments was a change in the nominating process. Labour believed, like many Irish, that the process the British executive used when appointing judges put politically biased men on the bench and that "there is nothing save the good sense, honour and susceptibility to public and professional opinion of the

[75] Ibid.

Executive Council [of the Irish Free State] to prevent the appointments of quite unsuitable persons being made on political or personal grounds."[76] The opposition party wanted to ensure that the Executive would advise the Governor-General whom to appoint as required by the Constitution, and that the people considered by the Executive would be well qualified individuals. The Labour party hoped to see a system where judges, senior barristers, or a combination of the two would nominate people they felt were qualified when vacancies occurred on the bench, but the final choice would still be made by the Executive who could possibly pick some other person who was not nominated. The party felt that under this system, the nominations made by those in the legal profession would be "responsible in a very large degree for the maintenance of the high standard of qualification amongst judges, while the final choice of the Executive Council… would act as a check on undue exclusiveness or conservatism in the profession."[77] While this proposal seems sound in its reasoning, it is surprising to see this recommendation coming from the party of organized labor and not from the Bar Council.

The final proposal put forward by Labour in an attempt to ensure there would be good judges on the bench was one of the proposals put forward by Meredith—create a system where judges from lower courts can be promoted to higher judicial positions. As Meredith had pointed out, the opposition party believed the "water-tight" barriers between the various judicial levels was one of the contributing factors to why the judges on lower courts were not as capable higher court judges.[78] Labour also believed promotions should be allowed because "periods of service as a District Magistrate and County Court Judge would be an experience of great value to a judge of the High Court."[79] This third proposal, while being the least revolutionary of three

[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] Ibid.

recommendations, was the one with the most support from other parties involved and therefore the most likely to be accepted.

Finally, there was the main issue of contention between the *ancien regime* and revolutionary justice—decentralization. With the Free State Executive supporting decentralization, if there was to be any significant challenge to the idea if it went before the Dáil it would have to come from the deputies of the Labour Party. Unfortunately for supporters of the old system created by the British, the official opposition joined the majority in supporting a trend towards decentralization. The Labour Party memorandum spoke only very briefly on the issue, but made its position clear stating "the new District Courts appear to be inexpensive and readily accessible, and an extension of the system so as to give District Justices wider powers would probably be advantageous."[80] Labour also believed that expanding the powers of County Courts should be considered because their judges, as others pointed out, did not have enough work to keep them occupied. To correct this problem the party proposed that the territory each judge was responsible for could be expanded and that "devolution of jurisdiction from the higher courts might make for substantial economy as well as for improvement and efficiency."[81]

Studying Abroad

While the Committee members looked at the two legal systems used in contemporary Ireland and the new system was to be largely based on the two, they did not strictly limit themselves to the British and Dáil Courts as they looked at other European judicial systems and the judiciaries of other British dominions. Three memorandums in particular are especially important in regards to this topic. The first is the aforementioned Labour memorandum, which crafted some recommendations based on Continental European countries. Second, was a

[80] Ibid.
[81] Ibid.

memorandum submitted by Henry Hanna, which gave a brief summary of the Scottish judicial system. Finally, A.F. Blood submitted a memorandum on behalf of the Bar Council providing an analysis of the judiciaries of the British dominions of Australia and New Zealand.

The separation of the professions of judge and advocate was not the only Labour proposal inspired by a foreign system. Based on a service provided in Germany, the party wanted there to be municipal legal advice centers. These centers would be started by municipalities or at least subsidized by them and would provide quality legal advice to those who usually could not afford it. Labour admired the success of the system in Germany where 110 of these centers provided "advice in over 300,000 cases, chiefly to the working people and people of small means."[82] With these centers helping those who made up a large portion of Labour's constituency, the party put forward this recommendation although it is not clear if this fell in the scope of the Committee's work. Also, the party's recommendation for an arbitration system did not trace its roots to early Sinn Féin ideas as Meredith's proposal had. Instead, the recommendation was based on procedures in France and Denmark where an attempt at conciliation was a mandatory step in the judicial process. While discussing how these systems all had a great deal of success in Europe was useful because it showed such systems were not just theories but could be implemented, there is a major shortcoming to such proposals—they did not explain how they could work in Ireland. The Free State Executive wanted a system created by and for the Irish people with special consideration to the current situation of the former British colony, but Labour never discussed how systems that worked in Continental Europe would be acceptable to and helpful to the Irish people.

Henry Hanna's description of the Scottish system provides a succinct summary of the judiciary's organization. Hanna, a barrister who had been appointed 3rd Serjeant of Ireland in

[82] Ibid.

1911, knew the workings of other legal systems in Great Britain well as he was educated in London and was admitted in the English Bar. He was also in good standing with the Free State Government and would be appointed to the Irish Free State's High Court in 1925.[83] In the Scottish system, there was a system of lower courts, which fell under the category of Sheriff Courts. At the lowest level there were Sheriff Substitutes, which were in every large town and several in each county. It handled every type of case except for divorce cases and ones that would carry a sentence of penal servitude or death. All civil cases involving £50 or less were tried before the Sheriff Substitute and there was no appeal unless the judge who decided the case allowed it. There was also a Sheriff Depute jurisdictional level, which was solely a court of appeal. There was a Supreme Court headed by the Lord President, which corresponded well with the High Court and Lord Chancellor in Ireland's British created system. The Supreme Court had 13 judges who served in various functions. In the Supreme Court there were two Courts of Appeal, which heard appeals from the Sheriff Courts and also the Lord Ordinary, who was a Supreme Court Judge who heard cases of first instance and urgent matters. Finally, six of the Supreme Court judges would go out on circuit.[84] While there are similarities between the judicial systems in Ireland and Scotland, it is surprising to see the differences between the two when both were nations ruled by England for centuries.

Two judicial systems that were especially relevant for the Irish to look at were New Zealand's and Australia's because both countries, like the Irish Free State, were British dominion states. While the memorandum, written by the elderly and experienced barrister A.F. Blood, was on behalf of the Bar Council, the memorandum did not set forth recommendations as the previously mentioned Bar Council memorandum did, but strictly provided a summary of the two

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[83] Kenneth Ferguson, ed., *King's Inns Barristers, 1868-2004*, 200.
[84] UCD Archives, Kennedy Papers, P4/1089, Memo 1, Preliminary Memo from Serjeant Hanna.

systems.[85] Unfortunately, the summary was fairly brief and did not offer much analysis of the two judiciaries. In regards to Australia, most of the description of the legal system focused on the structure of the system. One important difference between Australia and the Irish Free State was that Australia was comprised of six federated states. Each state had its own judicial system, which had various jurisdictional levels. There was a High Court of Australia, which had jurisdiction over all of Australia and was a court of appeal for all six states. The final appeal though was to the English Privy Council, as was the case under the Free State Constitution. One aspect of the appeal process that Nationalists would find particularly unacceptable was that there was a provision to bypass the Australian High Court with its leave to go directly to the English Privy Council. As Meredith had articulated, those who wanted to move away from the British created system wanted to minimize the impact appeals to the Privy Council had on Ireland, so they would not want to make special provisions to make it easier for cases to reach the Privy Council.

New Zealand's structure of the judiciary was unique and while discussing New Zealand, Blood touched on another issue that Nationalists and *ancien regime* supporters had strong feelings on. As for the structure of the court system, there were only two levels of courts in New Zealand—the Resident Magistrate's Court and the Supreme Court. The Resident Magistrate jurisdictional level was the lower court system and could deal with cases involving up to £200. The Supreme Court heard all other matters and appeals. The Supreme Court was comprised of a Chief Justice and four ordinary judges. An ordinary judge was assigned to each of New Zealand's four major cities: Otago, Canterbury, Wellington, and Auckland. The choice of these four cities does have some relevance to the Irish situation because these four cities had been the

[85] Biographical information on Blood can be found in Kenneth Ferguson, ed., *King's Inns Barristers, 1868-2004*, 141.

centers of four of New Zealand's six provinces. At one point these provinces had their own governmental entities, but during the time the Judiciary Committee was meeting, New Zealand's provinces, like Ireland's, were mostly irrelevant within the government's structure.[86] These four judges had unlimited jurisdiction in their assigned areas and appeals would be heard by the Chief Justice along with two of the other ordinary justices.[87]

Blood did not discuss the relationship between the judiciary and the Privy Council as he had with Australia, but he did touch on an issue sure to stir emotions amongst Committee members—maintaining English traditions. In both New Zealand and Australia, English wigs and gowns were still worn. To O'Connor and the Bar Council, who wanted to keep the English traditions alive in the Courts of the Irish Free State, the decision of these two dominions to preserve English ways was the course of action they wanted to take as well. Many Nationalists, though, wanted to do away with English traditions and incorporate the Irish language and other Irish ways into court proceedings.

How to Make the Irish Courts Irish

Hugh Kennedy's cultural nationalism brought the issues of costume and language to the forefront of the Committee's work. While the structure of the courts and other legal issues were of great importance to Kennedy, they could not be the only issues considered. The Attorney General of the new nation believed it was crucial for the people of the Free State to embrace the new system and see it as distinct from the courts created by England. For there to be a clear difference, the English traditions in the courtroom had to be replaced. Kennedy wondered if significant improvements were made to the judiciary, but judges and barristers were still wearing

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[86] W.H. Oliver and B.R. Williams, ed., *The Oxford History of New Zealand* (New York: Oxford University Press, 1981): 91-105.
[87] UCD Archives, Kennedy Papers, P4/1089, Memo 2, A.F. Blood, Memorandum on the Constitution of the Courts and Judiciary etc. of the Australian Commonwealth, and of New Zealand, December 12, 1922.

wigs and the Irish language was not allowed in court, would a poor Irish-speaking farmer in the rural west coast of Ireland recognize that the system had changed? Probably not, which meant that these seemingly superficial changes were of grave importance.

In March 1923, the issue of language took center stage in the formulation of a new judicial system due to events outside of the Committee's control. In a case before Committee member Charles O'Connor, acting in his capacity as Master of the Rolls, an affidavit, which was written in Irish and accompanied by no English translation, was presented to the judge. O'Connor rejected the affidavit because there was no way he could read the document. Although this case was otherwise not noteworthy, the rejection of a document in Irish in the Free State grabbed headlines and the story appeared in *The Irish Times*, *The Freeman's Journal*, and *The Irish Independent*. All three publications claimed that O'Connor stated that "He was one of those who did not know Irish. If the documents were to be accepted in Irish he would have to go home and study the Irish language; and he was too old now to acquire the language."[88] O'Connor asked the barrister involved, Conor Macguire, if an English affidavit could be provided. Macguire claimed that an English version was not needed as the Irish document provided should be allowed under the Constitution.[89] This argument did not sway the Master of the Rolls.

Macguire appealed the decision and was met by the same ruling from Lord Justices Ronan and O'Connor, who submitted the aforementioned memorandum in defense of the *ancien regime*. O'Connor believed that Macguire was quite right in claiming Irish was the official language of the new nation, but that he overlooked the clause that says English is also the official language. Furthermore,

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[88] UCD Archives, Kennedy Papers, P4/1919, *The Freeman's Journal*, "Swearing in Irish," March 15, 1923; *The Irish Times*, "Affidavit in Irish," March 15, 1923; *The Irish Independent*, "An Affidavit in Irish," March 15, 1923.
[89] Irish Free State (Saorstát Éireann), *Constitution of the Irish Free State (Saorstát Éireann) Act, 1922*, Acts of the Oireachtas; Article 4 read "The National language of the Irish Free State (Saorstát Eireann) is the Irish language, but the English language shall be equally recognised as an official language…"

> English was the official language of these Courts. These Courts, [O'Connor] said, were not the new courts, which might be constituted… They were the Supreme Court carrying on jurisdiction under the Free State by reason of the Constitution retaining all their attributes as Judges of the Supreme Court appointed by his Majesty, and performing their duties until such time as the new courts could be set up.[90]

O'Connor said that to the best of his and Ronan's knowledge, no judge on the High Court was proficient enough in Irish to be able to hear an argument or read an affidavit. Ronan agreed with O'Connor and added that an old statute still in effect established English as the official language of the Court.

The rulings by judges appointed by the British government brought on the ire of many cultural nationalists, notably the Gaelic League. After the Master of the Rolls's ruling, the secretary of the Gaelic League, Mr. O'Fathaigh, sent a letter to the Irish Free State Executive objecting to Charles O'Connor's decision. After Lord Justices Ronan and O'Connor made their ruling, the Gaelic League sent a letter to the editor of the *Freeman's Journal*, which showed how this incident enraged some of the Irish populace. In the letter the Gaelic League lamented the treatment of the language in the new nation and in a hostile tone offers possible ways to ensure Irish's place in the courts stating:

> The Irish language is the national language of the Irish people. This fact is embodied in the Constitution of the Free State. That embodiment did not make Irish the national language; it was so before there was a Constitution. The Constitution enactment weakened rather than strengthened the national status of Irish by admitting English as a co-equal language for official purposes. But the Courts go one better, and declare that English is exclusively the language of the courts… The decision is that Irish cannot enter the courts except by use of an English crutch, there is no counter provision that English cannot enter the courts without an Irish crutch. The main reason assigned for this discrimination against Irish is that the judges and officials are not conversant with Irish… One way out would be for the judges and officials who are ignorant of Irish to resign their jobs and make way for people who can administer the laws in the national language. Another remedy would be to order an official translation of the document for the use of the officials… Gaels will not use an English crutch to get into the Law

[90] UCD Archives, Kennedy Papers, P4/1919, *The Freeman's Journal*, "Not to be Filed," March 17,1923.

> Courts. They propose to take Irish by the front door to every court and every office in Ireland. Those who stand in their way will get hurt.[91]

With such a strongly worded reaction to the court's decision from this well known organization with ties to many Nationalist leaders, the Committee and Free State Executive could not overlook this incident.

Hugh Kennedy, a strong cultural nationalist himself, believed the issue needed to be addressed, but was surprised at the strong reaction of the Gaelic League. Kennedy responded to the letter sent to the Executive in a letter of his own explaining his position. He did not understand why the Gaelic League was so infuriated about the Master of the Rolls requiring a copy of the affidavit in English when the organization's letter to the Executive Council in Gaelic was "accompanied by a duplicate in English. When the official Gaels fall, what is one to expect of an 'ex-British Judge'?"[92] Kennedy said that Irish was the country's national language, but so was English for official purposes. He considered it any litigant's right to use Irish in court, but that there is nothing in the Constitution that barred the requirement for a translation. He thought that requiring translations into both languages was fair and also would prevent a party in a case from gaining an unfair advantage by using a language the other party did not speak. In his opinion, the Judiciary Committee would have to address this issue, but he thought "it will be found that the provisions in this respect will not differ substantially from the ruling of the Lord Chief Justice and the practice of Mr. O Fathaigh (*sic*) as exemplified by his bi-lingual correspondence."[93] Louis Walsh, while not objecting to Kennedy, wanted to ensure that Irish could be used in court by requiring solicitors and barristers to pass a section on Irish in their

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[91] UCD Archives, Kennedy Papers, P4/1919, *The Freeman's Journal*, "Irish in the Courts," March 23, 1923.
[92] UCD Archives, Kennedy Papers, P4/1170, Kennedy to Cosgrave, March 9, 1923.
[93] Ibid.

entrance examinations. Walsh felt that "There is nothing very drastic in that proposal and I trust it will be agreed to by everybody."[94]

Unfortunately, almost no record of the debate concerning judicial costumes during the Committee's work has survived. A letter from Walsh to Kennedy sent just before the Committee released its recommendations gives an overview of how the Committee responded to the issue and the position that Kennedy and he were taking. Walsh believed that having a simple costume that was "characteristic of Irish traditional art" would have symbolic meaning and "be a perpetual reminder both to ourselves and to the World of our distinctive nationhood; and the adaptation of it would appeal very much to the national instinct."[95] Walsh was disappointed the Committee was not willing to make such a recommendation saying "I wonder that the other members of our Committee could not see that far more propaganda would be used against our new Courts on a question of this kind than in respect of far bigger issues."[96] Kennedy agreed with this position as Walsh claimed the Attorney General said "a distinctly Irish costume will be an 'ocular demonstration' to the man-in-the-street that our Courts are really Irish ones."[97] While the Committee decided it would not mention costumes in its final report, Walsh claimed that the issue was dead because it could be taken up again in the Dáil after the Committee's report was released.

Under Pressure

While it was essential for the Committee to make recommendations, it had to produce a report as quickly as possible. Neither political nor judicial affairs in Ireland paused for the Committee to do its job. The new political institutions established in the Free State went along

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[94] UCD Archives, Kennedy Papers, P4/1101, Walsh to Kennedy, March 27, 1923.
[95] UCD Archives, Kennedy Papers, P4/1102, Walsh to Kennedy, June 3, 1923.
[96] Ibid.
[97] Ibid.

with business as usual, some which inevitably dealt with the administration of justice. Court cases were still being heard although the future of the system was unknown. The Committee was not oblivious to the need to move quickly as the pressure of the world outside of its meetings pushed it forward to a final conclusion.

With the legislature in session during the period the Committee was performing its task, both deputies and senators debated the administration of justice until new sweeping legislation based on the Committee's report could be put forward. When the Dáil was debating temporary legislation regarding District Justices in February 1923, the leader of the Labour Party, Thomas Johnson, challenged the Government on the appointment of judges. He wanted to ensure that judicial posts in the Irish Free State would be free from political influence and patronage, touching on an issue the Committee was dealing with.[98] The same temporary legislation became an issue in the Seanad with many senators wanting to add amendments. Glenavy, in his role as President of the Seanad, assured his colleagues that all the issues mentioned were under consideration by the Committee. He promised the Seanad a detailed report addressing their concerns and stated that the Committee had already reached decisions on some of the pertinent issues. Glenavy did not mention when the report would be released and as a result many amendments were still put forward to make changes to a temporary provision.

Besides the confusion in the legislature engendered by the suspense of waiting for the Committee's recommendations, the judiciary of the time was not functioning efficiently: the Dáil Courts were no longer in existence and the British created courts seemed to be in their final months of operation. Lacking recommendations for a new system, judges were unable to deal with certain cases as they usually would. The Ministry of Home Affairs received a report for the month of April from District Justice Gleesons giving an example of such problems, which was

[98] *The Irish Times*, "The Test of Fitness," February 3, 1923.

forwarded on to the Committee's secretary in June. The judge had two prisoners who were to be tried for willful murder, but said there was no court he could send them too. In his report Gleeson suggested the solution to this problem lay with the Committee saying "I would respectfully suggest the advisability of speeding up the work of the [Judiciary Committee] with a view to having the superior Courts of Circuit re-established in the immediate future."[99]

The public also became impatient with the Committee as month after month went by with no recommendations being put forward. Very little was known about the Committee and what it was doing except that its ideas would be used to formulate legislation to create a new judiciary. With such an important task, the public understandably wanted to know what was being said behind closed doors and in confidential letters instead of relying on conflicting rumors. This frustration is best summarized in an anonymous letter to the editor of *The Irish Times* in May stating the Committee has:

> now been sitting for some months, and no one knows what they are doing or have done. On the one hand, one hears that they cannot agree; on the other hand, that their report has been completed and sent in… Before the Judiciary Committee deal with these matters it would be well to give the public, as distinct from the legal profession, an opportunity of expressing their views.[100]

Despite the public growing impatient, the people of Ireland would have to continue to wait without any information to what the Committee was doing.

The Committee was well aware of the demand for the release of their report. Its concern was rooted primarily in its fear that negative stories about the group's work would doom the recommendations they made before they were even released. One eye-catching story was published in *The Freeman's Journal* just days before the recommendations were made public, which suggested the Committee may not release its report at all. In a letter, Walsh said he was

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[99] UCD Archives, Kennedy Papers, P4/1098, Smidic to Kennedy, June 4, 1923.
[100] Attorney-at-Law, "Letters to the Editor: Legal Reforms," *The Irish Time*s, May 3, 1923.

glad the report was to be released shortly because stories such as the one that appeared in *The Freeman's Journal* was "illustrative of the danger that I feared, namely the unauthorized forecasts would take the taste off the report… The Report could be damned by some fellow getting up and proclaiming that we had practically re-established the British system."[101] How much the public pressure and concern for false reports hurried the Committee along is uncertain, but such factors were on the minds of the men trying to create a new judiciary.

Consensus Reached and the Report is Released

After months of deliberation, on June 12th the report of the Judiciary Committee was made available to the public.[102] In a letter to President Cosgrave, which was also included in the report, Glenavy acknowledges that with the Committee's work complete, the onus of creating a new judiciary was on the Executive saying he hoped the report would "be a helpful contribution to the difficult task with which your colleagues in the Government and yourself are confronted and upon which so largely depends the future peace and prosperity of our country."[103] The chairmen of the Committee pointed out that while the work was not easy and required a great deal of time, the Committee members committed themselves whole-heartedly to their work and the group was able to reach a unanimous consensus. While it is unusual that men with different political, religious, and ideological backgrounds were able to agree on many issues, this unanimous support for the final report had two major drawbacks. First, as with the issue of costume, it seems that when the Committee members could not agree on an issue they left it out of the report all together. Secondly, the Committee did not feel it was necessary to explain the rationale behind their proposals since they all agreed on the recommendations.[104] Although

[101] UCD Archives, Kennedy Papers, P4/1103, Walsh to Kennedy, June 11, 1923.
[102] For an example of media coverage see, *The Irish Times*, "Majority Verdict in Free State Courts," June 13, 1923.
[103] UCD Archives, Kennedy Papers, P4/1096, *Report of Judiciary Committee*, 1923, 7.
[104] Ibid., 26.

several issues are not addressed in the report and the rationale behind recommendations is not provided, this report had major ramifications on the judicial system of Ireland from the day it was released to present times.

The most important issue the Committee addressed in its report was the issue of how centralized the court system would be; decentralization was the path chosen. Although not explicitly mentioned in the report, the position of JPs and RMs would be eliminated and the lowest jurisdictional level would be the District Courts. There would be a district justice for each administrative county, with additional justices being appointed on a case by case basis if the workload was too much for one judge. These courts would have limited civil and criminal jurisdiction taking on all the judicial functions of JPs and RMs and some of the responsibilities of the county courts under the British created system.[105]

Also contributing to the process of decentralization would be the creation of a Circuit Court jurisdictional level resembling the circuit courts of the Dáil Courts. Unlike the circuit courts under the British created system, these courts were their own distinct entity with their own judges as opposed to the British method of sending High Court judges on circuit. These courts would be far more powerful than the county courts and would be able to deal with most cases at a more local level as opposed to many cases previously having to go to the High Court in Dublin. The circuit courts would also have the power to hear appeals from district courts. The Committee recommended that there be eight circuits.[106] It was Johnston, whose county courts were to be supplanted by the District and Circuit Courts, who distributed counties into different circuits. Johnston determined that the counties of Dublin and Cork, with populations of 476,000 and 392,000 respectively, were large enough that each warranted its own circuit. The remaining 24

[105] Ibid., 10-14.
[106] Ibid., 14-19.

counties of the Irish Free State had a combined population of 2.3 million, which Johnston tried to split as equally as possible between six circuits, with a target of 378 thousand per circuit. With the ideal population per circuit established, Johnston grouped counties into Northern, Western, Midland, Eastern, South-Western, and Southern circuits.[107] While eight was the ideal number of circuit judges in the eyes of the Committee, the recommendation was made for when the country returned to normal conditions so "in view of the accumulation of claims… it is probable that eight judges, for some time at least, be inadequate in number, and accordingly we recommend that power should be reserved to the Executive to appoint temporary Assistant Circuit Judges."[108]

Finally, there was the High Court and provisions were made to address the need for an improved appeal system. The number of High Court judges was reduced from twelve under the British created system to only six, which included the President of the High Court. Each one of these judges would be responsible for dealing with all kinds of cases instead of the rigid spilt between areas such as chancery, criminal, probate, etc., which existed under the *ancien regime* system. To hear appeals, there would be a Criminal Appeal Court and the Supreme Court, which would be the highest court of appeal in Ireland. The Criminal Appeal Court would consist of at least two judges of the High Court and presided over by one of the Supreme Court judges. The Supreme Court would be comprised of its president and two other judges. All of these courts would be located in Dublin, probably because of Meredith's belief that this would counter certain effects of decentralization.[109]

To ensure the judges of the new system were qualified, the report put forward a three fold approach. First, the Committee proposed the judges be well paid. District Justices would be paid £1,000 per annum increasing in increments up to £1,200, Circuit Judges would receive £1,500

[107] UCD Archives, Kennedy Papers, P4/1086, Smidic to Kennedy, October 31, 1923.
[108] UCD Archives, Kennedy Papers, P4/1096, *Report of Judiciary Committee*, 1923, 19.
[109] Ibid., 19-24.

per annum, High Court Judges would be paid £2,500 per annum, the President of the High Court and the two Supreme Court Judges would be paid £3,000 per annum, and the President of the Supreme Court would receive £4,000 per annum.[110] This new pay scale would keep the pay of the judges of the High Court and Supreme Court roughly comparable to that of their British appointed predecessors. For the lower courts, this represented an increase in pay, which would attract more talented individuals to serve. The second approach was to require judges to have a certain amount of experience as an advocate to be appointed to the bench. District justices had to be barristers or solicitors with six years of experience, circuit judges barristers with ten years experience, High Court and Supreme Court judges barristers with at least twelve years experience.[111] As Meredith had suggested, the new rules would make it possible to promote judges to higher courts to ensure the best talent available could be attracted to lower courts since they knew they would have the opportunity to climb the judicial ladder. To allow for promotion, experience as a judge at either of the lower level courts was deemed as being a practicing barrister so years on the lower courts could count towards the mandatory number of years experience as a barrister to be appointed to a higher level court.[112]

To ensure that the judiciary would be independent from the other branches of government, the report recommended judges have job security so they did not have to worry about the Executive's opinions. Judges of the Supreme Court, High Court, and Circuit Court could only be removed from their position for some form of misconduct or disability and only with the approval of both houses of the legislature. District Justices could be removed by the will of one person, just as RMs had been removable by a decision of the British executive, but to ensure a separation of powers the decision to remove a District Justice lay with the President of

[110] Ibid., 13, 18, 22, 23.
[111] Ibid., 13, 17, 24.
[112] Ibid., 13, 18.

the Supreme Court, not the President of the Executive.[113] Another innovation put forward by the Committee in regards to tenure was a mandatory retirement age. Judges on the District Courts and Circuit Courts would be required to retire upon reaching the age of 70. This recommendation was put forward in hopes of having mentally and physically capable judges on the bench, so people like the late Chief Justice Lefroy were not making outrageous decisions that could jeopardize the public's faith in the system.

To further ensure the judiciary's independence, the Committee also proposed that many of the rules of the courts would be made by neither the legislature nor the Executive, but by the courts themselves. Three, organizations called Rule-Making Authorities, would be established with a separate authority for the District Courts, the Circuit Courts, and for both the High Court and Supreme Court. Each jurisdictional authority would be comprised of five judges selected by their colleagues on each judicial level. Along with these five judges judges, each would have two barristers selected by the Bar Council and two solicitors selected by the Incorporated Law Society.[114] While the Committee wanted to give the courts as much autonomy as possible in crafting their own rules it did weigh in on two important issues. First, the notorious long vacation was to be reduced to less than ten weeks per year. Second, the Committee instructed "Each of the Rule-Making Authorities to prescribe rules for the purpose of giving effect to the provisions of the Constitution as to the use of the Irish language in their respective Courts."[115]

Two issues that were put forward by major players in this process were not addressed well or were left out altogether from the final report. The Labour Party's proposal to have a separate juvenile court system was not endorsed by the Committee. It did recommend that there be a separate court for children in Dublin, which would be presided over by one of the junior

[113] Ibid., 14.
[114] Ibid., 14, 18, 24.
[115] Ibid., 25.

district justices in Dublin as an additional responsibility to his regular workload.[116] This recommendation essentially called for a continuation of the system Labour objected to. Finally, it is surprising that the idea of establishing an arbitration system, which originated from the founders of the political party in power at the time and had support from Meredith and from Labour, did not gain a mention in the report.

Kennedy's Approval of the Report

In a draft of an article the Attorney General was writing for publication, he outlined his own position on judicial affairs in Ireland and gives his support to the recently released report. In this document, Kennedy complimented the judiciary of the former rulers of his nation, but said that the judiciary based on the English system "as we had it was imposed from outside; until quite a late period of Irish history, its authority was not real over a greater part of the country; it neither took root among nor derived any growth or sap from purely the Irish population."[117] Kennedy praised the Dáil Courts as a step in the right direction because although he believed the Free State needed to suspend these courts as part of creating a new nation:

> they supplied something for which the circumstances of the country called, namely, local courts with jurisdiction to dispose of the average local litigation, with simple procedure expeditious and not ruinously expensive, and presided over by men who would not be regarded as distant strangers deriving their appointments and their authority from alien sources.[118]

Kennedy believed that the Free State Government would be foolish to ignore the faults and benefits of the colonial system and the Dáil Courts and that the report issued by the Committee demonstrated it learned from the lessons history had to teach.

The optimistic Kennedy had nothing but praise for the Committee members and the report. He said that Committee members who were selected "to inspire general confidence, and a

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[116] Ibid., 14.
[117] UCD Archives, Kennedy Papers, P4/1690, Hugh Kennedy, "Judicial Re-organization in the Irish Free State," 1.
[118] Ibid., 4.

keen spirit of co-operation was shown" by the individual members.[119] The chief legal expert of the new Government believed that this Committee of experts successfully completed its task by producing a report "which presented a complete scheme for an Irish judiciary differing radically from that in existence under the British regime in Ireland but devised to meet the condition of the Free State and its population."[120] Kennedy claimed that the Government had accepted the report and was preparing to put forward legislation based on the Committee's work. He assumed that the legislation would have an easy passage through both houses since the majority party in the Dáil backed this plan and "there has not so far been any indication that it will meet with opposition in the Senate which is presided over by the distinguished lawyer and notable personality who was Chairman of the Judiciary Committee."[121] The man who selected the members of the Committee and was the leading legal figure of the government expressed his cautious optimism about what the future would hold saying:

> We may be venturesome in departing so far from familiar and well beaten tracks. But this young State is determined on the one hand to achieve sound economy in administration (we anticipate a saving under our scheme of £35,000 a year on salaries and personnel alone) and on the other hand to create legal organization adapted to the requirements of its people and devised to attract their respect and confidence. So let it be put to the test.

Kennedy and the rest of the Executive would be tested soon enough.

Uneasy Reaction

While Kennedy was satisfied with the final product of the Judiciary Committee, the report met with hesitation and also outright rejection by some in the legal profession. In an interview soon after the report was released, Mr. A. Julian, a solicitor from Cork, complained that "few of the suggestions of the solicitors had been adopted by the Judiciary Committee, and

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[119] Ibid., 9.
[120] Ibid., 10.
[121] UCD Archives, Kennedy Papers, P4/1690, Hugh Kennedy, "Judicial Re-organization in the Irish Free State II," 1, 14.

that the suggestions of the Bar seemed to have received little consideration."[122] While he agreed with Kennedy's view that the new judiciary would reduce costs and offer drastic changes, he thought it was impossible to determine if the proposed changes were improvements. The Bar was much more decisive in its reaction as it believed these recommendations "would seriously affect their interests" because decentralization would lead to barristers becoming "more or less local practitioners, and the Central Bar in Dublin will thereby, according to one of its members, become greatly weakened in power and influence."[123] While barristers could not change the outcome of the Committee's work, they prepared to oppose it in the legislative process.

Salute to the Judiciary Committee

As Kennedy mentioned, the Judiciary Committee did not just endorse the continuation of the colonial courts, but recommended the creation of a new system, although the English common law tradition was a strong influence. The Committee's task was not easy and little praise or credit was given for their work either by their contemporaries or historians, but these men proposed a judiciary system that has ensured freedom and liberty in a democratic and free Ireland. After the Judiciary Committee released its report, it disbanded since its task was solely to come up with recommendations. The responsibility of enacting these ideas now lay with the Executive. Some of these men would go on to help lead the legislative fight, others would receive appointments to the bench in the judiciary they helped create, and some would slip into historical obscurity. Regardless of what each member of the Committee did before or after the half a year they spent deliberating, they each had an impact on Ireland's past, present, and future.

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[122] *The Irish Times,* "Cork Solicitor's View," June 14, 1923.
[123] *The Irish Times*, "The Judiciary," June 14, 1923.

Chapter 4: Dáil Éireann and the Judiciary Bill

Overview of Chapter

In order to create a new judicial system based on the recommendations of the Judiciary Committee, the Executive Council needed to pass a bill through the legislature of the Irish Free State. While this thesis focuses on the judiciary of Ireland, it is not possible to understand the creation of the new court system without examining the political system at the time. Just as it was necessary to introduce the major players involved with the Judiciary Committee, an overview of the legislature and the parties involved is essential to put the debates involving this bill into context. This chapter will begin by giving a brief introduction into the Irish political scene in the early 1920's. This overview will only discuss the development of the political landscape up until 1923 and the Third Dáil, which is the time and political entity that the legislation based on the committee's report was introduced to.

The rest of the chapter will present the debate that occurred over the legislation that created the new judiciary. While the principles the Judiciary Committee's report were not changed by the Dáil, some notable modifications were made to the bill. During the debate, the Executive had to present and defend the system made by the Committee it appointed. The duly elected representatives of the people had an opportunity to enquire about specifics of the new system, after spending months pondering what the Judiciary Committee was considering. Also, these representatives had the opportunity to make amendments to the proposed court system to ensure that it would serve their constituents. Like the Judiciary Committee, the Dáil's involvement in the creation of an Irish judiciary marked a significant departure from the way the official courts of Ireland had been implemented by the British.

Structure of Dáil Éireann and Party System in the Early Irish Free State

The Constitution of the Irish Free State "provided in general for a British-style system: a bicameral legislature… and Cabinet government with the executive responsible to the lower house."[1] The legislature is called the Oireachtas and its upper house is the Seanad Éireann ("the Seanad"). Although the Seanad played an important role in the process of creating the new judiciary, its actions will be discussed in the next chapter where its constitutional powers and composition will also be explained. The lower house is called the Dáil Éireann ("the Dáil"), which closely resembled the British House of Commons, and its members were referred to as deputies.[2] Each deputy represented no more than 30,000 people and no less than 20,000, and these deputies were directly elected by the Irish people using the method of the single transferable vote.[3] Also, each university in Ireland was entitled to three deputies in the Dáil.[4] The Dáil would select among its own members to serve on the Executive Council ("the Executive"), which would consist of a President, Vice-President, and five to seven ministers who would be in charge of certain departments.[5] The President of the Executive Council was the head of government and comparable to the Prime Minister in Britain.[6] The Executive crafted the legislation based on the report of the Judiciary Committee and would have to put it before the Dáil for its passage, which required a simple majority.

A Problematic Party System

While the structure and the powers of the Dáil are easy to understand, the political party system involved is not. The Irish party system is often considered the "problem child in Western

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[1] Cornelius O'Leary, *Irish Elections, 1918-77: Parties, Voters and Proportional Representation*, 13.
[2] Irish Free State (Saorstát Éireann), *Constitution of the Irish Free State (Saorstát Éireann) Act, 1922*, Article 12.
[3] Ibid., Article 26.
[4] Ibid., Article 27.
[5] Ibid., See Articles 51-59 for clauses establishing their power.
[6] While the President of the Executive Council was effectively in charge of running the government, he did so through the representative of the British monarchy, who was referred to as the Governor General.

European schema."[7] At first, there were those who "had hoped that the Free State could be run without political parties, but reality dictated otherwise."[8] The party system that began to take shape in 1922 was the foundation of the contemporary system in the Republic of Ireland and was just as difficult to understand as it is today when analyzed through traditional political science studies that look for a left vs. right divide. In *Political Parties in the Republic of Ireland*, political scientist Michael Gallagher outlines the three major features of the Irish party system that make it confounding. First, it is difficult to determine how people associate with a particular party as there is a low correlation between a parties' membership and categories such as class, religion, and geographical location when compared to other Western democracies. The second feature is that when the political landscape of Ireland is compared to other European countries, the left is very weak, which will be explained further in a later discussion of the Labour Party.

Finally, it is difficult to tell the difference between the two major parties in Ireland, which during modern times are Fine Gael and Fianna Fáil, but during the early 1920's was Cumann na nGaedheal and Sinn Féin, respectively.[9] These two parties are not split along traditional left vs. right ideological lines, but "are structurally and historically, not different political parties, but internal factions of the old pan-nationalist party."[10] These parties were both descendents of Arthur Griffith's Sinn Féin. One of the parties was called Cumann na nGaedheal, while the other retained the name Sinn Féin. To avoid confusion the party both modern parties trace their roots

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[7] Derek Urwin and Kjell Eliassen, "In Search of a Continent: The Quest of Comparative European Polities," *European Journal of Political Research* 1 (1975): 97.
[8] Michael Gallagher, *Political Parties in the Republic of Ireland* (Manchester: Manchester University Press, 1985), 41.
[9] Ibid., 1-2.
[10] Tom Garvin, *The Evolution of Irish Nationalist Politics* (Dublin: Gill & Macmillan, 1981), quoted in Michael Gallagher, *Political Parties in the Republic of Ireland*, 7.

to will be referred to as Sinn Féin and the party that is descended from it and shares its namesake will be referred to as Republican.[11]

Parties with Seats in the Third Dáil

During the Civil War there was a clear break of the Sinn Féin Party and the two camps formed their own parties. The pro-Treaty wing of the party was the first to form its party as a result of a meeting in December 1922, which organized those supporting the Treaty into a new party called Cumann na nGaedheal (League of Gaels).[12] This party was born in extremely difficult and unique circumstances. The pro-Treaty camp had recently lost its two most important leaders with the deaths of Arthur Griffith and Michael Collins in 1922 and the party would be led by 42-year-old William T. Cosgrave. These politicians had "a steep learning curve" as there was no time to act slowly as they acclimated themselves to power.[13] The government had to build a new state, including the judiciary, while simultaneously winning the Civil War. The circumstances of Cumann na nGaedheal's founding led to a party with "an absence of policy or class interest. By avoiding any criterion for membership apart from acceptance of the Treaty and the new Constitution, Cosgrave hoped to bring into his party 'the best elements of the country, irrespective of class or creed.'"[14] Since the party appealed to all those who wanted peace regardless of their socio-economic or political positions, it was able to attract a large base, but

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[11] Peter Pyne, "The New Irish State and the Decline of the Republican Sinn Féin Party, 1923-1926," *Eire-Ireland* 11, no. 3 (1976): 34; Pyne lays out useful categorizations for different parties that have operated under the name Sinn Féin. Sinn Féin from 1905-1917 is classified as "Monarchial," for the party's vision of having parliamentary autonomy for Ireland but under the British monarch, much like the Austro-Hungarian government of the time. The second incarnation of the party is the "Nationalist" Sinn Fein, which refers to the party during 1917-1922 when the party became the largest party in Ireland. Third is "Republican" Sinn Féin, operating from 1923-1926, which was the party of members of the "Nationalist" Sinn Féin who opposed the Treaty signed with the British government that created the Irish Free State. This party lead by Eamon de Valera, changed its name to Fianna Fáil and continues to exist in this form today. Finally, there is the "Fundamentalist" Sinn Féin, which covers the party from 1926-present.
[12] Michael Gallagher, *Political Parties in the Republic of Ireland*, 41.
[13] Michael Gallagher and Michael Marsh, *Days of Blue Loyalty: The Politics of Membership of the Fine Gael Party* (Dublin: PSAI Press, 2002), 16.
[14] Cornelius O'Leary, *Irish Elections, 1918-77: Parties, Voters and Proportional* Representation, 17.

one that did not agree on all issues outside that of the Treaty and "there is evidence that several of Cosgrave's ministers were not really 'party-minded.'"[15]

One of the unique aspects of Cumann na nGaedheal was that it was already in power when it was formed. Most political parties establish themselves and work their way up the political ladder to power, but by the time the party was fully operational in April 1923, its members had been leading the government for over a year.[16] Another unique aspect of the party was that is acted boldly despite being a minority Government. The party only controlled 58 out of the 128 seats in the Third Dáil, but with the 36 anti-Treaty deputies abstaining, the party controlled 58 out of the 92 seats that were filled. While a new party that was the minority might be expected to tread carefully, Cumann na nGaedheal acted boldly to establish the new nation and win the Civil War. This was the party that had commissioned the Judiciary Committee and would put forward the bill to establish the new legal system. Throughout this thesis the terms Cumann na nGaedheal, the Executive, and the Government are used interchangeably as they all refer to the same political leadership that oversaw the creation of a new court system.

There is not much to say about the anti-Treaty camp since it decided to abstain for the legislature that considered the matter this thesis deals with. This wing of Sinn Féin would reorganize itself under the same name and the Republican faction fought the Government on the battlefield instead of serving as the official opposition to Cumann na nGaedheal in the Dáil Éireann. The Republicans were still a political force to be considered, but would not have any direct impact on the legislation that shaped the new judiciary since the bill was passed years before they took their seats in the Dáil. While the party would naturally have views about what court system would supplant the *ancien regime's*, this thesis will only briefly mention their

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[15] Ibid.
[16] Michael Gallagher and Michael Marsh, *Days of Blue Loyalty: The Politics of Membership of the Fine Gael Party*, 47.

influence on the legislative process due to the fact that the Republicans had very little since they abstained from government.

With the Republicans abstaining, the role of the official opposition party fell to the Labour Party. The Labour Party, which was founded in 1912 to be the political arm of Irish trade unions, came in third in the 1918 elections behind the two Sinn Féin factions, winning 17 seats. Labour, which was the largest left wing party of the time, faired so poorly when compared to its liberal party counterparts in other European countries for several reasons. First, the territory that was included in the Irish Free State had a very small industrial sector and therefore a small working-class population.[17] Second, the party organized its platform around socio-economic issues and this left Labour at a disadvantage against both camps of Sinn Féin "which have organised their support in terms of variations on q nationalist/republican theme, and which have effectively rendered [Labour's focus] irrelevant."[18] Labour did not focus on the Treaty issue as the two largest vote getters did for two reasons. First, the party had members from across the spectrum of the issue and secondly the party at the time was established to act as the political arm of labor unions in Ireland and not win electoral majorities so stayed focused on issues they saw more directly related to its cause.[19] Another major hindrance to the Labour Party was the blow it received during the 1916 Easter Uprising. Although the Labour Party had no official involvement with the rebellion, its leader, James Connolly, was executed for his involvement and the party's Dublin headquarters was destroyed.[20] Thomas Johnson, who was English-born and more moderate when compared to his predecessor, succeeded Connolly as party leader. Finally, the party's decision not to contest the 1918 election is largely responsible for the party's

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[17] Peter Mair, "Labor and the Irish Party System Revisited: Party Competition in the 1920s," *Economic and Social Review* 9, no. 1 (1977): 59.
[18] Ibid.
[19] Michael Gallagher, *Political Parties in the Republic of Ireland*, 70-71.
[20] Cornelius O'Leary, *Irish Elections, 1918-77: Parties, Voters and Proportional Representation*, 18-19.

weakness. Labour had planned to run in the 1918 election and it appeared it would do well, but a combination of many of its own members being supportive of Sinn Féin and pressure from Sinn Féin leadership to get out of the election led to Labour's withdrawal.[21] During what can be seen as the first election in an independent Irish nation, Labour's absence allowed Sinn Féin and others "to monopolize what were essentially virgin voters, and so create the foundation for the subsequent and virtually undisputed hegemony of the nationalist cleavage in Irish politics."[22] With all these handicaps it is impressive how well the party was able to regroup in the early 1920's.

After the vote on the Treaty that split Sinn Féin, Labour decided to run in the election for the Third Dáil because it wanted to have a hand in shaping the new nation and felt that neither branch of Sinn Féin represented its view point.[23] In the election, the party was able to carve out a significant niche of the electorate by attracting the working-class it was established to represent. It also was able to attract voters who were pro-Treaty, but opposed to the Executive, helping Labour "to secure a relatively strong electoral following as a relevant party of opposition to Cumann na nGaedheal."[24] The party's relative strength in the Dáil was drastically increased by the Republicans' abstention policy, which made Labour the largest opposition party. Once in the Third Dáil, the party "adopted a non-partisan role... [and] subjected proposed Bills to a close, public scrutiny and occasionally succeeded not only in inserting useful amendments but in substantially shaping legislation."[25] Perhaps Labour's greatest accomplishment in the Irish Free State was not its impact on a particular piece of legislation, but "to establish the Dáil as a

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[21] John Coakley, "The Election that Made the First Dáil," *The Creation of the Dail: A Volume of Essays from the Thomas Davis Lectures*, ed. Brian Farrell (Dublin: Blackwater Press, 1994), 38.
[22] Peter Mair, "Labor and the Irish Party System Revisited: Party Competition in the 1920s," 60.
[23] J. Anthony Gaughan, *Thomas Johnson, 1872-1963: First Leader of the Labour Party in the Dáil Éireann* (Dublin: Kingdom Books, 1980),197.
[24] Peter Mair, "Labor and the Irish Party System Revisited: Party Competition in the 1920s," 69.
[25] J. Anthony Gaughan, *Thomas Johnson, 1872-1963: First Leader of the Labour Party in the Dáil Éireann*, 217, 221.

genuine chamber of debate rather than a rubber stamp for the Executive Council."[26] The party would play a large role in the debate over the bill this chapter deals with and it carried itself in the most respectful and dignified manner following the example of its leader, Thomas Johnson.

Minor parties held 17 seats in the Dáil. Seven of these seats were held by the Farmers Party, which like Labour, was founded not to win a majority but to be the political arm of the Irish Farmers' Union. This party was "a classic example of an interest group-sponsored party… In general it exuded a stodgy conservatism, and was not noted for imagination or an interest in non-agricultural topics, while its desire for stability led to its alignment with the pro-Treaty camp from the start."[27] The party would not play a role in the debate over the bill to create a new court system, siding with the Government almost every time. Even when an issue affecting farmers came up, the party did not have an official stance and its deputies would debate each other. Another group that secured representation was commercial interests who had two Businessmen Party candidates elected from Dublin.[28] Although small in number, with the help of several other deputies, business would play a very vocal role in this debate as it saw its interests directly threatened by the Judiciary Committee's recommendation to decentralize. The remaining seats were filled with independent candidates who did not officially affiliate with the aforementioned parties. These independent deputies would play a significant role in the debate and helped Labour hold the Executive accountable.

The Judiciary Bill's Introduction into the Dáil

Soon after the Judiciary Committee released its report, the public began to speculate when the Government would introduce the resulting legislation. On June 30th, *The Irish Times* reported the Government was planning to introduce a bill to craft the new judiciary system

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[26] Michael Gallagher, *Political Parties in the Republic of Ireland*, 72.
[27] Ibid., 98.
[28] Cornelius O'Leary, *Irish Elections, 1918-77: Parties, Voters and Proportional Representation*, 20.

within three weeks.[29] The Government's desire to pass a bill as soon as possible is understandable as the nation's patience was wearing thin after waiting months for the Committee's report to be released. The old judiciary was in what can best be described as a lame duck situation and parliamentary elections were coming up. Yet putting forward legislation to create one of the pillars of the young democracy was easier said than done. The Irish Free State was still establishing itself both at home and abroad, the Civil War had just ended, and the Dáil Courts had still not been wrapped up, so the Third Dáil had its agenda full with items to address. Three weeks after *The Irish Times* report predicting the Government's intentions, the bill had yet to be introduced. But President Cosgrave did tell the Dáil around the time the bill was hoped to be introduced that although there were many pieces of legislation to consider, he still planned to introduce it before the election in fall.[30] Even more ambitiously, Cosgrave wanted to have the new Court system operational by that autumn, which would require the greatest haste in the legislative process.[31]

On July 31st, 1923, President Cosgrave introduced the bill based on the recommendations of the Judiciary Committee to the Dáil and hoped for the Dáil to give the Executive a significant concession.[32] When he began to speak, he did so with humility recognizing that he might not be up the task he hoped to achieve that day saying "I feel unequal to the proper treatment of a subject of such magnitude and importance and… that if the subject-matter with which I am attempting to deal were in more capable hands, that all concessions which I crave would willing

[29] *The Irish Times*, "Court Staffs," June 30, 1923.
[30] *The Irish Times*, "The Elections: Date Not Fixed Yet," July 20, 1923.
[31] *The Irish Times*, "New Courts in the Autumn," August 4, 1923.
[32] The bill that was introduced was officially titled "The Courts of Justice Bill, 1923" but was commonly referred to as the "Judiciary Bill" and would latter be renamed "The Courts of Justice Bill, 1924," which was the form it was passed in. All three terms refer to the same piece of legislation.

be assented to."[33] When introducing bill he touched on many the points from his letter that commissioned the Judiciary Committee such as calling the *ancien regime* courts an alien invention and saying that the right to establish new courts was among one of their greatest liberties. Cosgrave claimed that the legislation he was introducing was based "exactly on the lines of the [Judiciary Committee's] report."[34] He hoped that the earlier support of the report would compensate for the fact that other deputies had not even seen the actual wording of the legislation, but his statement is simply not true, the Government did deviate from the report on several matters.

Having introduced the bill, Cosgrave asked for one last favor of the Third Dáil. The President said:

> The Dáil is within its rights, within its privileges, and within its generosity in refusing this request… I put this [bill] forward in the highest national interest to ensure the most priceless blessing which any Parliament can hope to secure, the cordial acquiescence of its people in their legislative assembly, an acquiescence which is attainable only by limiting complaints and helping in the construction of institutions which will command their highest confidence. I beg to move for leave to introduce bill.[35]

While Cosgrave's wording was eloquent, his request was clear. He wanted the bill passed immediately, which could only be done with little to no resistance by deputies in the Dáil.

Unfortunately for Cosgrave, other members of the Dáil were not so willing to allow such an important bill to pass without scrutiny. Immediately after the President made his request, Thomas Johnson, leader of the Labour Party and of the official opposition in the Dáil, denied the request saying "until the Bill is before us I think that we must harden our hearts, at least until then, and probably even afterwards… we should not hold out a promise that there is general

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[33] Dáil Éireann, *Dáil Debates—The Courts of Justice Bill, 1923—First Reading*, July 31, 1923, http://historical-debates.oireachtas.ie/D/0004/D.0004.192307310020.html.
[34] Ibid.
[35] Ibid.

acceptance of this proposition that this bill should pass through without full consideration."[36] After Johnson refused, Deputies Fitzgibbon and Magennis objected to hurrying the bill through because the Dáil needed to make sure that such an important bill did not have any mistakes in it that could doom the new judiciary, which meant they had to at least see the Judiciary Bill. With some members of the Dáil wanting to take time to consider the bill, Cosgrave acquiesced to the opposition saying "I would like to say that I think that is perfectly fair… I cannot ask for anything more than Deputy Johnson is inclined to give."[37]

Although the opposition did not say they would oppose the bill vigorously, the delay meant that the legislation would not be passed before the upcoming elections and that the new courts would not be operational by autumn. Kennedy, although not a deputy himself in the Third Dáil, was very knowledgeable about the bill's status as the Executive's Attorney General and was one of the first to express doubt of the legislation's passage. In early August he received an inquiry from a Dublin sheriff asking if the Grand Jury in his city should continue its functions despite the fact the new bill was eliminating the entity. Kennedy told the sheriff to proceed with the Grand Jury's work since "There is no chance that the Judiciary Bill will be law before the 7th August — in fact, it will probably not be passed until after the next Election."[38] On August 9th, the day the Third Dáil was prepared to dissolve itself, *The Irish Times*, was easily able to report that the Judiciary Bill had not been acted upon further since its introduction and would be one of the Government's proposals that would not be dealt with until after the elections.[39] The newspaper did not predict any drastic changes to the bill or any other legislation that had not

[36] Ibid.
[37] Ibid.
[38] UCD Archives, Kennedy Papers, P4/1098, Kennedy to Sherlock, August 4, 1923.
[39] *The Irish Times*, "The Third Dáil," August 9, 1923.

been passed since the paper predicted the Executive of the Third Dáil would win the August 27th election and control the Fourth Dáil as well.[40]

On August 9th, the Third Dáil met for the last time to dissolve itself before the elections. In his final address, Cosgrave praised the assembly for its courage and courtesy during the tumultuous infancy of the Irish Free State, but mentioned that it did not pass some important legislation, "perhaps the most important, is the Judiciary Bill."[41] Joining Cosgrave in praising the Dáil were Deputies Johnson of the Labour Party and Gorey of the Farmers Party. Both believed that the past year had been an extraordinarily difficult time for the new nation but that all the deputies had become more educated about the legislative process, which would prove useful in the Fourth Dáil.

With statesmanship shown by all on the final day of the Third Dáil, it dissolved at 5:15 p.m. and the politicians turned from the business of the assembly to their own electoral races, officially eliminating any chance the bill would be passed before the election. In its quest to maintain a majority in the Dáil, Cumann na nGaedheal ran an advertisement in *The Irish Times* on August 20th boasting of its work on judicial reform. The advertisement mentioned the work of the Judiciary Committee and the resulting bill, which it hoped to have passed once the Fourth Dáil assembled. The party said "We have already introduced, and we propose at the earliest possible moment to carry to the Statute Book, [the] Judiciary Bill."[42] With this election promise, members of the Fourth Dáil had been forewarned what the Executive's plans were.

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[40] *The Irish Times*, "Strength of Parties," August 9, 1923; the predictions the paper reported were based on an unnamed politician's predictions that the paper implicitly endorsed. The exact breakdown of seats in the Dáil by Party given was: Cumann na nGaedheal (the party that was the executive in the Third Dáil) 56, Farmers 41, Labour 27, Independents 16, and Anti-Treaty (Republican Party) 13.
[41] Dáil Éireann, *Dáil Debates—The Dissolution*, August 9, 1923, http://historical-debates.oireachtas.ie/D/0004/D.0004.192308090003.html.
[42] Liam T. MacCosgair (President Cosgrave), "To the People of Ireland," August 20, 1923.

The Election for the Fourth Dáil

The Executive called for a snap election in August 1923, hoping to catch the Republicans off guard. While this seemed to be a brilliant strategy and Cosgrave's party was expected to take up to 80 seats in the now 153 seat Dáil, Cumann na nGaedheal "got a rude electoral shock…it actually won 63."[43] Cumann na nGaedheal's failure to achieve the gains it expected can be attributed to the widespread economic depression in the Irish Free State and the loss of voters who voted for the party as a personal vote for Michael Collins in 1922, who had been assassinated between the elections.[44] The Republicans who were only predicted to win between 13 and 25 seats far exceeded expectations and won 44 seats.[45] While this gain by Republicans was of concern to the Executive as their rival's power grew, it would have no direct impact on the Fourth Dáil as the Republicans would continue their policy of abstention. Once again, the decision to abstain turned Cumann na nGaedheal's plurality of Dáil seats into a majority. Another ramification of the Republicans abstaining was that the Dáil would continue to operate in a dignified manner because with the animosity and passion that still remained from the recent Civil War, Republicans taking their seats may "have induced behavior far from conductive to the reputation of parliament."[46] So as had predicted, the election did not significantly change the status quo.

The Labour Party had the greatest electoral setback in the 1923 election. The party had expected to be rewarded for its admirable performance as the official opposition in the Third Dáil, but after the results were in, Labour went from 17 seats in the 128 seat Third Dáil to 14 seats in the 153 seat Fourth Dáil. The party faired poorly for multiple reasons: while Labour's

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[43] J.J. Lee, *Ireland: 1912-1985*, 94.
[44] Ibid.
[45] Peter Pyne, "The New Irish State and the Decline of the Republican Sinn Féin Party, 1923-1926," 38.
[46] J.J. Lee, *Ireland: 1912-1985*, 95.

"constructive opposition" in the Dáil had a lasting and beneficial impact on the country as a whole, it did little to help the workers who were the backbone of the party's electorate.[47] The party was strapped for cash in the 1923 election, so it had difficulty presenting its case to the nation. Because of the emotions caused by the Civil War, Labour also lost voters to both Cumann na nGaedheal and the Republicans. While these three factors contributed to Labour's setback, none of them had as detrimental an impact as the infighting that occurred within the party between Thomas Johnson and the more radical Jim Larkin, who had been in the United States during the previous election.[48] After the election, Johnson was once again leader of the party, but he "and his colleagues were still in a chastened mood even with the new session of the Dáil began and Johnson… implied that they would in future limit themselves to socio-economic matters."[49] The strategy of backing away from being the official opposition made sense as the party was hoping to return to its roots as the political arm of unions and in turn reclaim the working-class voters it had lost. Also, Labour was no longer the second largest party in the Dáil as the Farmers Party had won 15 seats in the election. With the Farmers continuing to side with the Executive, though, Labour quickly reassumed the mantle it had held in the Third Dáil and Johnson was once again the leader of the official opposition. Thus, the significant changes that occurred in the 1923 election had little impact on the actual composition of the new Dáil as it closely resembled the previous one.

Calm before the Storm and a Demand for One

With the elections over and the same party returning to power, the Judiciary Bill was reintroduced to the Dáil. The political correspondent of *The Irish Times* reported that it "is expected that one of the first and most important items on the Government's legislative

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[47] J. Anthony Gaughan, *Thomas Johnson, 1872-1963: First Leader of the Labour Party in the Dáil Éireann*, 222.
[48] Ibid.
[49] Ibid., 223.

programme for the new Dáil will be the Judiciary Bill."[50] On September 20th, President Cosgrave introduced the bill to the Fourth Dáil, claiming that the chief objection to the bill in the Third Dáil was that because this was such an important measure, "it would be advisable that this particular Bill should be before the country for some time."[51] The President believed that this objection was invalid; "It has now been before the country for nearly two months, and, as I have been able to find out, there has been no criticism of it…There are certain objections to it from certain quarters, but they have not found any real volume of public opinion behind them."[52] Cosgrave believed that the dissenters in the legal profession naturally objected because the new system would provide cheaper law, which would have a financial impact on the members of the profession. On September 25th, the bill had its second reading; surprisingly, after these two instances of the bill being addressed in the Dáil, there had been no debate.[53]

The lack of opposition in the Dáil led to public demands that the bill should be criticized. The demand for opposition came in the form of letters published in newspapers, many of them anonymous, but presumably from members of the legal profession. On September 18th, right before the bill was introduced, a letter by a writer under the pen name of "The Camel" was published in *The Irish Times*. The author of the letter expressed concern about the new system eliminating many of the judges that were currently sitting on the bench, which meant the taxpayers would be paying the large pensions of judges who could still do their job. "The Camel" hoped that "Independent members [of the Dáil] may find a solution of the difficulty and so rise to fame."[54] Several days after this letter, another anonymous letter was published

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[50] Political Correspondent, "New Government's Programme," *The Irish Times*, September 7, 1923.
[51] Dáil Éireann, *Dáil Debates—Courts of Justice Bill—First Stage*, September 20, 1923, http://historical-debates.oireachtas.ie/D/0005/D.0005.192309200005.html.
[52] Ibid.
[53] Dáil Éireann, *Dáil Debates—Questions on the Adjournment—Courts of Justice Bill, 1923—Second Stage*, September 25, 1923, http://historical-debates.oireachtas.ie/D/0005/D.0005.192309250021.html.
[54] 'The Camel,' "The Judiciary," *The Irish Times*, September 18, 1923.

addressing "The Camel's" concerns. The letter by "Enucleatus," which comes from a Latin word meaning "to make clear," says "'The Camel' may rest satisfied that when the Judiciary Bill comes up, it will be discussed clearly."[55] Such a reassurance, if true, could feasibly come from a member of the Dáil. *The Irish Times* itself took a stand on this issue of judges that were on the bench of the British created courts pointing out how many people were raising questions on the issue and questioning the logic and cost of removing judges who were in their prime "to make room for a new rota."[56] While this issue did not actually become a major point of contention in future debates, it does suggest that Cosgrave's claim that there was no public criticism was not entirely accurate.[57]

Letter writers to the newspapers became especially vocal about the lack of debate over the bill upon its introduction and its second reading. Writing in *The Irish Times*, F.J. Clarke, a Dublin resident, believed that the Judiciary Bill was the most important measure before the Fourth Dáil. He personally thought that the bill would hurt the Irish Free State and lamented what happened in the Dáil exclaiming "what happened yesterday! The second reading of the bill passed without a single contribution to the debate… Where was the Business Party? Where were the Independents? … I must regard the silence yesterday as very disquieting."[58]

It is not just disquieting but also confusing that no deputy had risen to speak against the bill when there were members, such as the Businessmen Party, who opposed the bill. Another letter was sent to *The Irish Times*, from "Festina Lente," which is Latin for "to make haste

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[55] 'Enucleatus,' "The Judiciary Bill," *The Irish Times*, September 22, 1923.
[56] Political Correspondent, "Judiciary Bill: Case of Existing Judges," *The Irish Times*, September 26, 1923.
[57] Dáil Éireann, *Dáil Debates—Committee on Finance—Money Resolution*, September 25, 1923, http://historical-debates.oireachtas.ie/D/0005/D.0005.192309250022.html; William Archer Redmond, a Waterford deputy, questioned President Cosgrave about the issue of judges who were currently on the bench. He asked the president, "Do I understand the President to say supposing some of the existing Judges are kept on that that will be saving money to the Free State Exchequer?" Cosgrave responded "Yes." This answer was enough to appease Redmond and others on the issue and it did not become a major point of contention during the legislative process and was rarely mentioned in the media again.
[58] F.J.Clarke, "The Courts of Justice Bill," *The Irish Times*, September 27, 1923.

slowly." Not surprisingly given the pseudonym, the writer argued that the bill was being moved through the legislative process too quickly. The author used the English Judicature Act of 1873 as a point of comparison to the Courts of Justice Bill. The principles upon which the English bill was based were discussed for years before the legislation was crafted and then Parliament debated it for weeks. In comparison, the Judiciary Bill had been in the works for less than a year and there had been an effort to push it through the Dáil without debate. The writer criticized the Government's defense of this approach by claiming the bill was based on the work of the Judiciary Committee reminding people the Committee "sat in secret, that no witnesses were heard, and not the slightest clue was allowed to leak out of what were likely to be its recommendations. It is possible that in our new-born freedom we are moving too rapidly."[59] While it was impossible that the Government and the public would be willing to spend years debating the principles of the bill as the *ancien regime* courts continued to preside over the Irish Free State, the demand to at least spend some time debating this bill was gaining traction.

These anonymous letters and one sided coverage by the media led the Executive to criticize these reports. In a Dáil debate, President Cosgrave commented on the letters to the editors of newspapers saying they "have been mainly anonymous, and they are worthy of being anonymous."[60] Cosgrave, frustrated with the media coverage, said "Most of the criticism of this Bill that has appeared in the Press is unfair and false criticism, and that is well known to the people who have uttered it; they know it is unfair and it is false."[61] Later, he continued his criticism noting "in one section of the Dublin Press that an impression seems to have gotten around that we want changes simply for the purpose of making changes. That is an utterly wrong

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[59] 'Festina Lente,' "The Courts of Justice Bill," *The Irish Times*, October 12, 1923.
[60] Dáil Éireann, *Dáil Debates—The Courts of Justice Bill, 1923—Third Stage (Resumed)*, October 11, 1923, http://historical-debates.oireachtas.ie/D/0005/D.0005.192310110011.html.
[61] Ibid.

view to take."[62] Cosgrave's criticism of the press did not help his cause in the least, as the press did not report his critique and continued to publish its claims. Hugh Kennedy did not hold the press in higher regard than Cosgrave blaming the media for a lot of what he saw as a misunderstanding of the bill. Regarding one section of the legislation that was surrounded with controversy, Kennedy said "I believe that this particular criticism is largely due to people confining their reading to one or another comment, whether in speech or newspaper, instead of studying the text of the measure."[63] Characteristically, both men argued that the misunderstanding of the bill was not the Executive's fault, but that of the press.

There were those who took exception to the Government's view that all criticism was due to being misinformed by the media. While the Irish Free State Executive was possibly correct that press coverage was biased and there were some claims that were not always entirely accurate, the media simply covered the story from their worldview. Widely circulated papers, such as *The Irish Times*, disagreed with certain principles of the bill and offered its opinion accordingly. The Executive failed to make an important distinction; the media coverage was in fact biased, but by in large it was not misleading or false. The Executive had only itself to blame for the one-sided coverage of the Judiciary Bill in the newspapers: if the paper was willing to publish anonymous letters, for example, it would have published a letter from President Cosgrave, Attorney General Kennedy, or another Government official defending the Executive's stance.

While the Government did publish the report of the Judiciary Committee, it never made any effort to explain the principles of the report or the details of the legislation to the public or

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[62] Dáil Éireann, *Dáil Debates—The Dáil in Committee—The Courts of Justice Bill, 1923—Third Stage Resumed*, October 12, 1923, http://historical-debates.oireachtas.ie/D/0005/D.0005.192310120014.html.
[63] Dáil Éireann, *Dáil Debates—The Dáil in Committee—The Courts of Justice Bill, 1923—Third Stage Resumed*, November 1, 1923, http://historical-debates.oireachtas.ie/D/0005/D.000 5.192311010015.html.

even other members of the Dáil. As Deputy Cooper pointed out in a debate "We are a House very largely of laymen—the world outside is largely composed of laymen—it is very hard to read a long and complicated measure and take in every detail. The Government should have treated the Dáil to a fuller exposition of the principles of the Bill."[64] The Executive would now have to spend a significant amount of time in debates explaining parts of the legislation and why the Government accepted the principles that it did, which should have been addressed from the time the bill was originally was introduced in the Third Dáil.

The Legal Profession Objects

The legal profession opposed the bill just as they had objected to the Judiciary Committee's report and barristers, solicitors, and judges made their opinions known publicly. The legal profession took its time before commenting on the legislation, but on October 8th, Lord Justice O'Connor broke the silence in a letter to the editor of *The Irish Times*.[65] O'Connor believed that he had the qualifications to speak on this matter due to his vast experience in the legal field and could speak freely because he was retiring in the near future and his pension was protected under the Treaty. O'Connor, who had recommended some changes to the system in a memorandum submitted to the Judiciary Committee, commented that the leaders involved in this matter were changing too much saying "There is a tendency to shift from right to left, and the stolid reactionary, unless his tough hide, produces a stasis in the process, emerges as a full-blown radical."[66] He criticized any attempt to move away from English traditions because "the law, by its ceremonial and majesty, keeps the evil doer in check; to the man who risks the dock, the bloke in a wig is more an object of dread than a bloke without a wig."[67] O'Connor believed that

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[64] Ibid.
[65] *The Irish Times*, "The Judiciary Bill," October 8, 1923.
[66] James O'Connor, "The Real Danger," *The Irish Times*, October 8, 1923.
[67] Ibid.

decentralization would weaken the bar and bench's ability and financial reward; leading him to say "The real danger seems to me…that Ireland may become a humdrum commonplace country, exporting its intellect faster than before."[68] The arguments O'Connor presents are no different than past statements, but his letter was a message to the Executive that the legal profession's opposition was not going away.

After O'Connor's letter was published, there was consistent resistance to the Courts of Justice Bill from members of the legal profession. Central to the profession's argument was the idea that the bill was change for the sake of change and would not make the judiciary better. On October 10th, barrister H.J. Moloney gave a lecture to the National Club, raising the criticism that no judiciary system is without its weaknesses and that there was no demand for change in 1914 when the country was at peace. Moloney also observed that the bill was being rushed and that it called for decentralization, which in his opinion would both hurt the Irish Free State.[69]

Another criticism of the bill came in the form of a long article in *The Irish Times* written by an unnamed King's Counsel. He disagreed with several issues in the bill including decentralization, but realized that he and the rest of the legal profession were outnumbered on this issue so would have to find a different approach, saying:

> There are no doubt certain guiding principles accepted in the shaping of the bill [i.e. decentralization] and now outside the limits of useful controversy, but even in regard thereto it should not be forgotten that a perfectly good principle may sometimes inadvertently be pushed too far. Assuming, however, a loyal acceptance of these principles, there are matters that seem to furnish a field for helpful and constructive criticism by which the bill might be improved.[70]

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[68] Ibid.
[69] *The Irish Times*, "The Judicature Bill: A Barrister's Criticism," October 11, 1923.
[70] A King's Counsel, "The Courts of Justice Bill," *The Irish Times*, October 12, 1923.

This proposal to improve the bill by amendments and by offering criticism to the details and not the principles of the bill would prove to be successful for this minority interest group, although they would continue to challenge the principles of the bill.

Solicitors joined the barristers in expressing their dissatisfaction with the bill. The bill became a punch line at a meeting of the Solicitors' Apprentices' Debating Society where many important solicitors, including the President of the Incorporated Law Society, were in attendance for a debate over Irish social problems. One of the solicitors cracked a joke saying "that he thought that the real social problem for lawyers at present was the Judiciary Bill. (Laughter.)"[71] In December at a meeting of the Incorporated Law Society, the leading solicitors of Ireland debated whether the Judiciary Bill would hurt or help their profession. Mr. Brady, who had been a member of the Judiciary Committee, said that if people gave the bill a chance they would see it benefited the profession and the public. Many of his colleagues, though, spoke against the bill saying that it would in fact achieve the opposite of what the Government wanted and would hurt the public.[72] This pronounced motive closely resembled the one put forward by barristers, who also downplayed their own interests.

While the legal profession was a small interest group it was not without representation in the Dáil. Professor Magennis and Captain William Archer Redmond, both deputies and members of the Bar, put forward amendments on behalf of the legal profession.[73] Magennis, the deputy for the National University of Ireland who served in both the Third and Fourth Dáil, would advocate for many changes on behalf of the legal profession, yet was committed to the principles set forth in the report of the Judiciary Committee. During a debate in the Dáil, Magennis said that the report of the Judiciary Committee "has become a species of Bible in my hands from which I

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[71] *The Irish Times*, "Social Problems," November 20, 1923.
[72] *The Irish Times*, "The Judiciary Bill: Some Outspoken Criticism," December 1, 1923.
[73] *The Irish Times*, "Judiciary Bill," October 9, 1923.

draw inspiration and doctrine."[74] While he accepted the principles of the report, such as decentralization, that did not mean that he believed the bill carried out the report perfectly and offered amendments accordingly.[75] During the debates Magennis would become irritable if interrupted which tended to happen since he made his points in very round about and sometimes difficult to understand speeches, but he was generally respectful and spoke with the calmness and wisdom of a distinguished professor.

Captain Redmond, the Waterford deputy, also opposed the bill. A barrister, he had served in the military during the First World War and was the son of John Redmond, who at one time was the most powerful Irish politician as the leader of the Irish Parliamentary Party. Captain Redmond served as an MP in the British House of Commons as a member of his father's party, but did not serve in the Third Dáil so was not present when the bill was originally introduced. He was strongly opposed to the Judiciary Committee Report. Not a shy man, in the Dáil he made many of the claims members of the legal profession made in the media stating, "I fear that throughout the whole of this Bill a spirit is manifesting itself of a desire for change merely for the sake of change... I have not reached the stage of narrow-minded ultra patriotism that because a thing comes from the outside, therefore, I cannot take it…for the benefit of my country."[76] His tenacity could sometimes turn to temper and his opposition might lack basic parliamentary

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[74] Dáil Éireann, *Dáil Debates—The Dáil in Committee—The Courts of Justice Bill, 1923—Third Stage Resumed*, October 12, 1923.

[75] Ibid.; It is important to note that while Magennis had his own personal views that were behind most of his actions concerning the Judiciary Bill, he did have a constituency he had to represent. In an October 12, 1923 debate in the Dáil, he put forward an amendment that worked against the principle of decentralization. When another deputy asked if this was his own personal view of the view of the Bar Council, Magennis responded "We are all here as representatives; we are here in a representative capacity…whose duty is to expound the views of his constituents. I am speaking now as one of the members for the National University of Ireland.

[76] Ibid.

niceties. Near the end of the legislative process for this bill, the understated Hugh Kennedy, who had endured months of Redmond finally asked Redmond, "Is it necessary to be rude?"[77]

While Magennis and Redmond were both members of the Bar, that did not mean the two always coordinated their efforts or even cooperated in the Dáil. Part of this was due to the fundamental difference in opinion over the principles behind the Judiciary Bill. Redmond's personal view was that "we have adopted, and I think very rightly, the British Common Law system… we have not gone back to the Brehon Laws" and that only a few logistical changes needed to be made to the judiciary for the British system to work in the Irish Free State.[78] Magennis dismissed the idea there should only be minor logistical changes because this was based on a false view "that all the contest of centuries between the two races was not with regard to the creation and the working of national institutions in this country so much as a dispute as to which precise body of men should have control over the institutions."[79]

This difference of opinion placed Redmond on the side of the legal profession that had made its views known in the press, where they looked at the system simply from a legal and logistical standpoint with no regard to history. Magennis, however, sided with the Executive acknowledging the strengths of the English common law tradition, but took into consideration the centuries of struggle between the English and the Irish. Also, in terms of behavior in the Dáil, while both men were pugnacious, there were moments when Magennis grew tired of Redmond's behavior and would try to put him in order. One example occurred during a Dáil debate on November 1st, when Redmond had spoken more than the rules allowed him to. Magennis tried to have *An Leas-Cheann Comhairle* (the Deputy Speaker of the Dáil) silence Redmond to no avail.

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[77] Dáil Éireann, *Dáil in Committee—Courts of Justice Bill, 1923—From the Seanad*, April 2, 1924, http://historical-debates.oireachtas.ie/en.toc.D.0006.19240402.html.
[78] Dáil Éireann, *Dáil Debates—The Dáil in Committee—The Courts of Justice Bill, 1923—Third Stage Resumed*, October 12, 1923.
[79] Ibid.

When Redmond was allowed to speak again he expressed confusion as to why Magennis did not want him breaking the rules. Magennis replied, "For the sake of order," to which Redmond sarcastically replied, "Deputy Professor Magennis says it is for the sake of order. I am glad he is a custodian of order, and I hope he will always remain so."[80] This incident here illustrates a larger problem deputies in opposition to the Judiciary Bill had throughout—they did not coordinate their efforts and used time and energy fighting each other instead of the bill.

Demand for Kennedy and His Role in the Dáil

As Cosgrave admitted, the Judiciary Bill would be more likely approved if it was in better hands than his own. Other members of the Dáil agreed and asked that Kennedy, the legal expert of the Irish Free State who was not a deputy when the Fourth Dáil was convened, to guide the bill. True to form, Redmond put the request the most bluntly to Cosgrave in early October: "I would seriously suggest that it would be a good thing for the Dáil and the country if the Government could wait until the Attorney-General could be present here to take part in the discussion of the Bill, and give us the great benefit of his knowledge and experience."[81] Cosgrave, who wanted the bill passed immediately, took exception to Redmond's request saying "it should not appear necessary to wait until any other legal gentlemen are returned to the Dáil. I think the legal gentlemen in the last Dáil were surprised at the ability with which measures were dealt with by those who have not had any association with the law."[82] The problem for the Cosgrave was that his legal knowledge did not command the respect of people in various quarters, which led to the bill quickly being bogged down with amendments that he was not able to speak authoritatively on.

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[80] Dáil Éireann, *Dáil Debates—The Dáil in Committee—The Courts of Justice Bill, 1923—Third Stage Resumed*, November 1, 1923.
[81] Dáil Éireann, *Dáil Debates—The Courts of Justice Bill, 1923*, October 3, 1923, http://historical-debates.oireachtas.ie/D/0005/D.0005.192310030030.html.
[82] Ibid.

Kennedy would have been the ideal person to guide the bill through the Dáil as he was widely respected by members of the Dáil for his experience and knowledge of legal affairs and had been a member of the Judiciary Committee, but he was not a member of the Dáil when the bill was reintroduced.[83] Kennedy did have an interest in a political career and had been provided with the connections by Louis Walsh to stand for a Donegal seat during the election for the Fourth Dáil.[84] Kennedy politely declined his friend's offer because:

> the President holds the view very strongly that the administration of the law should be kept clear of politics and that from the beginning a new clean tradition should be establish which will definitely mark a new era and so recover the respect of the people for the law and its administration. I have my_self (*sic*) constantly preached this doctrine and urged it from the beginning as the ideal to be aimed for, I could not therefore complain when it was decided that I should not stand for a seat at the Election.[85]

While this policy is admirable since it was consistent with the Government's policy to move away from the practice of having law and politics intertwined, it was short lived. After the elections for the Fourth Dáil had occurred, Phillip Cosgrave, the deputy for South Dublin and the President's brother, died. Kennedy ran in the by-election that was held and won the vacated

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[83] Kennedy's reputation did not just extend to members of the Dáil, but also to the legal profession, which had proven to be a tough group to win over. Henry Hanna, who had submitted a memorandum to the Judiciary Committee and was a well respected member of the legal community, sent a letter to Kennedy asking the Attorney General to reach out to the legal community. Kennedy was not seen as a revolutionary or radical, but as an experienced member of the Bar who was quite successful and respected by his peers. In his letter he told Kennedy, "I would like to say this, that I have thought over the question of getting the good will of the bar to help the working of this measure… I need not refer to any one person or persons who would have wished the bill obstructed or warped from any good effect & I do not know if their efforts are at an end. But I think that the level-headed section would respond to an appeal… will you consider, whether you could not, as head of the Bar, address a dignified letter to each Barrister on the lines I suggest. I believe it would receive a more favorable consideration than you imagine;" UCD Archives, Kennedy Papers, P4/1130 Hanna to Kennedy, December 6, 1923.

[84] UCD Archives, Kennedy Papers, P4/1104, Walsh to Kennedy, July 10, 1923; Walsh had made all the arrangements for Kennedy to stand for election in Donegal after reading false reports of Kennedy being interested in a political career. While Kennedy said the report was not true, he did say "I confess that the idea of standing for Tirconaill appealed to me very strongly…Moreover I think that the work of the Dáil is going to be very interesting;" UCD Archives, Kennedy Papers P4/1104, Kennedy to Walsh, August 18, 1923.

[85] UCD Archives, Kennedy Papers, P4/1104, Walsh to Kennedy, August 18, 1923.

seat.[86] Now that Kennedy was a deputy, he wrote Walsh to let his friend know, "I took charge of the Judiciary Bill… There will be a considerable number of amendments to consider."[87]

Still serving as Attorney General, Kennedy's election clearly violated a principle he and the President once preached, but he and the assistance he could provide were warmly welcomed by the Dáil. Deputy Cooper was the first to express this on the floor of the Dáil saying "I should like to congratulate, not so much the Attorney-General, as the Dáil on the presence of the Attorney-General, and on that fact he is now able to speak to us face to face instead of through the voice of somebody else."[88] Even Redmond expressed satisfaction with Kennedy taking charge of the bill saying "I am very glad indeed that at length the Government thought fit to accept my suggestion that they should postpone the consideration of the Committee Stage of this Bill until we had the advantage of the presence of the Attorney-General among us."[89]

Kennedy's warm welcome was short lived as he immediately had to defend a bill that had been bogged down with amendments and begin to move it towards passage. The Attorney General, who despite being on the political stage only a short time was a brilliant debater as a result of his years as a barrister, was a force to be reckoned with. He knew more about current legal affairs than anyone else in the Dáil, including Magennis and Redmond, which instantly improved the Government's chances since the layman President was no match for these two barrister deputies. Kennedy held his ground throughout the debate, and while his determination was a seen as a positive by some, it did bring him a fair share of criticism. He was accused of being too stubborn and letting pride prevent himself from making changes because Kennedy in a

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[86] *The Weekly Irish Times Christmas Number*, "Our Calendar Supplement. Irish Judges. Personal Sketches," December 12, 1924.
[87] UCD Archives, Kennedy Papers, P4/1123, Kennedy to Walsh, November 5, 1923.
[88] Dáil Éireann, *Dáil Debates—Civil Service Regulation (No. 2) Bill, 1923 – The Courts of Justice Bill, 1923—Third Stage Resumed*, October 31, 1923, http://historical-debates.oireachtas.ie/en.toc.D.0005.19231031.html.
[89] Ibid.

sense was the parent of the bill, having been involved in the process even before the Judiciary Committee met for the first time. One example of an attack on Kennedy is from Deputy Gorey who said "I am very sorry at the attitude taken up by the Attorney-General. I think he is rather pigheaded, with all due respect to him, and his attempt at wit does not help either."[90] This statement shows how short-lived his welcome was.

Regardless of the attacks, Kennedy won. The legislation was increasingly bogged down in amendments when Cosgrave was guiding the bill. From its introduction in July until Kennedy took his seat at the end of October, the legislation made virtually no progress. In just over a month under Kennedy, the Judiciary Bill was approved by the Dáil. While Kennedy was criticized during the debate, he got his way. Kennedy was certainly stubborn at times, but he carried himself in the most honorable fashion. He kept his temper throughout, a compliment that can not be extended to all of his opponents. He was willing to make compromises and work with others to make changes to the bill. At the end of the debate in the Dáil, Deputy Cooper one of the people Kennedy made a compromise with, praised the Attorney General saying in regards to the issue the two disagreed and tried to compromise on, Kennedy "has fulfilled every pledge that he made."[91] Changes were made to the bill in the Dáil, but the principles behind it were not changed. It is ironic that Redmond wanted Kennedy to take charge of the bill when it ended up hastening the passage of the bill he opposed. Kennedy's reputation in the legal field and his debating ability caused his opponents to back down or gain him majority support when it came time for a vote. While the claims that Kennedy was stubborn due to his pride of parentage at times were legitimate criticism, now he enjoys the status of father of this legislation.

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[90] Ibid.
[91] Dáil Éireann, *Dáil Debates—Dáil in Committee—Courts of Justice Bill, 1923*, December 4, 1923, http://historical-debates.oireachtas.ie/D/0005/D.0005.192312040028.html.

Issues Considered by The Dáil: Labour's Causes

While Labour's role throughout the debate was as the loyal opposition to the Government and a critic of the bill, it also took on the role of champion for Children's Courts and for the establishment of an arbitration system. Both these issues were integral components in the memorandums the party submitted to the Judiciary Committee. Neither of the recommendations were accepted. Labour decided to put forward proposals on these issues in the Dáil, but only its efforts for Children's Courts made any gains. The party's efforts were led by Thomas Johnson and Thomas O'Connell, the party's leader and a Labour deputy representing Galway respectively. Johnson knew that legal affairs were not his expertise, admitting "I am not sufficiently familiar with the process of administration of the law."[92] Although the party was not an authority on legal matters, it presented its case before the Dáil on both issues competently.

The original wording of the Judiciary Bill did provide for a Children's Court, but the Labour Party found the provision inadequate. There was to be only one court, permanently located in Dublin, that would be presided over by one of the district justices of Dublin on a part-time basis. On the first day of debate for the Courts of Justice Act in the Fourth Dáil, Johnson pointed out the shortcomings of the bill and why courts for juvenile offenders were so important saying "I would like that there had been something in the Bill to improve and extend provisions of Children's Courts… which are not Courts in the minds of the people, but places where strict fatherly advice might be given and minor punishment inflicted."[93]

When the section on Children's Courts was considered, Deputy O'Connell put forward an amendment to correct these shortcomings. The amendment called for the type of court provided for in the bill in Dublin to be created in Dublin, Cork, Limerick, and Waterford.

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[92] Dáil Éireann, *Dáil Debates—Committee on Finance—Money Resolution*, September 25, 1923.
[93] Ibid.

O'Connell explained the rationale behind his amendment stating "It is highly desirable that all charges against children should be held in a special Children's Court… Those Courts are specially desirable in cities where many of the offenses arise from street trading and matters of that kind."[94] Although Labour eventually wanted to have Children's Courts throughout the country, they realized this would not be practical to do at first as the entire judiciary was restructured, so they should start with the places that would have the highest volume of cases. Surprisingly, Deputy John Good of the Businessmen's Party, wanted courts for juveniles throughout the country. This was a rare case of the Businessmen's Party strongly backing the Labour Party.

Kennedy, who at this point was the person responsible for accepting or rejecting amendments on behalf of the Government, was willing to accept O'Connell's amendment. He admitted that the Judiciary Bill did not extensively deal with juvenile offenders and that the crimes they envisioned when creating the Children's Court in Dublin occur in other cities as well. He said that "the providing of a hearing for cases against children in special surroundings other than the formal courts and have them dealt with in a paternal rather than a judicial manner," as the Labour Party suggested was a good idea that had not been fully addressed in the new legislation.[95] Therefore, he accepted Labour's amendment and Children's Courts would be established in Cork, Limerick, Waterford, and Dublin when the new judiciary system was put into operation. This amendment would be Labour's most significant contribution to the bill.

Labour's efforts to create an arbitration system were unsuccessful. Johnson stated the advantages of the system he envisioned: he called for district justices to serve as conciliators for cases in their jurisdiction if all parties consented. He believed that such a system has had a record

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[94] Dáil Éireann, *Dáil Debates—The Dáil in Committee—The Courts of Justice Bill, 1923—Third Stage Resumed*, November 1, 1923.
[95] Ibid.

of being economical for the judiciary because "a great deal of money might be saved to the country if there was some application in Ireland of system which has been introduced with success in one or two Continental countries."[96] He also believed that an arbitration system would be beneficial in the Irish Free State because it could help "avoid contentious legal proceedings, and to avoid the bad blood that very often follows legal proceedings."[97] Just as in the Labour Party's recommendations to the Judiciary Committee, Johnson did not mention the arbitration system Arthur Griffith envisioned and instead referenced a foreign system as a potential model for Ireland. The language of the amendment he put forward was from a piece of legislation that created an arbitration system in Australia and had been passed by that dominion's Commonwealth Parliament.

Johnson's amendment was adamantly opposed by Attorney General Kennedy who was unwilling to compromise. Kennedy believed that this important bill should not include language that he did not think was necessary or practical. He pointed out that the district justices could do anything with the consent of all parties already, including arbitration, so the amendment that Johnson put forward was not needed. Kennedy also did not think the system under Johnson's amendment would work, despite the language being taken from another nation's legal code, for two reasons. First, the district justice would be left in an impossible position because he would first "act in the capacity of Conciliator… disregarding all rules of evidence, and then if he failed to conciliate he should assume the ermine and rigidly bind himself by the rules of evidence as regards the facts."[98] Secondly, he said he opposed it because:

> from my own experience of agreed settlement of disputes, I really do not think that on the whole settled disputes meet with the satisfaction of either parties.

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[96] Dáil Éireann, *Dáil Debates—Committee on Finance—Money Resolution*, September 25, 1923.
[97] Dáil Éireann, *Dáil Debates—The Dáil in Committee—The Courts of Justice Bill, 1923—Third Stage Resumed*, November 1, 1923.
[98] Ibid.; the term "ermine" was often used to refer to the position of judge because of the robes judges wore.

> Fixed decisions of the Court in the settlement of affairs between people is better, whereas the settlement of affairs between people compelled to agree leads to this, that for the rest of their lives they never cease to regret what they might have got had they fought the case out.[99]

After Kennedy's rejection, Johnson backed down to the legal expert saying "it is a layman's amendment, and I am not going to try to put the layman's view before that of the Attorney-General. He says it is impractical and unnecessary. Then I cannot help that, and I ask leave to withdraw the amendment."[100] This is a clear example of the impact Kennedy had when he took charge of the bill, where the official opposition backed down after only a few words on the subject from the distinguished jurist.

Issues Considered by The Dáil: Superior Courts[101]

Of all the jurisdictional levels of the new judiciary, the provisions for the three higher level courts received the least amount of criticism. The vast majority understood that the nation needed courts at the apex of the system with unlimited jurisdiction and ones that could hear appeals more effectively than their colonial counterparts. Thus, a streamlined High Court based on the recommendations of the Judiciary Committee was welcomed for economic reasons. The Court of Criminal Appeal and Supreme Court provided a simplified yet more effective appeal system than the confusing appeal system established by the British. Yet there was still a debate over the logistics of the Court of Criminal Appeal and the role of the Supreme Court.[102] In two

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[99] Ibid.
[100] Ibid.
[101] In this paper, the term "Superior Courts" refers to the High Court, Criminal Court of Appeal, and Supreme Court. It is not its own jurisdictional level nor is it intended to cause the reader to associate these courts with courts of other nations that are referred to by this term. It is simply an invented term for this thesis used to put these courts, which were often considered at the same time, under a single category.
[102] Dáil Éireann, *Dáil Debates—Tuarasgabhail I Dtaobh Cur Amach Riteach I Gcoir Baile Atha Cliath Theas—The Courts of Justice Bill, 1923—Committee*, October 10, 1923, http://historical-debates.oireachtas.ie/D/0005/D.0005.192310100046.html; There was also a point of contention over how much High Court and Supreme Court judges would be paid. Redmond, supported by supported by some of the other independent deputies, wanted to have the pay for these positions equal as he saw the two positions interchangeable since both could serve on the Court of Criminal Appeal and on the Supreme Court if the Chief Justice wanted a High Court judge on it. Cosgrave rejected the idea the two positions were equivalent in responsibilities or status and pointed to the Judiciary Committee's

instances the Government conceded to opposition and made changes that enhanced the legislation.

While no deputy objected to the creation of the Court of Criminal Appeal or the Supreme Court, some were concerned about how judges from the High Court could be hearing a case on these two courts. Two of the three judges on the Court of Criminal Appeal would be High Court judges and High Court judges could be asked to serve on the Supreme Court if the Chief Justice thought their help was needed. Opposition hoped that the Court of Criminal Appeal could have more judges and the High Court judges would attend solely to matters before the High Court. Cosgrave, still without the aid of Kennedy at this point in the debate, did not dare try to approach this from a legal standpoint. Instead he stuck to an area he was more comfortable with, how to maintain an economic government in financial hard times, saying "The justification for this arrangement is that we cannot afford to set up a larger Court of Appeal. If it were possible it would have been desirable to get a Court of Appeal quite independent from [the High Court]."[103] Cosgrave's simple and blunt argument that the nation could not afford a system with more judges could not be contested and was a striking reminder of the constraints on the Irish Free State.

Redmond and Magennis, in an example of the two barristers working well together, wanted to amend the way judges would hear appeals from the Circuit Court. The way the original bill was worded, when a party filed an appeal it would be heard by two judges of the High Court. If both judges agreed, then the case was decided and the litigants would either accept the decision or appeal to the Supreme Court.

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report, which called for different pay scales. The government easily defeated Redmond's proposal and the issue did not arise again.

[103] Ibid.

If the judges did not agree, however, then a judge from the Supreme Court would join the two High Court judges and the majority's decision could be accepted by the litigants, or they could alternatively appeal to the Supreme Court. So theoretically, a case could be heard by a district justice, then the Circuit Court, then two judges of the High court, then two judges of the High Court and one of the Supreme Court, and then the Supreme Court, which Redmond believed were simply too many hearings of one case. He believed "that there should be three Judges in the first instance, thereby obviating the possibility of anything in the nature of a disagreement… and having another re-hearing on appeal."[104]

Redmond did not care if the appeal was heard by two judges of the High Court and a judge of the Supreme Court or by three judges of the High Court, he just wanted there to be no possibility of deadlock between judges resulting in an additional hearing. Magennis said that this was a useful amendment that ensured a majority of judges coming to a decision after one hearing recalling "the old idea expressed in rhyme which I remember well, by junior barristers, is to have effect, that, namely, 'When the Court is made up of three you have a clear majoritee (*sic*).'"[105]

In Cosgrave's place, Minister of Finance Blythe agreed to consider the amendment. Later, Kennedy took the matter under consideration and put forward a proposal that was approved, and Redmond and Magennis did not object. The appeal would still go to two judges of the High Court and if they agreed then the result would be identical to what would occur under the original wording of the bill. If the two judges disagreed, instead of a third judge joining them, the decision being appealed would be affirmed and the litigants could appeal to the Supreme Court, effectively eliminating the additional hearing Redmond and Magennis opposed.

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[104] Dáil Éireann, *Dáil Debates—The Dáil in Committee—The Courts of Justice Bill, 1923—Third Stage Resumed*, October 12, 1923.
[105] Ibid.

Redmond tried to eliminate another step in the appeal process by supporting an amendment put forward by another independent Deputy but was defeated in the name of protecting the sovereignty of the new nation. The Judiciary Bill allowed litigants to appeal from the Court of Criminal Appeal to the Supreme Court. Redmond felt that the Court of Criminal Appeal's decisions should be final. Redmond claimed that there was no criminal appeal court under the *ancien regime* system and the Judiciary Bill was calling for two by having an appeal to the Criminal Court of Appeal and the Supreme Court. He believed that one was "proper and humane," but that two courts would lead to excessive litigation.[106] Cosgrave responded saying:

> If we are giving let us give generously, and I would have the Supreme Court of Appeal [be] the final tribunal before whom any person should have an opportunity of appearing if he thinks injustice has been done to him. That, I think is fair, and the person is entitled to it. There is just the possibility that an attempt might be made to skip the Supreme Court if it were not there, and go direct to the [English] Privy Council. I do not think that is desirable. It will not make for confidence in the institutions we are putting up.[107]

The Executive did not see this issue as simply a legal matter as those pressing the amendment, but as an issue where the Free State Executive needed to let the public know it was committed to ensuring the Irish would be governed and adjudicated by the Irish, which was not easy in the face of accusations from Republicans. The Executive was facing pressure from de Valera's political faction whose official publication criticized those for took the oath required in the Constitution to take a seat in the Dáil. Whoever took the oath was saying they supported the provision for an appeal to the Privy Council, which "No Republican, no believer in his country's freedom or independence in any form; can conscientiously take that oath."[108] Cosgrave did what he could to

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[106] Dáil Éireann, *Dáil Debates—Tuarasgabhail I Dtaobh Cur Amach Riteach I Gcoir Baile Atha Cliath Theas—The Courts of Justice Bill, 1923—Committee*, October 10, 1923.
[107] Ibid.
[108] *Sinn Féin*, "Perjury or Truth?" September 29, 1923.

refute the point of the abstaining Republicans by doing everything he could to ensure that the Supreme Court would be the highest court in the land.

Issues Considered by The Dáil: Circuit Courts

The provisions for the Circuit Courts were considered by many the most drastic change to the judiciary system in Ireland because they would facilitate decentralization. Many accepted the Judiciary Committee's recommendation for decentralization and saw the success of such a system in the Dáil Courts, but others viewed the creation of a Circuit Court as a disaster. Some of the criticism of the Circuit Courts was focused on the logistics of this jurisdictional level and its independence from the Executive, but the effort from people who opposed these courts were focused on reducing their jurisdictional authority.

Redmond pressed for an amendment to allow for up to ten judges so they could adequately handle their workload rather than the eight provided for in the original bill. Having only eight judges did not make sense to Redmond because the position would have more responsibility than County Court judges, of which there were 16. The barrister deputy could not see how this could be implemented and said "the work that is proposed for those judges is not only mentally but physically impossible."[109] He was also confused by the Government recommending a maximum of eight judges, when the Judiciary Committee's report called for a minimum of eight. Cosgrave responded to Redmond by implying that the number was set at exactly eight for economic reasons as it was the Finance Ministry that determined this number. Cosgrave conceded that it was true the County Court judges did very little and asking a smaller number of judges to do more work could seem counterintuitive, but believed the work could be done if the judges worked hard. He pointed to the example of the Recorder of Dublin, a position in the *ancien regime* courts, saying he was "a very able Judge—a great Judge… as his work

[109] Dáil Éireann, *Dáil Debates—The Courts of Justice Bill, 1923—Third Stage (Resumed)*, October 11, 1923.

increased, he showed greater form, and I hope that we shall give the new Judges an opportunity also of showing their form."[110] The President would have his way and the number would remain fixed at eight.

Another logistical detail opposition deputies wanted changed was the pay scheme for Circuit Court judges. While the original wording of the bill set the salaries of judges on the District Courts, High Court, and Supreme Court, the Circuit Court judges' whole salary was not fixed. The wording stated that "Every Circuit Judge shall receive a salary of £1,500 per annum, together with an addition or bonus."[111] It is unclear why this pay scheme was proposed because it was not recommended in the Judiciary Committee's report and it was not being implemented at the other jurisdictional levels. Some deputies were understandably concerned that the vague language in the section could be used by an Executive to reward judges who ruled favorably towards it, which is a clear breach of judicial independence.

The clause is even more of an anomaly because the President offered an amendment to change the pay of judges on the Circuit Court to a fixed £1,700 without explaining why the original clause was there and why they were changing it. It seems that Kennedy supported the idea of having a fixed pay because the Minister of Finance was agreeable to setting the fixed rate after a discussion with the Attorney General.[112] Like with the other examples of opposition deputies and later Senators trying to protect judicial independence, the efforts are directed at changing certain logistics of the court to eliminate the possibility of the Government influencing the judiciary.

The greatest challenge to the Circuit Courts came from deputies representing two interest groups. The first group that was opposed to the vastly increased powers of the Circuit Courts was

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[110] Ibid.
[111] Dáil Éireann, *Dáil Debates—Dáil in Committee—Courts of Justice Bill, 1923*, December 4, 1923.
[112] Ibid.

the Bar. Redmond was the chief advocate on behalf of the Bar and raised his objections on October 12th to the section of Circuit Courts. The chief criticism of the jurisdictional powers of the Circuit Court was in cases involving contracts and torts, which County Courts could deal with cases involving up to £50 and the Circuit Courts would be able to hear cases involving up to £300. The amendments put forward on behalf of the Bar sought to lower the upper limit to £100 in Redmond's amendment. While £300 was the amount agreed upon by the Judiciary Committee, Redmond was not without a strong argument although he knew he would be criticized for it. In all other types of civil cases, the Circuit Court's jurisdiction was the amount handled by County Courts multiplied by two. In the case of contract and tort, though, Redmond observed "the jurisdiction has been six times multiplied… though I and those associated with me may be taunted with a certain tinge of conservatism in this regard, I claim at any rate to be conservative of what I consider worth conserving."[113] Redmond did not understand why the Circuit Court, which he believed did not have enough judges, should have their powers expanded in one area far more than others, giving the courts additional work.

Redmond's main reason for opposing the bill was the same as the Bar had stated many times—decentralization would weaken the Bar and in turn the bench and the nation's entire judiciary. The barrister deputy believed that members of the Dáil took the stand that they did because they did not understand what legal professionals actually do. He patronizingly told the other deputies "that many people [in the Dáil] do not realise the exact nature of a barrister's work… I say that it will be impossible for members of local Bars in Ireland to be sufficiently equipped in legal knowledge and to be up in all the requirements to bring about not bad but good

[113] Dáil Éireann, *Dáil Debates—The Dáil in Committee—The Courts of Justice Bill, 1923—Third Stage Resumed*, October 12, 1923.

law."[114] Redmond did not believe that local Bars scattered across the Irish Free State could provide sufficient resources to practicing barristers and rejected any comparisons to local Bars that had proven successful in other nations.[115]

Redmond's amendment was overwhelmingly defeated by the Fourth Dáil. The Dáil, elected by the people of Ireland, would not be controlled by a wealthy interest group that had once held so much sway when the country was under British rule. Deputy O'Mahony, a Government deputy, stated that Redmond's objected because decentralization would adversely impact barristers but "The duty of the Executive Government is not to consider the interest of a small section of the population, or of one particular branch of the profession, but rather what is for the general benefit of the community."[116] Deputy Hewat, who had served on the Judiciary Committee, said Redmond was "looking too much into the past and too little into the future… the Bar will adapt itself to the changed order of things."[117]

With the Dáil stacked against him, the only advantage that Redmond had was that Kennedy had not taken his seat yet and could not speak from his position as head of the Bar in opposition to his amendment. This advantage was negated when Magennis, with his own gravitas in legal affairs, rose to oppose Redmond's amendment. He could not accept the amendment because in his opinion it would ruin everything the new nation was trying to achieve and was set forth in the Judiciary Committee's report—a system that met the needs of the Irish people. A centralized system centered in Dublin was not the way of the future because "we are

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[114] Ibid.
[115] Ibid.; Some supporters of decentralization pointed to the success of various Bar associations in England located in that nation's cities. Redmond rejected the comparison saying "I do not think that that the comparison between Manchester, Liverpool, and some out local county districts in Ireland is quite on parallel. After all, within a few miles of Manchester, say a radius of 20 miles of that city, you have a population as large, if not larger, than unfortunately we happen to possess in the whole of the Free State, and to suggest that local Bars are going to spring up in remote country districts in Ireland where litigants and solicitors will obtain the best legal experience and legal knowledge is a suggestion that I contend does not hold water."
[116] Ibid.
[117] Ibid.

legislating for an agricultural country, and trying to meet the law and needs of a farming population mainly."[118] Magennis believed that local Bars, of which there would probably be one per Circuit, would help most barristers and the public as a whole. He drew upon his own experience as a barrister saying:

> anyone who was ever at the Bar is aware that with the centralisation of it the tendency is for half a dozen of the big wigs to monopolize the greater part of business and leave the rest of the profession briefless. That is not a good thing for the briefless barristers, and it is still worse for the public. The result is delay. The law's delay has been the cause of lamentation for centuries… it comes to a question of prophecy, as between prophecy pessimistic [Redmond's view] and prophecy optimistic [Magennis' view], and I would ask you to accept the more hopeful view, which is more in line with experience.[119]

Magennis' argument proved to be persuasive as Johnson said "This discussion that has taken place between Deputies Box and Cox [referring to Magennis and Redmond] has convinced me that the Government would be well advised to stand firm by the proposals of the Bill."[120] Cosgrave did as the leader of the opposition suggested and would not budge on the amount of £300, citing the arguments of other deputies and the Judiciary Committee's report.

The other interest group that strongly opposed the Circuit Courts having jurisdiction in contracts up to £300 were businessmen, who would be directly affected by this provision when trying to collect money owed to them. The deputies representing commercial interests were in a position similar to Redmond's, where they were vastly outnumbered in the Dáil and the wealthy merchants did not have the influence they once had with the former British administration. The independent and Businessmen Party deputies who tried to amend the section on behalf of commercial interests had no natural allies in the Dáil as the Farmer's Party and Labour Party felt

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[118] Ibid.
[119] Ibid.
[120] Ibid.; The phrase "Box and Cox" was a reference to an English play where two men unknowingly lived in the same apartment as one resided there by day and one by night. The two, after several arguments, decide that they were brothers.

their constituents would benefit from decentralization and would shed few tears if life became more difficult for merchants. Business claimed that the Judiciary Bill would hurt credit in the new nation because businesses would be less likely to extend loans to people in the countryside if debt collection was difficult and this would have a negative impact on the already struggling economy. Commercial interests' critics; however, saw their attempt as purely an act of self-interest.

Deputy Darrell Figgis, an independent member of the Dáil representing Dublin County, led the opposition to the bill on behalf of businesses. He had two major criticisms. Because merchants in Dublin would have to leave the city and go to the countryside to recover debt, they would be less likely to give loans to people in rural areas. He read a resolution passed by a group of Dublin merchants to express his position which stated "the Judiciary Bill before the Dáil, if passed in its present form, will create a great hardship on merchants in Dublin owing to the difficulty in recovering debts and the inconvenience and expense in sending witnesses to attend hearing[s]."[121] His second criticism was that Dublin businessmen would not be able to get a fair trial at a court in the countryside because of hostile juries since the merchants "may be called upon actually to appeal to friends and relatives of persons who may owe them monies that are being claimed."[122] While Figgis would get himself in trouble for framing his opposition in such self-interested terms and for criticizing the jury process, he would draw ire from others for his comments regarding English merchants. He told the Dáil that English companies were drafting a clause for future contracts to people in the Irish countryside who took out credit. The clause stated that if a person did not repay their debt they would have to go before an English arbitrator in England, instead of going to an Irish court.

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[121] Dáil Éireann, *Dáil Debates—The Dáil in Committee—The Courts of Justice Bill, 1923—Third Stage Resumed*, November 1, 1923.
[122] Dáil Éireann, *Dáil Debates—The Courts of Justice Bill, 1923—Third Stage (Resumed)*, October 11, 1923.

Opposition to Figgis and commercial interests came from across the political spectrum. Cosgrave still believed the Judiciary Bill would provide cheaper and more efficient justice for all. The President rejected Figgis' claim that juries would be biased saying "There are honest juries in the country… it is not fair that the whole jury system should be indicted here… We know the juries in the country will give honest verdicts."[123] The strongest reaction from those opposed to businesses stance was to the reference to English merchants. Magennis said that "The whole doctrine of Deputy Figgis is that we should legislate to make it easy for Manchester merchants to collect debts in Ireland."[124] Kennedy would later join Magennis in this view stating "I find that the city [Figgis] was most concerned with was the city of Manchester."[125] Figgis was truly upset by these accusations. Although he did spend part of his life in England, Figgis had helped procure German rifles for the Irish Volunteers in 1914 and saw himself as a hero in the fight for Irish independence. He was resourceful, an able leader, and "Arthur Griffith trusted him, and probably if Griffith had lived, Darrell Figgis would have been in a position of responsibility."[126] Instead he was faced of accusations of favoring the English over the Irish by other deputies.

Cosgrave was quite upset about Figgis' reference to having English arbitration courts making decisions regarding the people of Ireland and challenged him: "Who is to carry [the arbitrator's decision] out? If it be thought by any people that we are going to see that our independence or our integrity as a State is going to be interfered with, whether or not they are business people, they will find they have bitten off more than they can chew."[127] Labour would

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[123] Ibid.
[124] Ibid.
[125] Dáil Éireann, *Dáil Debates—The Dáil in Committee—The Courts of Justice Bill, 1923—Third Stage Resumed*, November 1, 1923.
[126] Padraic Colum, "Darrell Figgis: A Portrait," *The Dublin Magazine* 12, no. 2 (1939): 24.
[127] Dáil Éireann, *Dáil Debates—The Courts of Justice Bill, 1923—Third Stage (Resumed)*, October 11, 1923.

join the government in opposing a reduction of the Circuit Court's jurisdiction as Johnson said "I am prepared to stand for the rights of the poor debtor as against the rights of big wholesale merchants in the city of Dublin."[128] Business's amendment was overwhelmingly defeated.

After failing to make changes to the Judiciary Bill while being chastised by the many individuals for their advocacy for English and Dublin merchants, business had suffered not only a serious legislative loss, but a public relations disaster. Whether it was accurate is debatable, but the public was hearing charges against businessmen that they were more concerned about merchants in England than farmers in the countryside. Even more damaging to commercial interests, in a short period of time they would be seeking to collect debts by appearing before the courts and juries they so harshly criticized.

Barrister Henry Hanna wrote Kennedy to let him know he was talking to the business community to try and alter its approach. Hanna said that he "advised them that there was little likelihood of altering the fundamental idea of decentralisation & that it would prejudice their position if they attempted to fight."[129] He said that he was working with them to craft amendments that would not attack the principle of decentralization but would address what he felt were legitimate concerns. While it took some time before they followed Hanna's advice, business interests did shift their strategy in the Dáil. The debate over the amount of money the Circuit Court should have jurisdiction over in cases involving contracts was the last time they would directly challenge decentralization in the Dáil although they would still make it clear they disapproved of it.

An interesting aspect of this debate, which was the biggest challenge to the principle of decentralization, was the lack of coordination between those representing the barristers and those

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[128] Dáil Éireann, *Dáil Debates—The Dáil in Committee—The Courts of Justice Bill, 1923—Third Stage Resumed*, November 1, 1923.
[129] UCD Archives, Kennedy Papers, P4/1130, Hanna to Kennedy, December 6, 1923.

representing the business community. Although the two groups were arguing against decentralization for different reasons, they were both putting forward amendments that were nearly identical. While these two interest groups would still have been defeated by other deputies in the Dáil, they might have been able to achieve more if they had worked together. Instead, one interest group would put forward an amendment, which would not be supported by the other group and it would be harshly criticized and defeated. Then the group that sat silently would put forward an almost identical proposal and be easily defeated while the group that had already lost did nothing. It was a poor legislative strategy for two groups with mutual desires.

Issues Considered by The Dáil: District Courts

There was significantly less controversy over the provisions covering the District Courts than the ones for the Circuit Court. Although the District Courts had expanded powers when compared to RMs and JPs, their jurisdiction still had limits most people were comfortable with. Also, the justices were better equipped for the job than RMs and JPs because they needed to be legal professionals so had the necessary training to preside over a court. Finally, the courts had been in operation for several months already under a temporary measure and had proven to be effective.[130] Nevertheless, there were some points of contention that were addressed. First, there were issues that seem purely logistical or superficial, but that some deputies believed detracted from the District Courts' independence and status. Also, the deputies representing farmers of County Donegal wanted to make some changes to the jurisdictional powers of the District Courts to benefit their constituents.

Opposition deputies objected to the pay scheme and source of funding for the District Justices and sought to amend the relevant sections of the Judiciary Bill. Although the Judiciary Committee's report recommended justices should start at a salary of £1,000, the legislation

[130] The temporary District Courts were established under the District Justice (Temporary Provisions) Act, 1923.

called for the salaries to be determined by the Ministers of Finance and Home Affairs, making the source of the District Justices' pay different than that of judges of the Circuit Court and Superior Courts. Judges of the other courts would be paid from the nation's central fund, which meant the funds were automatically available each year. District Justices' pay was to be voted on annually by the legislature. The Minister of Finance, Deputy Blythe, believed that the pay should be voted on from year to year because "the number of District Justices will not be fixed, as the number of [other jurisdictional levels'] judges will be fixed. It will give the Oireachtas annually an opportunity of saying that there are far too many District Justices… [or] the Courts are congested, that there should be more District Justices."[131] So the Executive saw it as solely a matter of controlling the number of District Justices and not the judges themselves.

Magennis could not accept the government's proposal and vehemently opposed it. He claimed that the remuneration for judges was related to judicial independence because it "is an elementary fact of psychology that nothing gives so much independence to the character of a man as the knowledge that so long as he discharges his duties efficiently he has an adequate salary."[132] The pay needed to be fixed and the judges needed to be assured they would receive a salary that was independent from their rulings or the courts would be subservient to the Executive just as the RMs were. Magennis was not willing to revert back to the British system saying "we do know that there was in the case of the Removable Magistrate in the past continual interference with the administration of justice from the Castle. Now Castle Government has gone. Let us make sure that it has gone with vengeance and that it cannot return under any other name."[133]

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[131] Dáil Éireann, *Dáil Debates—Dáil in Committee—Courts of Justice Bill, 1923*, December 4, 1923.
[132] Dáil Éireann, *Dáil Debates—Civil Service Regulation (No. 2) Bill, 1923 – The Courts of Justice Bill, 1923—Third Stage Resumed*, October 31, 1923.
[133] Ibid.

Along with other independents, Redmond backed Magennis and he received enough support that the Executive had to accept his position. Labour backed him with Johnson questioning why the Government was doing this and O'Connell saying "I would like to support as strongly as possible the suggestion made by Deputy Magennis."[134] Commercial interests, represented by Figgis, backed the professor. Even deputies from the Executive's party, Cumann na nGaedheal, spoke against this provision of the bill with deputies O'Mahony and Ward asking their party's leadership to reconsider. In the end the overwhelming support Magennis received translated into the Executive agreeing to the pay being fixed in the legislation.[135]

Opposition deputies also objected to having the pay of District Justices being voted on instead of paying them from the central fund. Johnson was the first to speak against the amendment and did not believe it was right that one judicial post was paid in a different fashion than all the others. Even more alarming to the leader of the official opposition was the fact "There is nothing to prevent judgments being discussed if the salaries are reviewable."[136] Redmond joined Johnson in opposing this section of the bill because he too was concerned politicians would be discussing judicial decisions in debates. Having served in the British House of Commons himself, Redmond was alarmed at this because only magistrates' and not judges' decisions could be debated in the British legislature. This led Redmond to raise the question, whether District Justices are magistrates, like the RMs, or indeed judges like the judges on the Circuit and Superior Courts?

Kennedy called Redmond's implication that District Justices are the same as RMs "a thoroughly mischievous suggestion" and assured the Dáil that District Justices were in fact

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[134] Ibid.
[135] Dáil Éireann, *Dáil Debates—Dáil in Committee—Courts of Justice Bill, 1923*, December 4, 1923; The amendment setting the pay was put forward in this debate.
[136] Ibid.

judges, believing that the Constitution did not allow for deputies to discuss the conduct and rulings of judges when voting on their pay. Deputy Cooper disagreed with the Attorney General saying if the legislature "is asked to vote money it is bound to see that the money is properly expended, and you cannot shut out of debate the question of competence of any one of these people for whom money is voted."[137]

An Ceann Comhairle (Speaker of the Dáil), Michael Hayes, weighed in on the issue. He said that since Kennedy had established District Judges are indeed judges and their status was protected under the Constitution, he would not allow deputies to speak about the rulings of District Justices when debating the bill authorizing their pay. He said this with reservations though because "it would be open to discuss the fitness of such persons for the position. I think that could not be prevented. While their decision could not be discussed, I have great faith in the ingenuity of Deputies."[138] The opposition was not able to gain enough support as they were able to with the previous issue and the Dáil would approve the section of the Judiciary Bill allowing the salaries to be voted on annually, but the issue was still a disputed one and would arise again in the legislative process.

A more superficial change the opposition was trying to have enacted was to modify the title of District Justice to District Judge. This effort was primarily led by Johnson and backed by Redmond. This seemingly unimportant change harkened back to Redmond's suggestion that District Justices may not be judges but magistrates and the opposition wanted to make the language clear that District Justices were unquestionably judges. This would not be such an issue with titles from the *ancien regime* court as the Lord Chief Justice was a higher ranking position than a Country Court Judge. But this judge vs. justice distinction was more problematic under

[137] Ibid.
[138] Ibid.

the system set forth in the bill. There were judges of the Supreme Court, judges of the High Court, and judges of the Circuit Court, but justices of the District Courts. Johnson said that since the Executive has stated that District Justices were indeed judges, "it is very desirable that we should alter the phraseology of the Bill so as really to indicate these intentions."[139] Kennedy opposed this idea because people in the Irish Free State have already become used to the title as they had been operating admirably on a temporary basis and that "there is absolutely nothing derogatory in the word 'Justice.'"[140] As with the previous issue, the opposition would lose this battle but the issue would be taken up again later.

The Dáil also addressed an issue that impacted farmers more so than any other group, which ties into Magennis' point that they were legislating for an agricultural nation. The original wording of the Judiciary Bill would allow for many cases to be heard at a more local level, but one of the exceptions to this was questions of title, which were not under the jurisdiction of District Courts.

Deputy McGoldrick, a member of Cumann na nGaedheal representing County Donegal, put forward an amendment to change this because he believed it was a major shortcoming of the bill with "About 70 per cent. Of the cases in counties like that which I represent are concerned with questions of title—disputes about rights of way, fences, water rights, etc.—and to my mind it would be an intolerable hardship if people are compelled to travel long distance to Circuit Courts."[141] Deputy Doherty, another member of Cumann na nGaedheal representing Donegal, rose to support his colleague as this was an issue that specifically impacted people in the rural

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[139] Dáil Éireann, *Dáil Debates—Public Safety (Powers of Arrest and Detention)—The Courts of Justice Bill, 1923—Fifth Stage*, December 11, 1923, http://historical-debates.oireachtas.ie/D/0005/D.0005.192312110022.html.
[140] Ibid.
[141] Dáil Éireann, *Dáil Debates—Civil Service Regulation (No. 2) Bill, 1923 – The Courts of Justice Bill, 1923—Third Stage Resumed*, October 31, 1923.

west of Ireland. These representatives from Donegal found support among members of the Farmers Party and the Labour Party.

Deputies White and Baxter from the Farmers Party supported giving District Courts jurisdiction over small title cases as they estimated 75-80 percent of the litigation in the County Courts of the rural west were title cases, which would cause many people to travel to Circuit Courts under the original wording of the bill. White believed McGoldrick's proposal would help achieve the Government's principle of good, cheap law that met the needs of the citizens because giving title jurisdiction to District Justices would "be rendering a great service to poor men, as he will give them cheap law. As the District Justice is a trained lawyer, he will in a position to decide such cases as well as Circuit Judges."[142] Johnson, speaking for the Labour Party, said "I want to support the amendment, or at least the idea behind the amendment… It seems to me that the case for easy and cheap litigation demands that this amendment, or some such amendment, should be agreed to."[143]

While the amendment from the Donegal deputies had many supporters, there were opponents of the bill including other members of the Farmers Party, which made it an interesting issue. The divide was not so much along party lines as it was the region deputies represented. Kennedy was blindsided by the amendment because it was the first he had heard of giving District Justices jurisdiction over title cases. He was not prepared to act on the amendment on the day it was introduced because he had "heard practically only Tirconnaill in advocacy of that particular jurisdiction. Clare, apparently, is against it, and Cork had not yet spoken… There is a good deal to be said on either side, but at the present state, the matter has only been pressed from

[142] Ibid.
[143] Ibid.

a limited part of the country."[144] Kennedy took the matter under consideration and was able to put forward a compromise that was acceptable to the majority of the Dáil. District Justices would be given jurisdiction over title cases involving land up to £10, which would specifically target the poor small farmers McGoldrick and others were concerned about. McGoldrick thanked Kennedy for his solution to the problem saying it achieved what he wanted and the Dáil approved the proposal.[145]

Issues Considered by The Dáil: Place of the Irish Language in Court

Another issue that effected the rural west of Ireland was the place of Irish in the new courts as most native Irish speakers lived there. With the uproar over the affidavit in Irish being rejected earlier in the year, this was not a new issue. There were two main reasons put forward by proponents of the Irish to have the Irish language integrated into the new judiciary system. First, for people who spoke only Irish or for those who only knew a little English, it was a dreaded experience to appear in a court where they could not understand what was being said and whose own words had to be translated. Second, there was the connection between nationalism and the Irish language. Irish was more than a form of communication for some; it was also part of an identity that helped distinguish the Irish people from their former rulers. The debate over language that took place in the Dáil focused on ensuring court procedure that accommodated the language and that Irish titles would be used for judicial positions.

To ensure that the new court system had rules that gave Irish an equal footing with English, advocates for the language pressed to have Irish speaking judges, barristers, and

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[144] Ibid.; Tirconnail is another name for the area of County Donegal.

[145] Seanad Éireann, *Courts of Justice Bill, 1923—Report Stage Resumed*, March 20, 1924, http://historical-debate s.oireachtas.ie/S/0002/S.0002.192403200006.html; In the Seanad this section was scrutinized by two senators who were barristers and felt that the section should be removed from the bill. Kennedy succeed in defending principle of the section, which was slightly amended, telling the Seanad, "The Donegal Deputies were vociferous on this point, however, and this was a cheap method of trying out a case of assault before a District Justice… There has been a strong demand for it along the West Coast and in Donegal, so that it should be possible, without going through the formality of a process suit, to get their title."

solicitors on the rule-making authority for Circuit Courts that was being established per the recommendation of the Judiciary Committee. The focus was mainly on the Circuit Courts because it was not a concern for District Courts since many of the Justices in Irish-speaking areas could speak Irish and it was well know that there were not enough qualified Irish speaking jurists to fill the seats on the Superior Courts. An amendment to make this change was first put forward by Pádraic Ó Máille, a Cumann na nGaedheal deputy representing County Galway, which was on the west coast of Ireland and had many Irish speakers. In principle, this amendment was warmly accepted by Kennedy, a strong cultural nationalist himself, who wanted to make sure that Irish and English were equal in court as was provided for in the Constitution. Although he was not prepared to accept Ó Máille's amendment, Kennedy said "It will be important that the rule-making authority personally should be of such a kind that full effect to the Constitutional position would be given. The most I will say at this present moment is that the Government will consider the best means of reaching that end we certainly desire."[146]

After considering the matter, Kennedy put forward another amendment that was widely accepted. Kennedy proposed that the rule-making authority for the Circuit Courts would have at least two members who the Minister of Home Affairs certified as having "an adequate knowledge of the Irish language."[147] Although the section was necessarily vague, Kennedy believed that having "some members who would be familiar with the Irish language, and who would, consequently, be capable of making rules which would provide for its use without inconvenience and without disadvantage to the parties interested."[148]

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[146] Dáil Éireann, *Dáil Debates—Civil Service Regulation (No. 2) Bill, 1923 – The Courts of Justice Bill, 1923—Third Stage Resumed*, October 31, 1923.
[147] Dáil Éireann, *Dáil Debates—Dáil in Committee—Courts of Justice Bill, 1923*, December 4, 1923.
[148] Ibid.

While thanking Kennedy for the amendment putting Irish speakers on the rule-making authority, Deputy McGoldrick encouraged the Executive to appoint Irish speaking judges to the circuits with large Irish speaking populations. He wanted Irish speaking judges appointed to the Circuit Court pointing to the example of the District Justices who had served on a temporary basis saying "There is nothing that has given such satisfaction to the community in general as the appointment of District Justices who have a knowledge of the Irish language especially in counties and districts where Irish is the only language understood and spoken."[149] He would not press that matter further though and there were no other efforts in the Dáil to ensure courts could provide adequate service to Irish speakers.

To help give the courts an Irish identity, proponents of the Irish language wanted the new courts and judicial positions to have Irish titles. This effort was not unique to the new judiciary as one only needed to look at the legislature itself. Although the lower house of the Irish legislature and its speaker were similar to the British House of Commons and the Speaker of the House of Commons, the lower house was called the Dáil Éireann and the speaker was *An Ceann Comhairle*. Labour's Deputy O'Connell pointed out that these titles needed to be used from the beginning or else the courts would suffer the similar fate of the Gárda Siothchána, which the public commonly referred to as the Civic Guard because the Irish title was not implemented immediately. O'Connell suggested "that if we put in here the Irish titles and use them right from the beginning, they will come to be known and to be used by everybody as a matter of course… I would urge the President to refer the matter to some of the Irish scholars he has at his disposal here."[150]

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[149] Ibid.
[150] Dáil Éireann, *Dáil Debates—Tuarasgabhail I Dtaobh Cur Amach Riteach I Gcoir Baile Atha Cliath Theas—The Courts of Justice Bill, 1923—Committee*, October 10, 1923.

The Executive took O'Connell's recommendation and Kennedy sought out expert advice to create Irish titles for the new courts. Kennedy spoke to Eoin MacNeill, who was a deputy in the Fourth Dáil and a distinguished scholar of Irish history, about this matter. On December 10th, Kennedy sent a letter to the Clerk of the Dáil with the titles MacNeill recommended and asked that they be circulated amongst the other deputies.[151] On December 11th, in response to O'Connell's original request, Kennedy put forward amendments to add the Irish titles and they were easily passed with no debate.[152]

Issues Considered by The Dáil: Judicial Independence and the Rule-Making Authority

The most heated debate occurred over an area of the bill that some believed was infringing on judicial independence. The rule-making authority for the District Courts, Circuit Courts, and Superior Courts, would have a large hand in crafting the new judiciary as they would be deciding how the courts would run on a day to day basis. They would be determining court hours, vacation time, how the courts would accommodate Irish speakers, costumes for judges, rules of evidence, among many other issues. The Judiciary Committee had recommended that these bodies be strictly comprised of members of the legal professions, with five judges of the applicable jurisdictional level, two barristers, and two solicitors on each of the rule-making authorities. What many found objectionable was that the Executive deviated from the report, despite Cosgrave's claim that the legislation was based exactly on the Judiciary Committee's work, adding the Minister of Home Affairs to the rule-making authorities along with the Minister of Finance if there was an issue of public expenditure. Some deputies were adamantly opposed to ministers being on the rule-making authorities, wanting to know why the Executive made this

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[151] UCD Archives, Kennedy Papers, P4/1107, Kennedy to O Murchadha, December 10, 1923; The terms Kennedy submitted were "Cúirt Bhreithiúnais Uachtarach" for the Supreme Court, "An Chúirt Bhreithiúnais Chuarda" for the Circuit Court, and "An Chúirt Bhreithiúnais Dúithche" for the District Courts.

[152] Dáil Éireann, *Dáil Debates—Public Safety (Powers of Arrest and Detention)—The Courts of Justice Bill, 1923—Fifth Stage*, December 11, 1923.

change and what it hoped to achieve by doing so. Also, businesses wanted to have their own representatives on the rule-making authorities since they were no longer strictly organizations of legal professionals. The Executive made some concessions on the issue, but the opposition would fail to remove the ministers from the rule-making authorities.

Deputies who opposed the Minister of Home Affairs demanded that the Executive explain why it deviated from the report. Redmond led the opposition against the Minister of Home Affairs being on the rule-making authorities and continuously pointed to the report of the Judiciary Committee. The firebrand best summarized his argument saying:

> the Government, while purporting to introduce a measure on the lines of the Judiciary Committee's Report, have disregarded the report wherever they disagreed with it, and have upheld the report wherever they agreed with it—a very accommodating sort of report indeed… Here we have the Government proposing, in the face of their own Committee's report, in the face of the Committee which they have been throwing at the head of everyone who has dared to criticise any proposal which they have made in conformity with the views of the Committee, to throw the Committee's suggestion upon one side, and putting forward something entirely and distinctly apart.[153]

Redmond's objection was reasonable and the claims were true. Throughout the debate, anytime a deputy tried to change a section that was based exactly on the Judiciary Committee's recommendations, the Executive would say the section was right because it was based on the report. Redmond, who had the report thrown at his head as he would say, did not appreciate the double standard.

Redmond found support from Magennis and Labour in his efforts. Magennis wanted the legislation to be based on the report of the Judiciary Committee, after all it was like a Bible to him. He told the Executive that "I stand here as I stood in the last Dáil to resist every

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[153] Dáil Éireann, *Dáil Debates—The Dáil in Committee—The Courts of Justice Bill, 1923—Third Stage Resumed*, November 1, 1923.

encroachment of a Ministry on the administration of justice."[154] Magennis was especially concerned that the Minister of Home Affairs had too much power on the rule-making authority for the District Courts, since he would be the one selecting the five judges to serve on the authority as opposed to the other jurisdictional levels having the judges select their own representation. The professor felt that this encroachment was "an unmistakable blot upon the Bill."[155] Johnson backed Redmond and Magennis. He criticized the Government's stance, especially in regards to the rule-making authority of the District Courts, saying "that it is the pride of parentage that makes [Kennedy] stand firm on the proposition."[156]

Opposition deputies did not want to give so much power over the courts to appointed political positions. These politicians correctly predicted that the party that controlled the Fourth Dáil would not always be in power. Cumann na nGaedheal's majority was not threatened immediately by any of the smaller parties that took their seats in the Dáil, but de Valera's party was growing although it abstained from the Fourth Dáil. Redmond had to look no further than the his father's Irish Parliamentary Party, which didn't even exist by the time of the Fourth Dáil after dominating Irish politics. Deputies who recognized the transient nature of political majorities did not think the ministers of Cumann na nGaedheal were sinister, but were concerned with those who would be in their positions in the future. Redmond said, he did not believe the rules that crafted the administration of justice "should not be confined to a Minister of the day."[157] If the Judiciary Bill was just a temporary measure this would not be such a concern, but as Johnson said "this Bill will deal with the future."[158]

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[154] Ibid.
[155] Ibid.
[156] Ibid.
[157] Ibid.
[158] Dáil Éireann, *Dáil Debates—The Courts of Justice Bill, 1923—Third Stage (Resumed)*, October 11, 1923.

These deputies mustered enough support and remained on the offensive, especially Redmond, so that Kennedy had to explain his position without being able to throw the report at their heads. Kennedy explained that the Minister of Home Affairs needed to be on the rule-making authorities so these organizations could be held accountable. The Minister of Home Affairs "is here responsible to the Dáil, and he is the link between the expert technical people who draft these Rules and the Dáil… Then [the rules] would be here for the Dáil to criticize."[159] Kennedy also argued that having the Executive involved with making the rules for the administration of justice in Ireland was not unprecedented, a claim Redmond did make, saying "it is hardly correct in saying that no similar Executive authority has been associated with the making of Court rules… all the judicature rules in this country up to this have been made by the Lord Lieutenant, who was the concentrated essence of Executive authority prior to the Treaty."[160] Kennedy's argument in this instance was astounding because he was defending a part of the new system by pointing to the foreign precedent he and the Executive wanted to replace.

Kennedy's arguments for the Minister of Home Affairs did not appease the opposition, especially Redmond. After Kennedy gave his usual explanation of the deviation in a November 1st debate, Redmond continued to press for a better answer finding the Government was going to try to ignore him by walking out of the Dáil's Chamber: "I notice there is now an exodus from the Government Benches, and no wonder, because they have refused to reply to one of my questions… If that is the way that they will think they are going to carry on Government, even in this country, they will very shortly find out their mistake."[161]

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[159] Dáil Éireann, *Dáil Debates—The Dáil in Committee—The Courts of Justice Bill, 1923—Third Stage Resumed*, November 1, 1923.
[160] Dáil Éireann, *Dáil Debates—Civil Service Regulation (No. 2) Bill, 1923 – The Courts of Justice Bill, 1923—Third Stage Resumed*, October 31, 1923.
[161] Dáil Éireann, *Dáil Debates—The Dáil in Committee—The Courts of Justice Bill, 1923—Third Stage Resumed*, November 1, 1923.

Other deputies would come to Redmond's aid such as Figgis, who observed the "Attorney-General stepping rather nimbly among the questions put to him and definitely avoiding some of them, but there was one question… that the Dáil should have an answer to that question, and that is: Why was the recommendation of Judiciary Committee changed?"[162] Deputy Cooper did not accept Kennedy's explanation either saying "I do not think the Government is treating us quite fairly. It is possible some of Deputy Redmond's questions are unanswerable... But surely the Government know why they departed from the Report of the Judiciary Committee."[163] Before the debate over this issue ended, Redmond railed against the Executive one more time for deviating from the report saying:

> I wonder does [Kennedy] remember that in the report, which he signed… Was it then unreasonable? Was it then unworkable? If it was, how came the Attorney-General to sign the report? If it was not, what has happened in the meantime to make it now unreasonable or unworkable? I have heard many plausible reasons put forward for departures from previous opinions or convictions, or even declarations of one's own signature, but I have never heard a more flimsy, or shallow, or less substantial defence of such a change of attitude as that put forward by the Attorney-General.[164]

Despite Redmond's best efforts, the Executive was able to hold its majority together and the Dáil would not remove the Minister of Home Affairs from the Rule Making Authority.

In spite of the heated debate between Redmond, Magennis, Labour, and Kennedy, there was an amendment regarding the rule-making authorities these politicians were able to agree on. Commercial interests had shifted their tactics, as Hanna suggested, and lobbied to have a commercial representative on the rule-making authority instead of focusing solely the decentralization issue. Deputy John Good of the Businessman Party, raised the question of having a commercial representatives on the authorities, which Kennedy rejected on the grounds

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[162] Ibid.
[163] Ibid.
[164] Dáil Éireann, *Dáil Debates—Dáil in Committee—Courts of Justice Bill, 1923*, December 4, 1923.

the rule-making authority was purely a body of legal professionals. This was not true though with ministers serving on the rule-making authority, so deputies representing businesses were not willing to back down. Good pointing out that there was a commercial representative, William Hewat, on the Judiciary Committee, said "it is obvious that the Rules Committee cannot be discharging work of greater importance than the [Judiciary] Committee had to discharge, and therefore, I hold it is equally necessary we should have a commercial representative on [the rule-making authorities]."[165]

In one of the lighter moments of the Judiciary Bill's debate, Kennedy humorously rejected the idea on the grounds that you cannot have representatives for every constituency on the rule-making authorities saying "I am surprised it should not be proposed that the President of the College of Surgeons, the President of the College of Physicians, and all the archbishops and bishops of the churches should be members on the Committee."[166] The Farmers Party and Labour would join Kennedy in opposition to what businesses wanted joining in on the joke with the Farmers Party's Deputy Conor Hogan asking to add "the farmers and the beggars to the committee," which Kennedy jestingly assented to. Labour leader Johnson then suggested adding "the criminals," to which Kennedy replied "Yes, a very large class."[167] Kennedy held his ground saying that this was technical work that should be done by legal professionals and when the rules were made, deputies would have the opportunity to question the Minister of Home Affairs thus having representation for all interest groups, "except for the one referred to by Deputy Johnson."[168]

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[165] Dáil Éireann, *Dáil Debates—The Dáil in Committee—The Courts of Justice Bill, 1923—Third Stage Resumed*, November 1, 1923; When Good said "Rules Committee" he was referring to the rule-making authority.
[166] Ibid.
[167] Ibid.
[168] Ibid.

The one important victory by opposition deputies came in the form of replacing one word. The original wording of the Judiciary Bill said that rules would be made by the rule-making authorities for the Circuit and District Courts by the Minister of Home Affairs with the "assistance" of the judges, barristers, and solicitors. Redmond objected to the word "assistance" because "the Minister of Home Affairs would really be the ultimate and final authority for making Rules for [District and] Circuit Courts."[169] The original wording required that the Minister only discuss issues with the other members of the authorities, but could make his own rules even if the other members were unanimously opposed to them. Deputy Edmund Duggan, a member Cumann na nGaedheal and a solicitor himself, put forward an amendment to delete the word "assistance" and replace it with the "concurrence of a majority." With the new wording, although the Minister of Home Affairs could essentially veto any rule since he was not required to do what the majority wanted if he disagreed, the minister could not put forward rules for the Oireachtas' review without the support of a majority of the authority. This gave some power back to those the opposition believed should be in complete control.

Issues Considered by The Dáil: What to Wear?

With so many issues to consider when creating one of the pillars of a democracy, one might think that the attire of barristers and judges would not be discussed or only given the slightest consideration. Yet, the issue of judicial costumes played a prominent role in the Dáil's consideration of the legislation as barrister deputies, the Labour Party, and the Executive clashed over the issue. The debate over the clothing to be worn by members of the new judiciary focused on two issues that were part of a larger debate: there was the issue of judicial independence where some deputies opposed the idea of the Minister on the rule-making authorities having a

[169] Dáil Éireann, *Dáil Debates—Civil Service Regulation (No. 2) Bill, 1923 – The Courts of Justice Bill, 1923—Third Stage Resumed*, October 31, 1923.

say in judicial garb. Second, there was the issue that Kennedy and Glenavy clashed on during their time on the Judiciary Committee where the two debated what costume should be worn as it would have an impact on the public's perception.

Redmond tried to prevent any minister from having a say in the costume of the bar and bench to protect the integrity and independence of the judiciary. Since the Minister of Home Affairs and the Minister of Finance were on the rule-making authorities they would have a say in what the official attire of the new courts would be. Redmond put forward an amendment that would have the decisions over costume determined by the legal professionals on the rule-making authority. He claimed he was not trying to have the old costumes remain but "Rather, my object is that the determination of the future dress, if any… should be at the discretion and in the hands of the Bench and Bar alone. I really cannot understand what the Minister for Home Affairs has to say on what costumes should be worn."[170] He also pointed out that he did know of any other nation where someone outside the judiciary controlled what judges and advocates would wear. Johnson supported Redmond's position, in fact saying he understated the issue, explaining the costume issue raised the question of the "relationship between the Judiciary… and the State. Is the Judiciary subordinate to the State; is the Judiciary subordinate to the Ministry, or is it… and I think with a great deal of sound reasoning, that it is of equal status with the political institution of the State."[171] While Johnson thought that the costume issue was minor, it connected to a much larger issue. This amendment would be defeated, which opened the door for the next issue where the Dáil debated what image it wanted to give off to the public.

The Labour Party put forward a recommendation that the Irish Free State Judiciary should not have an official costume for its members. Deputies Johnson and O'Connell both put

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[170] Dáil Éireann, *Dáil Debates—The Courts of Justice Bill, 1923—Third Stage (Resumed)*, October 11, 1923.
[171] Ibid.

forward arguments that there was no link between the respect institutions commanded and the costumes they wore. Johnson pointed to the Dáil Courts, which did not require its judges or advocates to wear an official costume yet commanded more respect among the public than the colonial courts. The leader of the Labour Party also pointed out that the United States, which had a widely respected, independent judiciary, did not have an official dress for its members.[172] O'Connell pointed to *An Ceann Comhairle* who unlike the speaker of the British House of Commons did not wear a wig or gown, yet still commanded the respect of the Dáil. He went on to say "I think we should get away from the idea that it is necessary to use artificial means of this kind to add to the dignity or solemnity of our Courts."[173]

Magennis harshly criticized Labour's position and advocated for the old costumes to remain. Magennis responded to Johnson's point on the Dáil Courts saying the leader of the opposition:

> gives us an example of a very famous and over-used form of sophistry. The Dáil Courts were highly successful; neither Judge nor pleaders in them wore an official costume; therefore official costume adds nothing to the dignity or success of proceedings. Would it not occur to the Deputy that it was in spite of the absence of these habitual and traditional elements of State that the success was achieved, because they were the Courts of our own people established to supersede the Courts of the alien?[174]

Magennis also did not accept that America's example should apply to all democracies because Johnson based it on the false view "that to be democratic is to be plain, because regal splendours have become associated with official costumes."[175] The professor said that his experience at the bar is what formulated his opinion on the costume issue because a litigant would feel he "got a great deal more value for his money when the argument was conducted by a man with a wig on

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[172] Ibid.
[173] Ibid.
[174] Ibid.
[175] Ibid.

his head before another man with a bigger wig on his head. That may be very faulty, very lamentable, and very regrettable, but it is incident to human nature."[176] Magennis believed that the Labour Party was wrong because people were naturally impressed by ritual and that is something that could not be changed by legislation or any standard put forward by one of the rule-making authorities.

Neither Labour nor Magennis would have their way in the Dáil as Cosgrave did not want the legislature to take up the issue and instead leave it to the rule-making authorities. This did not mean the Executive did not have a preference or was not doing anything in regards to costume as Kennedy tried to work behind the scenes to make his idea of an Irish costume a reality. Kennedy first received information on what a costume that was more Irish in appearance would look like after Louis Walsh forwarded a letter dated October 9th from Francis Biggar, a Belfast solicitor. Biggar wrote that if the Irish Free State were to dress its judiciary in clothing based on the Brehon system, "the mantles, cloaks or robes to be adopted would largely rank by colour. This has been fairly well written up and I can readily refer to it… As to the headgear an official cap might take the place of the wig and be very effective and traditional, same as in France."[177]

Kennedy would go on to write Biggar himself to enquire further about the costume. The Attorney General, though an expert in legal affairs and a passionate cultural nationalist, admitted to the Belfast solicitor "I am myself profoundly ignorant on the matter, and I turn to you with the hope that you may be able to give me some information which would at least stimulate ideas in devising a distinctive garb for the judiciary an legal profession."[178] Kennedy even went so far as to have designers in Dublin prepare sketches of what judicial gowns that appeared Irish would

[176] Ibid.
[177] UCD Archives, Kennedy Papers, P4/1122, Biggar to Walsh, October 9, 1923.
[178] UCD Archives, Kennedy Papers, P4/1164, Kennedy to Biggar, November 10, 1923.

look like for his review.[179] Kennedy would not have the chance to develop these sketches and had to temporarily stop addressing issue of judicial garments as he told Walsh in a November 5th letter:

> This matter is not in a pleasant position. The Bar is hostile to any change and, I fear, rather obstinately hostile. Some designs were recently made for me—quite privately—but the designer unfortunately showed them to a member of the Bar none too friendly, with the result that I had to scrap the thing and leave it so for the time being… It is a funny thing that the Bar clings to the wig with the greatest intensity, even to the extent of sending a lot of money out of the country to replace those burnt in the Four Courts.[180]

With Kennedy having to abandon his plans for the time being, the costume issue was not dealt with further in the Dáil even after he took charge of the Judiciary Bill.

Passage by the Dáil Éireann

After spending months deliberating and amending the bill, the Dáil passed the Courts of Justice Act, on December 11th 1923, clearing the way for it to be sent to the Seanad for its consideration. Besides commercial interests and the legal professionals who aligned themselves with Redmond's view, there really were no losers in this legislative battle. The Executive, led by Kennedy, had succeeded in gaining the support of the majority of representatives of the people for a new judicial system it had hoped for. While the English common law tradition would remain, the judicial system largely based on the recommendations of the Judiciary Committee was tailored to the needs of the Irish people. Thus, the new judiciary was not simply a continuation of the colonial courts.

At the same time, deputies who rejected approving the bill without debating it first were vindicated. Kennedy believed that the legislation passed by the Dáil had "been greatly improved"

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[179] UCD Archives, Kennedy Papers, P4/1163, Phillips to Kennedy, October 15, 1923; UCD Archives, Kennedy Papers, P4/1163, Kennedy to Phillips, October 16, 1923.
[180] UCD Archives, Kennedy Papers, P4/1123, Kennedy to Walsh, November 5, 1923.

by the changes.[181] Besides amendments, there were dozens of drafting errors that had to be corrected, which would have hindered the new judiciary if passed in its original form. The Judiciary Bill would have to be debated by the Dáil again after the Seanad made its amendments, but the lower house of the Oireachtas would not have to deal with the issue again for several months. The Dáil would go on with the rest of its agenda, while the Executive turned their attention to the looming debates in the upper house of the legislature.

[181] UCD Archives, Kennedy Papers, P4/1137, Kennedy to Smith, December 18, 1923.

Chapter 5: Into the Cooling Chamber

Overview of Chapter

Under the Irish Free State Constitution, legislation passed by the Dáil needed to be sent to the Seanad Éireann, which was the upper house of the Oireachtas. In the legislative process, the Seanad, "like many [European] senates, plays a minor and subordinate role."[1] Yet in its dealings with the Judiciary Bill, the Seanad was able to make important improvements to the legislation. The upper house was much different than the Dáil in terms of membership and constitutional powers; accordingly, the first part of this chapter will explain why the Seanad was created, the composition of its membership, its powers, and its relationship to the Dáil. After this legislative body is put in historical context, the rest of the chapter will look at the issues considered by the Seanad and the changes it was able to make to the Judiciary Bill. This chapter argues that despite the limited powers of the Seanad, it was able to make important changes to the Judiciary Bill, most notably being the amendments which protected the independence of judges.

Creation of a Second Chamber

When the Free State was being established, there was no great public outcry for a bicameral legislature. The revolutionary parliament created in 1919 had only one house, the Dáil Éireann, which was able to run the revolutionary government effectively. The Dáil fulfilled the demand for an autonomous Irish legislature that was elected by the people, so there was no apparent need to adopt a bicameral system in the eyes of many. Sinn Féin, which established the single house parliament, "neither needed nor wanted more in the circumstances."[2] So if the majority of people in Ireland and the dominant political party in the Irish Free State did not want a bicameral system, why was one established?

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[1] Basil Chubb, *The Government and Politics of Ireland* (Stanford, California: Stanford University Press, 1970), 194.
[2] Ibid., 204.

The first serious discussion after the Easter Rising about creating a bicameral legislature in Ireland was in 1917 at the Irish Convention. This convention, which was convened at the request of British Prime Minister Lloyd George, was assembled to address the Irish Question, or the British response to an Ireland that was demanding independence. According to one analyst, this assembly "was fully representative of Unionist and moderate Nationalist opinion, North and South… [and] it had the support of the Catholic Church."[3]

Sinn Féin did not participate in the Irish Convention, as its representatives resigned before it met. The convention recommended the creation of a bicameral system along the lines of the suspended Home Rule Act of 1914, which was supposed to give Ireland legislative autonomy but went unimplemented, due to World War I. Therefore, the genesis of the upper house came from the British, Unionists, and moderate Nationalists, not from the Sinn Féin which had won its 1918 electoral landslide several months after the Irish Convention released its report. The proposed senate's purpose was to protect the interests of the conservative Unionist minority, which would always be the minority in a democratically-elected parliament. The Irish Convention's proposal recommended a chamber of 64 members who were appointed and not elected to their seats. The members proposed in the report would be from the highest rung of Irish society and would disproportionately over represent Unionist interests.[4] The British government accepted this proposal, but it could not be implemented after the War for Independence began.

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[3] Donal O'Sullivan, *The Irish Free State and its Senate: A Study in Contemporary Politics* (London: Faber and Faber Limited, 1940), 38.

[4] Ibid., 42; The report of the Irish Commission called for a senate comprised of the Lord Chancellor of Ireland, four archbishops or bishops of the Catholic Church, two archbishops or bishops of the Church of Ireland, one representative of the General Assembly (Presbyterian), the Lord Mayor of Dublin, the Lord Mayor of Belfast, the Lord Mayor of Cork, resident Irish Peers elected by their fellow peers, four Irish Privy Councilors nominated by the Lord Lieutenant, three representatives of learned institutions nominated by the Lord Lieutenant, four others nominated by the Lord Lieutenant, 15 representatives of commerce and industry, four representatives of Labour with one appointed from each province, and eight representatives of county councils with two appointed from each province.

After the Treaty had been signed, the Provisional Government established a committee to draft a constitution in January 1922. Under the Treaty, the Irish Government would draft a constitution, which would have to be ratified by the Dáil and the British government. This committee was nominally chaired by Michael Collins, but Darrell Figgis actively chaired the group since the former was kept busy as head of the Provisional Government. Hugh Kennedy, in his role as the top legal mind in the new Government, also served on the committee. The members were all pro-Treaty, so de Valera's faction had no representation, and Unionists were underrepresented. This organization could not agree on one document, so submitted three different drafts for the Government's consideration, with all three calling for a bicameral legislature. There was nothing in the treaty in the eyes of the Irish or British governments that mandated a second chamber, so "it is noteworthy that all three drafts contained provisions for a senate."[5] One of the drafts called for a much stronger upper house than what the Government was envisioning and was thus rejected. Two of the drafts, accepted by the Government, agreed on the powers the second chamber of the Oireachtas should have. These drafts called for a 40-member body that did not have the power to veto any legislation passed by the lower house. The proposed senate could only suspend the legislation for a period of 180 days or call for a public referendum on the matter. While such a body would be very weak, it was significant because it showed that the new Dublin government was willing to accept the principle of a bicameral legislature.

The powers of the upper house would be increased during negotiations with the British over the Constitution. The new Irish Government did not want to give concessions on the senate but Southern Unionists were able to force the Dublin government to accept changes. Southern Unionists, "were but a tiny fraction of the total population, but the course of history had endowed

[5] Ibid., 70.

them with wealth, influence, and prestige far disproportionate to their numbers."[6] Realizing that the days of British rule were over, they wanted to ensure that there were sufficient safeguards to protect themselves and viewed a second legislative chamber as a potential defender of their rights. They feared persecution in a new democratic state where they would not have the power they were accustomed to. Their concern was perhaps understandable as they found themselves being specifically targeted by Republican forces during the Civil War. Unionists were determined to use their influence in London to get the protection they felt was necessary in the Irish Free State by having the British government demand such changes to the Irish Constitution.

While the Irish Executive did not believe the Unionists needed additional protection than what was called for in the draft of the Constitution it put forward, it was not unsympathetic to the concerns raised by the Civil War. Figgis said that Collins believed the original draft sent over to London, which called for the weak senate put forward in two of the proposals of the committee drafting the Constitution, was rejected "because of the action of certain men in this country who had created a disturbance from one end of the nation to the other… and whose action, therefore, had weakened the hand of our negotiators in London."[7] Kevin O'Higgins, who had taken part in negotiations with the British, noted the effect the Civil War had saying "There was never a time we sat down at the table with the British that wires did not come pouring in of soldiers shot in College Green, or raids across the Six-County border, or some such incidents that were not calculated to smooth our path and create a better atmosphere."[8]

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[6] Ibid., 74.
[7] Dáil Éireann, *Dáil Debates—Constitution of Saorstat Éireann Bill*, September 20, 1922, http://www.oireachtas-debates.gov.ie/D/0001/D.0001.192209200003.html.
[8] Donal O'Sullivan, *The Irish Free State and its Senate*, 81-82.

To address Unionist concerns, the Executive gave major concessions on the clauses related to the upper house both in terms of its membership and its powers.[9] On the day the Treaty was signed, Arthur Griffith promised two prominent Unionists that they would be given significant representation in the Senate.[10] At a meeting on June 14th, 1922, chaired by Winston Churchill, representatives of the Irish Government met with a delegation of Southern Unionists and made a final agreement in regards to the senate. The number of senators, at the request of Unionists, would be increased from 40 to 60. Senators would not be elected by the public, but instead half would be elected by the Dáil and the other half would be nominated by the Irish president "in a manner calculated to represent minorities or interests not represented adequately in the Dáil."[11] Senators would have to be at least 30 years old and their constituency would be all of the Irish Free State instead of a particular geographic area or interest group. Unionists objected to the 180 days the senate could suspend a bill, believing that was too short a period of time and that it should be changed to a full year. The Irish Government's delegation would not accept this, so the two sides compromised, increasing the period of suspension to 270 days. Finally, if three-fifths of the senate agreed, a piece of legislation would be put before the public for a referendum.[12] These provisions were put into the Constitution and the upper house of the Oireachtas would be given an Irish name—the Seanad Éireann.

Although the parties were able to compromise, no one was really satisfied with the settlement. The Unionist delegation sent a letter to the British government saying that "we are not satisfied that any Senate constituted, as proposed… can afford a genuine protection for

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[9] Ibid., 75; In giving these concessions, Arthur Griffith told the British government that "Similar safeguards we shall expect in the case of the [Catholic] minority in the North-East area of Ireland." Unfortunately for the Catholics in what became Northern Ireland, the Irish Free State's concessions were not contingent on the British giving protections for the minority in the north and the British never lived up to the Irish Free State's expectations.
[10] Cornelius O'Leary, *Irish Elections, 1918-77: Parties, Voters and Proportional Representation*, 14-15.
[11] Donal O'Sullivan, *The Irish Free State and its Senate*, 80.
[12] The powers of the Seanad are codified in Articles 30-39 of the Irish Free State Constitution.

minorities."[13] However, the Free State Government, still dealing with the split over the Treaty, could not give any further concessions because of public opinion. The Irish people were not prepared to accept an upper house that was not elected by the people and could block legislation passed by the elected members of the Dáil, especially if the chamber was created due to British influence. Republicans ridiculed the body that it viewed as undemocratic and de Valera would restructure the body in the 1930s. Needless to say, the origins of the Seanad were far different than the Dáil.

Members of the Seanad

On December 6th, 1922, President Cosgrave appointed the first 30 members of the Seanad. Out of the group, 16 were Unionists and it was truly a collection of distinguished figures. Some of the most notable members were William Butler Yeats, Andrew Jameson, John Bagwell, and Lord Glenavy.[14] With these nominated senators, the upper chamber would have significant commercial representation, two former directors of the Bank of Ireland, members of the medical profession, representation of pre-Sinn Féin nationalism, a man who commanded the British military forces in Ireland, Ireland's greatest author of the time, leaders of the southern Unionists, and the former head of the British judiciary.

Cosgrave's picks certainly fulfilled the requirement of providing representation to groups not represented in the Dáil. The election of the remaining 30 senators in the Dáil was bizarre with only 81 deputies voting to fill 30 seats from a panel of 113. Despite the irregular circumstances, the Dáil selected an impressive group of individuals although none of them had

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[13] Donal O'Sullivan, *The Irish Free State and its Senate*, 81.

[14] The following is the full list of those appointed by President Cosgrave to the Seanad: John Bagwell, H.G. Burgess, The Countess Dowgar of Desart, J.C. Dowdall, The Earl of Dunraven, Thomas H. Grattan Esmonde, Nugent Talbot Everard, Edmund W. Eyre, Martin Fitzgerald, Lord Glenavy, Dr. Oliver St. John Gogarty, James Perry Goodbody, The Earl of Granard, Captain J.H. Greer, Henry S. Guinness, Benjamin Haughton, The Marquess of Headfort, Arthur Jackson, Andrew Jameson, John Keane, The Earl of Kerry, General Bryan Mahon, The Earl of Mayo, James Moran, Sir Horace Plunkett, William Hutcheson Poe, J. Wyse Power, Dr. George Sigerson, the Earl of Wicklow, and William Butler Yeats.

any prior legislative experience.[15] Commercial interests and the medical profession gained additional representation. Ireland's most prominent historian and engineer were added to the upper house along with a member of the committee that created the Constitution. Most importantly, both farmers and the Labour Party were able to elect members to the Seanad, which added some balance to an institution that disproportionately overrepresented the elite of Irish society.

While the Seanad would be accused of being a predominantly Unionist and Protestant group of individuals, such allegations fail to take into account the actual composition of the group. In *The Irish Free State and its Senate*, Donal O'Sullivan, who was the clerk of the Seanad, refutes the negative criticism of the legislative body and points out the virtues of its membership. While it is certainly influenced by the author's bias in favor of the Seanad, his book is the only comprehensive account of the Irish Free State Seanad and he backs all his claims with facts. O'Sullivan said:

> Taking the Senate as a whole, and apart from the absence of adequate legal representation, we see it as a body admirably qualified for the task of expert revision which was to be its main function under the Constitution. It was much more truly a microcosm of the country as a whole than was the Dáil, comprising as it did representatives of the professions, commerce, agriculture, letters, organized labour, banking, and the landlord interest. The danger of over-centralization was avoided, for of the total of sixty members, only twenty-four lived in or near the capital. The remaining thirty-six lived or had residences elsewhere in the country, though some few, such as Lord Kerry and Lord Dunraven, resided for the most part in England… Throughout the thirteen years' history of the Senate, allegations were dishonestly made by some, and ignorantly repeated by others, to the effect that it was predominantly a Protestant and Freemason body. It is distasteful to take cognizance of such matters, but in view of the widespread character of these allegations it is desirable that the facts should

[15] Donal O'Sullivan, *The Irish Free State and its Senate*, 94; The following is the full list of those elected by the Dáil to the Seanad: Alice Stopford Green, John Purser Griffith, James G. Douglas, Brian O'Rourke, Colonel Maurice Moore, William J. Molloy, James MacKean, Mrs. E. Costello, Dr. William O'Sullivan, John MacLoughlin, Patrick W. Kenny, William Barrington, Michael Duffy, Thomas MacPartlin, Thomas Farren, Thomas Linehan, John T. O'Farrell, Richard A. Butler, Thomas W. Westropp Bennett, Dr. Henry L. Barniville, Peter De Loughry, Cornelius J. Irwin, Edward Mansfield, Edward MacLysaght, Edward MacEvoy, George Nesbitt, Joseph C. Love, James J. Parkinson, John J. Counihan, and Michael O'Dea.

> be put on record. The first Senate consisted of thirty-six Catholics and twenty-four non-Catholics. Not all of the non-Catholics were Protestants; Lady Desart, for example, was a Jewess, and no less than three Senators were members of the Religious Society of Friends.[16]

Thus, the Senate was not guilty of the most extreme accusations against it put forward by Republicans.

While O'Sullivan's claim that the Seanad was more representative of the people that the lower house can certainly be challenged, this legislative chamber had significant value since it would approach legislation from a different perspective than the Dáil. Also, the Seanad, along with the end of attacks on Unionists after the Civil War, was able to achieve its goal of making Unionists feel protected and part of a new Ireland. James O'Connor, who submitted a memorandum to the Judiciary Committee and railed against decentralization, spoke very highly of the Seanad in his book, *History of Ireland, 1798-1924*. He said that "From the first, the most happy relations were established between the Free State Government and the Protestant minority… [and the Executive] exercised their power of appointment to the Senate by nominating Protestants of standing and influence."[17]

While there are legitimate criticisms that can be levied against the upper house of the Oireachtas, it is only necessary to discuss one because of its relevance to the Judiciary Bill: There was little legal expertise in the Seanad. In what was supposed to be a body of experts, there was only one legal expert—Glenavy. His appointment was not because of his former career as a barrister though, but the positions he held under British rule. No other member of the legal profession was appointed or elected to the Seanad and it "Was to some extent handicapped by the lack of legal knowledge among its members."[18] Fortunately, just before the Seanad began its

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[16] Ibid., 95.
[17] James O'Connor, *History of Ireland, 1798-1924*, Vol. II (London: Edward Arnold & Co., 1925), 369.
[18] Donal O'Sullivan, *The Irish Free State and its Senate*, 95.

consideration of the Judiciary Bill, Samuel Brown, K.C., joined the Senate by the method of co-option after the resignation of Senator Horace Plunkett. Brown, in the words of Donal O'Sullivan,

> had been the leader of the Irish Bar, and was one of the most brilliant lawyers of his time. Devoid of any political bias or ambition, and utterly lacking in any forensic insincerity, he proved a tower of strength to the Senate, to which he devoted the whole of his time… he did only the work that needed to be done and that nobody else seemed equally able or willing to do, and that he spoke only when he had something to say.[19]

This legal giant would prove as effective in the Seanad as he was in the courtroom. Although he was just one man, he filled the large void admirably.

The Lack of Party Politics

The Seanad, an appointed body, was naturally much different in its political stance since its members did not have to run on party platforms as deputies did in the Dáil. O'Sullivan claimed that there "were no political parties, save for the small but influential Labour Party of five members, whose special position was generally appreciated. Indeed, a rigid alignment of parties can hardly be said to have taken place until December 1928."[20] The five Labour senators did not have a formal leader in the Seanad and "were not mere echoes of the colleagues in the other House, [as] they were a group of individuals holding similar views rather than a party."[21] Senator Jameson agreed with the clerk's view saying "We have our own individual opinion about things. I do not believe there is any member of the Seanad at present sitting here who is belonging to a party, or in any way shaping his actions or votes in the interest of any party."[22]

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[19] Ibid., 144-145.
[20] Ibid., 117.
[21] Ibid., 266.
[22] Seanad Éireann, *Seanad Debates—Report of the Committee on Standing Orders*, January 24, 1923, http://www.oireachtas-debates.gov.ie/S/0001/S.0001.192301240006.html.

A statistical analysis of the Seanad's votes backs the statements of O'Sullivan and Jameson. A study by Indraneel Sircar and Bjorn Hoyland, which is the only one ever done on the voting patterns of the Irish Free State Seanad, confirms that political parties did not exist nor have any influence in the upper house. Also, to dispel any idea that while parties did not exist there may have been a Nationalist vs. Unionist divide, "there are no patterns of bloc voting amongst Unionist or non-Unionists."[23] The study did show though that while the Labour senators did not have a formal leader, these senators did vote differently from the others.[24] So, during the period the Judiciary Bill was being considered, the opinions of senators were formed by their personal beliefs and not by party ideology.

Seanad Leadership

Lord Glenavy was *An Cathaoirleach* (Chairmen or President) of the Seanad. Because of Glenavy's role on the Judiciary Committee and in the Seanad's consideration of the Judiciary Bill, it is appropriate to briefly elaborate on what this position entailed. As called for in Article 21 of the Constitution, the Seanad was required to elect a Chairman, just as the Dáil was required to. While technically the positions were similar, where the two chairmen were responsible for keeping each house in order, in practice the two posts were different. In the Dáil, the individuals who set the agenda were members of the Executive, which was headed by the President. So the *Cheann Comhairle* (Chairman of the Dáil), was solely responsible for recognizing members to speak and ruling on questions of procedure. In the Seanad, there were no ministers and no parties, so the position of *Cathaoirleach* was the most prominent position in the upper house. Senator Moore explained the difference between the Chairmen of two houses saying "We have no one to lead the House; we are here standing alone without Ministers, and the person who is

[23] Indraneel Sircar and Bjorn Hoyland, "Get the Party Started: The Development of Political Party Legislative Dynamics in the Irish Seanad (1922-1936)," *Party Politics* (forthcoming): 11.
[24] Ibid.

put in as Chairman or as Cathaoirleach will be more or less in the position of Leader of this Seanad."[25] So while Glenavy's position as *Cathaoirleach* gave him no extraordinary powers for a speaker of a legislative body, he was for all practical purposes its leader.

The Role and Position of the Seanad in the Legislative Process

Given its Constitutional powers, the Seanad was a far calmer place of debate. The Seanad was often referred to and prided itself as being the 'cooling chamber.' It did not concern itself with the rhetoric or issues of Irish Nationalism, leaving that to the Dáil. Nor did it feel, except with certain urgent matters relating to the Civil War, pressured to hurry its deliberative process or bow to the wishes of the Executive. While the Seanad believed that it was important in the legislative process, the Dáil and general public were more dismissive of it. As O'Sullivan described, the Senate

> was largely composed of men whose attitude during the national struggle was supposed, rightly or wrongly, to have been one of apathy or even of passive hostility. The Dáil, moreover was a product of universal suffrage and regarded itself as the real repository of sovereign rights of the people; and, in respect of law-making, it intended to share those rights as little as possible with an 'unrepresentative' Second Chamber. Further, the Dáil has been in existence, in one form or another, for four years, and the Senate was regarded to some extent as an interloper… For these or other reasons, the Senate was never admitted to full co-partnership in the legislative scheme…. The Senate [was] in a position of isolation hardly to be found in the case of any other Second Chamber.[26]

During the course of the debate, the Executive would express its disdainful attitude of the Seanad when the upper house did not simply rubber stamp the Judiciary Bill. Regardless of the unpopular position it was in, the Seanad asserted its full Constitutional powers to make itself relevant in the process of creating the new judicial system.

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[25] Seanad Éireann, *Seanad Debates—Election of Chairman*, December 12, 1922, http://historical-debates.oire achtas.ie/S/0001/S.0001.192212120005.html.
[26] Donal O'Sullivan, *The Irish Free State and its Senate*, 120-121.

What Will the Seanad Do with the Judiciary Bill?

The Judiciary Bill was not immediately considered by the Seanad after the Dáil passed it because of the Christmas recess. Glenavy felt it would be best to postpone any discussion of the Courts of Justice Bill because the Dáil would not be able to reconsider the matter until after the break even if the Seanad acted immediately and the delay would give senators an opportunity to review the bill.[27] This short period resembled September 1923, when the Executive and the public wondered how the Dáil would treat the bill. Kennedy, fresh off his victory in the Dáil, was not sure how the Seanad would react to the bill. He wrote to Hill Smith, a Belfast barrister who was a personal friend of Kennedy's, telling him "The Bill has yet to go before the Senate, and I have no idea how it is likely to be received there."[28]

While the Attorney General was left to wonder what awaited the piece of legislation, he was satisfied with the recent appointment of Samuel Brown to the Seanad. Kennedy said "he should certainly be a very useful addition."[29] It is interesting Kennedy was so pleased to see Brown enter the Seanad since the new senator would closely align himself with Glenavy. In regards to matters concerning the judiciary, the head of the Seanad told Brown that he knew his own views would be well represented because "I always felt I could rely upon you in my absence."[30] Brown would oppose Kennedy's stance multiple times during the Judiciary Bill's consideration, but he did prove to be a useful asset as he was able to speak on some very technical points of the bill with expertise only an experienced member of the legal profession could do.

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[27] Seanad Éireann, *Seanad Debates—Courts of Justice Bill*, December 19, 1923, http://historical-debates.oireachtas.ie/S/0002/S.0002.192312190003.html.
[28] UCD Archives, Kennedy Papers, P4/1137, Kennedy to Smith, December 18, 1923.
[29] Ibid.
[30] Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923—Second Stage*, January 16, 1924, http://historical-debates.oireachtas.ie/S/0002/S.0002.192401160003.html.

While the Executive was left wondering how the Seanad would react to the Judiciary Bill, Lord Glenavy was unanimously reelected as *An Cathaoirleach* of the Seanad. Senator McLoughlin nominated the man who was chairman of the Judiciary Committee for a second term as *Cathaoirleach* because during the previous year Glenavy presided over the upper house he was "the one man whose judicial qualities and powers of decision pre-eminently fitted him for the position… [and] that no other Senator could have conducted the business with such expedition or presided over our deliberations with more tact."[31] In thanking the Seanad for reelecting him as its leader, Glenavy said that his first year as its head was difficult due to the devastating Civil War, but looked forward to the work ahead where senators "in a saner and more peaceful atmosphere… may yet attain to the poet's ideal, 'When none was for a Party, but all were for the State.'"[32] Thus, the head of the Seanad was a man who had been the head of the old judiciary the Government was seeking to eliminate when it took the Executive months to pass the Judiciary Bill in the house it controlled. However, Glenavy wrote to Kennedy about the Seanad's consideration of the legislation saying "I have no doubt that the Judiciary Bill will go through this house with little difficulty."[33]

While Glenavy suggested there would be little resistance, this reassurance was not entirely comforting to the Executive as others disagreed with Glenavy believing the Judiciary Bill would be criticized. The *Irish Times* reported that the Courts of Justice Act would receive "criticism of a more expert and; perhaps, more impartial order than the present *Dail* can furnish. It is very improbable that in these vital matters the Senate will abstain from the free exercise of

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[31] Seanad Éireann, *Seanad Debates—Election of Cathaoirleach*, December 12, 1923, http://historical-debates.oireachtas.ie/S/0002/S.0002.192312120003.html.
[32] Ibid.
[33] UCD Archives, Kennedy Papers, P4/1108, Glenavy to Kennedy, January 1924.

its independent judgment."[34] This claim alluded to the fact that Glenavy and Brown were in a stronger position in the Seanad than Redmond and Magennis were in the Dáil and that the party system that existed in the lower house was not present in the upper chamber of the Oireachtas. The major publication's prediction would prove to be more accurate than Glenavy's as the Seanad would make amendments to sections the Dáil approved and approached the legislation with far more legal expertise than could be mustered in the Dáil.

How to Approach the "Most Important" Piece of Legislation? Slowly

At the beginning of the Seanad's debate over the Judiciary Bill, the legislative body did not extensively discuss specifics of the bill, but instead discussed how important it was. Many senators believed this was the most important piece of legislation they would consider, establishing an important pillar of democracy. Senator Esmonde said that "This undoubtedly, in my opinion, is the most important measure yet submitted to the Senate of the Irish Free State… and it may be the most important measure that will ever come before us."[35] Senator Brown rose to explain why an independent judiciary is so critical stating "The question of the independence of the judges is a most important question for this country. There is no greater tyranny than the tyranny of absolute democracy, and the only protection against that is the independence of the judges."[36] Glenavy himself spoke on the necessity of creating an independent judiciary saying:

> Ex-President Woodrow Wilson, in certain interesting lectures he delivered a few years ago on the Constitution of the United States, points out that by reason of the fact that the Supreme Court of the United States is independent, that by reason of the fact that the Parliament and Congress of the United States cannot by legislation go one inch outside the Constitution, the judges have an equal power and footing with the Government itself, and he proceeds to state that the permanent guarantee and the basis of all personal freedom and of liberty in the United States is to be found in the courage and the conscience of the Courts and their perfect freedom from all Government control. Now, in theory that is what

[34] *The Irish Times*, "The Free State," January 7, 1924.
[35] Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923—Second Stage*, January 16, 1924.
[36] Ibid.

> the Constitution of the Free State confers on this country. It is a tremendous treasure, a tremendous privilege, and [politicians] would be well advised both in the Dáil and in this House to guard most carefully against the slightest attempt to infringe upon it.[37]

It is not surprising to see Unionists and Protestants stressing the importance of the role of the courts as protectors of rights as they were now living under a democratic government as a minority.

While there was little debate at first as senators expressed their general opinion of the bill, two things became clear to the Executive and anyone else following its progress. First, the issue of judicial independence would be the topic senators would primarily focus on. Second, the Seanad was not afraid to take its time considering the Judiciary Bill nor would they shy away from criticizing it. Glenavy said that although he had been very amiable to the Executive having "always tried to facilitate them in the passage of Bills through this House," he could not let this bill pass unchanged because it had clauses that encroached on the judiciary's independence which was an attempt "to curtail and to subtract from the rights of the people under the Constitution."[38] Since Glenavy and all other senators recognized that this bill was "going to set up a Judiciary for all time," they wanted to make sure they got it right and would spend three months deliberating this piece of legislation.[39] Along with the extensive debates, the Judiciary Bill's passage would be delayed because the Executive or senators were not available to debate the measure.[40]

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[37] Ibid.
[38] Ibid.
[39] Seanad Éireann, *Seanad Debates—Fisheries Bill, 1923—Seanad in Committee*, January 24, 1924, http://histor ical-debates .oireachtas.ie/S/0002/S.0002.192401240007.html.
[40] Seanad Éireann, *Seanad Debates—Seanad in Committee—The Courts of Justice Bill, 1923—Committee Stage*, January 25, 1924, http://historical-debates.oireachtas.ie/S/0002/S.0002.192401250005.html; Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923—Committee Stage Resumed*, January 30, 1924, http://historical-debates.oireachtas.ie/S/0002/S.0002.192401300004.html; Seanad Éireann, *Seanad Debates—Dáil Éireann Loans and Funds Bill, 1923—Seanad Resumes*, February 8, 1924, http://historical-debates.oireachtas.ie/S/0002/S.0002 .192402080007.html. On January 25th, the Seanad would not proceed with the Judiciary Bill because too many of its

The deliberations over the bill became more hostile on January 30th when President Cosgrave became upset that the Seanad planned to move slowly and to criticize the Courts of Justice Bill. The President could not understand why the Seanad was attacking the bill for allegedly violating the Constitution by infringing on the judiciary's independence, saying that this was the first time he was hearing this criticism, a claim that could easily be refuted since the Dáil did debate this issue. He pointed out that the Government had to go before the electorate after the bill was originally introduced in the Third Dáil and that he did not hear such criticism when campaigning. Cosgrave also pointed to the by-election in Dublin in which Kennedy won his Dáil seat, where many judges and barristers were voters, saying that "if this Bill suffers from all the infirmities which now have been seen for the first time, that was the time, and these were the opportunities for raising these questions."[41] Furthermore, he believed that there was an attempt by some, not just senators, to belittle the Executive and to bring the two houses of the Oireachtas into conflict. Cosgrave took a very confrontational stance saying that he was prepared to wait out the 270 days the Seanad could hold up the legislation or to have a public referendum on the bill instead of abandoning the principles of the measure that he believed were under attack.

Cosgrave's hostile and confrontational approach took many by surprise. Glenavy said the Seanad was doing its job by debating a bill and did not understand why this made the President so upset. The head of the Seanad said he would not try to change the principles Cosgrave believed were under attack because "I feel a sort of father to this Bill, because, as I say, I was

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own members were missing to consider such an important piece of legislation, so the members in attendance wanted to wait until more of their colleagues were present. On January 30th, President Cosgrave asked the Seanad to put off any further debates for a week since he and Kennedy had to go to London on government business. On February 8th, the Seanad adjourned for three weeks after completing the committee stage of the Bill, in part because Cosgrave and Kennedy were once again unavailable to answer questions regarding the legislation.

[41] Seanad Éireann, *Seanad Debates—Seanad in Committee*, January 30, 1924, http://historical-debates.oireachtas.ie/S/0002/S.0002.192401300005.html.

Chairman of the Committee which made the recommendations which have been adopted by the Government, and I am keenly anxious, far from preserving the old state of things, to see this Bill put into operation."[42] But Glenavy was not willing to let the Seanad simply act as a rubber stamp for legislation passed by the Dáil. Without more consideration and information about the Judiciary Bill, such as having an estimate of costs which was not provided, Glenavy felt that they would be taking a "plunge in the dark—absolutely in the dark."[43] The head of the Seanad received support from the media for his stance against President Cosgrave. *The Irish Times* wrote that "We have a high and grateful admiration for President Cosgrave's services to the State, and we can make every allowance for the stains of office, but we feel bound to say that [his] charges are wholly untenable and ought not to have been made."[44] Thus, it was clear that the Judiciary Bill would face a more critical deliberation in the Glenavy led Seanad than in the Dáil against Johnson and Redmond.

Kennedy is Called Upon Again

Just as in the Dáil, the Judiciary Bill was first under the guidance of President Cosgrave when it reached the Seanad, but members of the upper house requested that Kennedy be present to take charge of the bill. On January 24th, with President Cosgrave momentarily being unavailable to defend the Government's position in the Seanad, Senator Guinness asked if Glenavy would allow Kennedy to take Cosgrave's place. As *An Cathaoirleach*, the decision to allow the Attorney General to speak was Glenavy's. The head of the Seanad said he wanted "the assistance and presence of my friend, the Attorney-General," but hesitated to allow Kennedy to appear before the Seanad because of the Constitution. Article 57 stated that "Every Minister shall have the right to attend and be heard in Seanad Eireann," but did not mention allowing any other

[42] Ibid.
[43] Ibid.
[44] *The Irish Times*, "President and Senate," January 31, 1924.

person besides a senator or minister to speak in the upper house of the Oireachtas.[45] Glenavy was reluctant because he was not sure whether the position of Attorney General was ministerial or not. After Cosgrave was able to appear before the Seanad again, Glenavy decided to allow Kennedy to sit with Cosgrave and advise him during the debate, but the Attorney General would not to have the right to speak himself.

On the same day Glenavy ruled that Kennedy did not have the right to speak in the Seanad, he decided to change his stance. With legal experts such as himself and Senator Brown bringing up very technical points, Glenavy and others realized that Cosgrave was not up to the task and that having the Attorney General as part of the debate would greatly benefit both the Judiciary Bill and the nation. Glenavy decided to halt the consideration of the bill until a standing order allowing Kennedy to appear before the Seanad could be drafted and passed. The head of the Seanad came to this conclusion saying:

> I know it is the universal feeling in the Seanad that they would like to have the Attorney-General's views upon this question… It is putting an unfair burden on the President. It is not human nature that he could be equal to all these technical matters, and I think it would be a great relief to him, and also an advantage to the Seanad, if we could [allow Kennedy to speak]….We can then have the pleasure and the honour of the presence of the Attorney-General.[46]

This decision did prove beneficial as Kennedy was a far more knowledgeable speaker on this piece of legislation than Cosgrave was. Even the President, who resented the suggestion by Redmond that he was not capable of defending the Judiciary Bill accepted the advantage of having Kennedy speak in his place. The Attorney General was a far more effective advocate for the Judiciary Bill as his gravitas in legal affairs gave him the expert knowledge and respect to debate the likes of Glenavy and Brown, which Cosgrave understandably was not able to do. When Kennedy became ill in early February, Cosgrave asked the Seanad to allow him to

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[45] Irish Free State (Saorstát Éireann), *Constitution of the Irish Free State (Saorstát Éireann) Act, 1922*, Article 57.
[46] Seanad Éireann, *Seanad Debates—Fisheries Bill, 1923—Seanad in Committee*, January 24, 1924.

postpone the debate over any section he could not handle.[47] Multiple issues would come up over the several days that Kennedy was ill that both Cosgrave and the Seanad believed should be postponed until the Attorney General was well again.[48] This episode highlights the important role Hugh Kennedy had in creating the new judiciary.

Issues Considered by The Seanad: What to Wear?

One of the first issues to be extensively debated and that elevated tensions between Kennedy and Glenavy was the debate over judicial garb, which originated in the Judiciary Committee. Just as in the Dáil, most of the opposition to Executive-created uniforms focused on a minister being on the rule-making authority and objections were based on the principle that the Executive designing the judiciary's costumes would be infringing on judicial independence.

On the first day the Judiciary Bill was considered, Glenavy touched on the issue of judicial garb. While Kennedy believed that Irish costumes for judges would be an "ocular demonstration" that the judges were not from the *ancien regime* and were independent, the head of the Seanad could not agree with this in principle. He wondered how they could ask the public to see the judges as independent when "the first thing they will have to do will be to wear Government livery, the Government [will have] the power to dictate what their official robes will be!"[49] What was even more outrageous to Glenavy was the thought of changing the costume of barristers because they were not government servants as judges were and that Irish heroes such as "Dan O'Connell, Curran, O'Hagan, Palles, and men of that sort found no indignity or shame in

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[47] Seanad Éireann, *Seanad Debates—Seanad in Committee—Business of the Seanad*, February 6, 1924, http://historical-debates.oireachtas.ie/S/0002/S.0002.192402060006.html; UCD Archives, Kennedy Papers, P4/1125, Kennedy to Walsh, February 8, 1924; Kennedy told his friend that he "was laid low with ptomaine poisoning contracted in London, but [was] on the mend."

[48] Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923—(Committee Stage Resumed)*, February 7, 1924, http://historical-debates.oireachtas.ie/S/0002/S.0002.192402070005.html; Seanad Éireann, *Seanad Debates—Dáil Éireann Loans and Funds Bill, 1923—The Courts of Justice Bill, 1923(Committee Stage Resumed)*, February 8, 1924, http://historical-debates.oireachtas.ie/S/0002/S.0002.192402080006.html.

[49] Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923—Second Stage*, January 16, 1924.

wearing a wig and gown. They gave honour to it, and it is because it has been associated with great men like them it has become the heritage and treasure of the profession."[50] Lord Glenavy also pointed out that the same person would not be Minister of Home Affairs forever, which further complicated the situation. He put forward a hypothetical where the Minister of Home Affairs at the time "might prefer a kilt. His successor might be a sporting man, and he might prefer a jockey's costume. The next successor might have clerical tendencies, and he might prefer to see the judges robed in clerical costume. Where is this thing to end? It is really childish."[51]

With Kennedy unable to speak in the Seanad at this point, Cosgrave tried to diffuse the situation by denying the Executive was attempting to do away with English wigs and gowns. He tried to dismiss all accusations against such efforts by the Government by pointing to stories in newspapers that said Kennedy was trying to create a new costume, which were based on an interview with the Attorney General that never actually occurred. Cosgrave said "references to the effect that the Attorney-General wished to do away with the wig and gown [are false]. Having been present when the Attorney-General was stated to have given the interview, I know that he made no such reference to the dress."[52] The stories Cosgrave was referring to were indeed false, but the President's logic was flawed. Just because one report of Kennedy's efforts was bogus, does not mean that all reports were false and that he was not trying to create a costume, as can be seen by Kennedy having a designer come up with sketches of what an Irish costume would look like. The President's attempt to calm the fears of Glenavy and others was unsuccessful.

Glenavy's supporters on this issue would rise to give their opinion on the matter the next time the Judiciary Bill was debated. Senators O'Farrell and McLoughlin both based their

[50] Ibid.
[51] Ibid.
[52] Ibid.

argument on the principle that the English-styled uniforms added dignity to court proceedings, which in turn led to people respecting the courts. While acknowledging that there were those who opposed the white wigs and English robes, O'Farrell said "Some people allege that they are one of the relics of barbarism. That may be so, but they are certainly a picturesque relic, and I cannot see very much chance of having them replaced by anything more dignified or artistic."[53] McLoughlin argued that the English had their ceremonial costumes for a reason—to impress the people—and that "I do not think our people are less impressionable than the English, and the effect on the ordinary citizen of the wig and gown is to give more respect to the majesty of the law, than if the new Rule-making Authority prescribed judges should wear home-spuns."[54] It was clear that there was little support in the conservative Seanad to do away with English costumes.

What happened next in the debate over judicial costumes led to increased tensions between the Attorney General and *An Cathaoirleach*. While Kennedy did not have much respect for Glenavy, he had few personal reasons to dislike the man. But during the course of the debate Glenavy said "The Judiciary Committee, with the exception of one, were unanimous in favour of the retention of the wig and gown."[55] This claim was a lie: at least two (Kennedy and Walsh) and probably more members of the Committee wanted to do away with the English costume. Glenavy was taking advantage of the fact the Committee's work was secret so there was no way to easily refute his claim, which did not sit well with Kennedy. Kennedy was not afraid of opposition as can be seen by his actions over the previous year. He selected members of the legal profession who did not agree with him to serve on the Judiciary Committee. In the Dáil he

[53] Seanad Éireann, *Seanad Debates—Seanad in Committee*, January 30, 1924.
[54] Ibid.
[55] Ibid.

effectively debated the respectful Thomas Johnson and was even able to keep his calm with the brash and aggressive Captain Redmond. Lying though was something that made his blood boil.

Kennedy held his tongue on the floor of the Seanad, but vented his anger to his friend and fellow Judiciary Committee member, Louis Walsh. He confided to Walsh that he was glad:

> to see that you have been following the gyrations of the chairman of our Committee. One of the astounding assertions he made in the Senate was that the Judiciary Committee had considered the question of wigs and gowns and were unanimously, with one exception, in favor of retaining the former wigs and robes of both Bench and Bar… How he had the audacity to state such a tissue of falsehood, I do not know! I should take some opportunity of dealing with it, but I could not exactly give him the lie direct in his own Senate… He stops at absolutely nothing to gain his own end. His advocacy is of the most thoroughly dishonest and disreputable character… He appears to be "out for my blood", but he will have to "eat it in sand".[56]

From the usually calm and astute Kennedy, this shows how angry Glenavy made him and that it gave him the resolve to stand firm on the Judiciary Bill. Kennedy would receive morale support from Walsh who initially replied "Glenavy is a terrible old cod!"[57] Walsh would elaborate further in another letter expressing his own disgust at the chairman of the Judiciary Committee saying:

> Glenavy has come out of the debates of the last weeks very badly and has lost a lot of prestige amongst people who know [the truth]… Had I not heard it from you, I could not have credited that he would be guilty of such a misstatement about our Committee and robes as the one you quote. In a casual reference to the subject one day on which, I think, you were not there, I had made my opinion clear on the matter. So who was the "one exception", since your views were also known?... My idea of [Glenavy] is that he is most anxious to win cheap popularity.[58]

This incident set the tone for the rest of the debate as Kennedy was determined not to back down to Glenavy on any of the Judiciary Bill's principles.

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[56] UCD Archives, Kennedy Papers, P4/1125, Kennedy to Walsh, February 8, 1924.
[57] UCD Archives, Kennedy Papers, P4/1126, Walsh to Kennedy, February 9, 1924.
[58] UCD Archives, Kennedy Papers, P4/1127, Walsh to Kennedy, February 11, 1924.

Issues Considered by The Seanad: Overview of the Fight for Judicial Independence

Although the costume debate was one issue involving the principle of judicial independence, it was not the only one considered. Several topics already debated in the Dáil were discussed again in the Seanad and the upper house objected to an amendment the Dáil made on the grounds that it interfered with the independent status of judges. This thesis will first look at two sections of the Judiciary Bill that related only to the District Courts, the source of pay and title of District Court Judges, and then one that solely affected the Circuit Court jurisdictional level, which was the provision in the Judiciary Bill allowing temporary appointments to the circuit bench. Lastly, the issues of retirement age and the rule-making authorities will be discussed, which effected all jurisdictional levels. In the end, the Seanad proved to be far more effective in making changes than the opposition in the Dáil was. The upper house, which Cosgrave had expressed wishes of bypassing, left an important and beneficial mark on the Courts of Justice Bill by protecting the independence of judges.

Judicial Independence: The Pay and Title of District Justices

The Seanad would carry on the fight that began in the Dáil over the pay scheme for District Justices. Senators put forward the same arguments that Deputies Magennis, Redmond, Johnson, and others did in the Dáil saying that voting on the pay of District Justices would allow members of the legislature to talk about the judges, which would infringe on their independence. Cosgrave presented the same case he did in the Dáil saying that voting on the pay was going to be done just to control the number of district justices because he nor anyone else knew how many judges would be needed. The Seanad's position was best summed up by Senator Jameson who said that the way the President talked about the need for adjustments made the Judiciary Bill

seem "purely experimental, and yet we are passing it for all time."[59] The majority of senators believed that the proper way of adjusting the number of judges was to set the number in the Judiciary Bill and if it needed to be changed the Executive could pass a piece of legislation to make the necessary adjustment. The Seanad did what the opposition in the Dáil could not achieve and passed an amendment making the District Justice's pay come from the Central Fund instead of being voted on annually.

This was a significant defeat to the Executive that occurred while Kennedy was ill, but the fight over this issue was not over and would be taken up by Kennedy upon his return. The Attorney General did not repeat the arguments the Executive has previously used. Instead, he said the Seanad did not have the right to make the change it did under Article 37 of the Constitution. Article 37 stated that "Money shall not be appropriated by vote, resolution or law, unless the purpose of the appropriation has in the same session been recommended by a message from the [Governor General] acting on the advice of the Executive Council."[60] Kennedy's point was that the message from the Governor General on this bill said that the District Justices' pay would be voted on by the Oireachtas and not be paid from the Central fund; therefore, the Seanad could not make the amendment it did. Glenavy was thrown off guard by this argument as he was given no advance notice by Kennedy that he planned to challenge the powers of the Seanad. The *Cathaoirleach's* initial response was that Article 37 of the Constitution "only deals with the purpose of the appropriation. It does not deal with the fund from which the money is to come."[61]

Nevertheless, since the decision Glenavy would make on Kennedy's challenge would be setting precedent in the Seanad, the *Cathaoirleach* decided to form a committee to determine if

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[59] Seanad Éireann, *Seanad Debates—Dáil Éireann Loans and Funds Bill, 1923—The Courts of Justice Bill, 1923(Committee Stage Resumed)*, February 8, 1924.
[60] Irish Free State (Saorstát Éireann), *Constitution of the Irish Free State (Saorstát Éireann) Act, 1922*, Article 37.
[61] Seanad Éireann, *Seanad Debates—Courts of Justice Bill, 1923—Report*, March 6, 1924, http://historical-debates.oireachtas.ie/S/0002/S.0002.192403060003.html.

the Seanad was within its constitutional rights to pass the amendment. Glenavy would appoint himself, Senator Douglas (*Leas-Chathaoirleach*/Vice-Chairmen of the Seanad), Senator Brown, and Senator O'Farrell to the committee. On March 20th, the four senators presented their report to the Seanad, which Glenavy believed was extremely important "because it deals with perhaps the most important question that has yet to come before the Seanad in reference to its own powers and privileges."[62] The committee unanimously found that there was nothing in the Constitution, the message from the Governor General, nor inherent in the Judiciary Bill the Dáil passed that restricted the Seanad from passing the amendment. Glenavy, as *Cathaoirleach*, ruled that the upper house did nothing wrong and that the amendment would stand part of the Judiciary Bill.

With the two houses of the Oireachtas in disagreement over the issue, Glenavy offered a compromise to Kennedy. He proposed that the section be amended so that the District Justices' pay would be voted on by the Oireachtas up through 1926 or 1927, so their number could be adjusted the way the Executive wanted. After that period, the District Justices' pay would come from the Central Fund; therefore, satisfying the senators who wanted the judges' independent status protected in the future. With icy relations between the two men after the costume incident, Kennedy would not negotiate the proposal on the floor of the Seanad and would not give his stance on Glenavy's compromise. The Attorney General would end up accepting the proposal and when the Judiciary Bill returned to the Dáil, he put forward an amendment where the District Justices' pay would be voted on "until the end of the financial year ending on the 31st day of March, 1927… and shall thereafter be charged on and be payable out of the Central Fund."[63]

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[62] Seanad Éireann, *Seanad Debates—Report of Committee on Courts of Justice Bill*, March 20, 1924, http://historical-debates.oireachtas.ie/S/0002/S.0002.192403200004.html.
[63] Dáil Éireann, *Dáil Debates—Private Bill—Dáil in Committee*, April 3, 1924, http://historical-debates.oireachtas.ie/D/0006/D.0006.192404030027.html.

While the opposition in both houses was pleased by the Executive's concession, it still did not appreciate its determination to have votes on the pay of judges. Deputy Cooper believed that Kennedy's and the Executive's stance could not be attributed to a sinister motive, "but simply through pig-headedness. The Government having made up its mind to a certain course, absolutely refused to depart from it, but now it has made some concession, for which I thank it."[64] The opposition knew this was the best deal it could get since it would rather have achieved its wish of having the pay come from the Central Fund in three years than never, so the compromise was widely accepted.

Another issue the Dáil debated that was taken up again in the Seanad was the proposal to change the title District Justice to District Judge, Senators O'Farrell of the Labour Party and Senator Brown were able to succeed in passing an amendment to make the change. Unlike in the Dáil, there was no debate over the question of whether a District Justice was a judge or not. Senators thought that the issue was settled in the lower house and Glenavy said that any judicial post created under the Judiciary Bill was that of a judge according to the Constitution. So, O'Farrell believed this was not an issue of "paramount importance," where the status of District Justices was being debated, but instead an amendment to affect public perception.[65] The amendment was put forward because O'Farrell and others felt "it is desirable that there should be removed from the mind of the ordinary man in the street any impression that these judges are at all comparable with the old 'removable magistrates' as we knew them."[66]

The Executive's response was a far weaker defense than it put forward in the Dáil. Instead of focusing on the success of those who held the title District Justice at the time, which

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[64] Ibid.
[65] Seanad Éireann, *Seanad Debates—Dáil Éireann Loans and Funds Bill, 1923—The Courts of Justice Bill, 1923(Committee Stage Resumed)*, February 8, 1924.
[66] Ibid.

was briefly mentioned, Cosgrave and Kennedy focused on very trivial and easily refutable arguments. Cosgrave said that changing the title to District Judge would lead to confusion because "it is more than possible that they will be confused with Circuit Judges. One who has been any time in public life in the country can appreciate how easily mistakes of that sort creep in… 'District Judge' and 'Circuit Judge' would be very easily confounded."[67] Kennedy's argument was even more frivolous, saying "All their stationery, forms and rules are printed, and to make this change would lead to another upheaval… there would be large amount of administrative inconvenience."[68]

The arguments put forward by the President and Attorney General did not sway the majority of the Seanad. Senator Brown refuted the Cosgrave's claim that there would be confusion saying that the public would be far more confused to the "tenure, and the nature of the office of District Justice" if they were the only position without the word "judge" in the title.[69] He did not accept the position that the public was not smart enough to tell the difference between a person with the title District Judge and another with the title Circuit Judge. Kennedy's argument that stationery and such would need to be changed swayed the senators even less than Cosgrave's. Senator Brown believed that "the inconvenience referred to by the Attorney-General is entirely temporary, whereas the name District Justice or District Judge, whichever is adopted, is going to be adopted permanently. Therefore I think temporary inconvenience ought to give way."[70] Senator Farren responded even more dismissively to Kennedy's stance saying his "argument does not hold water. A rubber stamp put over the present stationery will meet the inconvenience that would be caused regarding the stationary at present in stock, in which they

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[67] Ibid.
[68] Seanad Éireann, *Seanad Debates—Courts of Justice Bill, 1923—Report*, March 6, 1924.
[69] Seanad Éireann, *Seanad Debates—Dáil Éireann Loans and Funds Bill, 1923—The Courts of Justice Bill, 1923(Committee Stage Resumed)*, February 8, 1924.
[70] Seanad Éireann, *Seanad Debates—Courts of Justice Bill, 1923—Report*, March 6, 1924.

are described as District Justices."[71] With no convincing reasons presented by the Executive, the Seanad passed an amendment changing the title of District Justice to District Judge.

While the Seanad made its wishes known, it turned out that its amendment could not be added to the Judiciary Bill and the Dáil would have to reverse the Seanad's decision. The Parliamentary Draftsman's Office, which was responsible for drafting legislation and was part of the Attorney General's office, contacted Kennedy to alert him to the problems the Seanad's amendment would cause. The Draftsman said that "Senator O'Farrell has made a serious mistake in the drafting of his amendment… The intention of the amendment is that the judges of the District Court should be called 'Judge' and not 'Justice' throughout the Bill, but the amendment as it at present stands would not have that effect."[72] Since the term "District Justice" was used many times throughout the bill, each section with that term in it would have to be changed to "District Judge." To make the changes the Seanad wanted, 20 sections of the Judiciary Bill and four amendments that were passed would need to be changed. Because of the effort it would take to make the change throughout the Judiciary Bill and since the pay issue for the District Justices had been resolved ensuring the position was on equal footing as the other judicial posts, the Dáil decided to reject the Seanad's proposed change and the title would remain District Justice.[73] As O'Farrell said, this was not an issue of paramount importance to senators and because the pay scheme dilemma was resolved, the Seanad was not prepared to fight the Dáil on the matter.

Judicial Independence: Temporary Circuit Court Judges

Many senators objected to section of the Judiciary Bill that allowed the Executive to appoint temporary Circuit Court judges believing that those who served in this position could be viewed as puppets of the Executive and not as independent judges. The Government believed it

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[71] Ibid.
[72] UCD Archives, Kennedy Papers, P4/1106, Arthur Matheson to Kennedy, March 24, 1924.
[73] Dáil Éireann, *Dáil Debates—Private Bill—Dáil in Committee*, April 3, 1924.

needed the ability to appoint these judges because of the large amount of business that had accumulated during the first few years of the Irish Free State. The power to put judges in a very high judicial post on a temporary basis was only intended to help handle cases until the Circuit Court judges appointed for life could adequately hear all remaining cases on their own.

Senator Brown, who led the fight on this issue, said that Circuit Court judges serving on a temporary basis at the will of the Executive could not only be compared to the British removable magistrates, but "would be the worst class of removables. They would be the worst class of removables, especially at a time like this."[74] Brown noted that many of the cases waiting to be heard were malicious injury cases that involved actions that occurred during the Civil War and the Government would be a party in almost all of these cases. He believed that litigants could not get or would not believe they were receiving a fair trial if they were before a judge who could be removed if the Executive wanted to. This would be devastating to the reputation of the judiciary at a time where the courts would be trying to show the public that they were independent and better than their British created predecessors. Cosgrave countered this argument by saying he hoped the Seanad trusted that the Executive had no sinister motives in having temporary judges and only wanted the overwhelming amount of cases to be brought to trial.

While the Seanad had sympathy for the Executive in this difficult situation and did not suspect an ulterior motive for wanting to appoint temporary judges, senators would not back away from supporting Brown's stance because the current Executive would not be in power forever. If the clause that the Executive originally had in the Judiciary Bill was passed, even to present times the Executive could appoint a judge temporarily to the Circuit Court bench. Senator Jameson gave a strong vote of confidence to the Executive, but condemned the section of the bill, saying that the current Executive was one that "we trust, and will not make any wrong

[74] Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923—Second Stage*, January 16, 1924

use of its powers… but to give that power in a permanent Bill of this sort, which will be administered years hence by a Government of which we know nothing… seems to me to destroy one of the greatest bulwarks of liberty that the people have."[75] Senator Sir John Keane, backing Senators Brown and Jameson, summarized the Executive's faulty view in which it believed "We are here for all times and we are to be trusted and therefore these innovations are not dangerous."[76]

Although the Seanad respected the Executive, it would not be so naïve to think that it would never do anything wrong. Senator Moore pointed to the fact that the current Executive was not flawless saying, "I have had experience enough to know that when they are in the least difficulty they do a great number of things that in their more sane and sensible moments they regret. I cannot forget what has been done by this Government."[77] He was speaking of the Crowley incident where the Executive removed one of the judges it appointed to the Dáil Courts after he ruled against the Government in a *habeas corpus* case. Under the original wording of the Judiciary Bill, there was nothing to stop the Executive from removing a temporary Circuit Court judge as it had removed Crowley. This all seemed to directly attack the principle of judicial independence and the Seanad was not prepared to pass the section of the Courts of Justice Bill unchanged.

The point of conflict that arose over this section of the legislation is similar to that of the pay scheme for District Justices. The Executive's stance was based on the view that they were in an unusual situation at the time and would need flexibility in the number of judges to handle the situation properly. While the Seanad understood the Executive's dilemma, it believed that since

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[75] Seanad Éireann, *Seanad Debates—Seanad in Committee—The Courts of Justice Bill—(Third Stage)*, February 6, 1924, http://historical-debates.oireachtas.ie/S/0002/S.0002.192402060007.html.
[76] Ibid.
[77] Ibid.

this bill was creating a system for all time, the legislation needed to reflect that. To resolve this impasse, the Executive and Seanad were able to agree to a compromise similar to the one agreed to in regards to District Justices' pay. For the first three years after the Judiciary Bill was enacted, the Executive would have the power to appoint temporary Circuit Court judges. After three years, though, the temporary judges would automatically be removed from their positions and the Executive would no longer have the power to appoint temporary judges. This compromise was satisfactory to both sides because the Executive had the power to appoint the judges necessary to handle the backlog of cases and the Seanad's desire to have all the judges at this jurisdictional level independent would become a reality after three years.

Judicial Independence: The Retirement Age of Judges

One of the innovations set forth in the report of the Judiciary Committee was the fixed retirement age of 70 for judges on the Circuit and District Courts. The Judiciary Bill introduced to the Dáil by the Executive had set the retirement age of District Justices at 65 and 70 for judges of the Circuit Court and Superior Courts. Deputies in the Dáil objected to these ages as they saw them as too low. Professor Magennis had suggested that the retirement age of District Justices should be set at 70 since "the Judiciary Committee which knows everything and is impeccable and infallible has recommended it."[78] Deputy Cooper wanted the retirement age of higher level judges raised to 75 because "There are professions where an age limit is necessary but I do not think the Judicial profession is one of them. It may be said, as a general rule, that judges, like wine, improve with age. They gain experience and knowledge."[79] The Executive was not willing to raise the fixed age retirement up so high, but was willing to compromise with opposition deputies. Cooper had put forward an amendment that would have given the Executive the ability

[78] Dáil Éireann, *Dáil Debates—Civil Service Regulation (No. 2) Bill, 1923 – The Courts of Justice Bill, 1923—Third Stage Resumed*, October 31, 1923.
[79] Dáil Éireann, *Dáil Debates—The Courts of Justice Bill, 1923—Third Stage (Resumed)*, October 11, 1923.

to extend the age of retirement of a judge by five years if it thought he was capable, which was a "power [the Executive had] been too modest to claim for themselves."[80] Kennedy was willing to accept this compromise and inserted amendments that would allow the Executive, after consulting with the Chief Justice of the Supreme Court and the Attorney General, to extend the retirement age from 65 to 70 for District Justices and 70 to 75 for the other judges.[81]

The Seanad believed that the ability to extend a judge's tenure was a power the Executive should not have taken on even though opposition deputies in the Dáil supported such a proposal. Senator Brown, once again trying to protect judicial independence, opposed the ability to extend a judge's retirement age because this power "puts the Judge in a most invidious position when he arrives at the age, say, of 69. For twelve months he is at the mercy of the Government. He does not know what is going to happen. That is not a position in which a judicial person should be put."[82] The barrister senator did not want to see a situation where an Executive, possibly one that would not be in office until years into the future, used its ability to extend a judge's tenure as a political tool to retire judges it did not like and keep ones it did, while at the same time using the power as leverage against judges who should be acting independently on the bench. Brown proposed that the Seanad should set a fixed retirement age, preferably at the higher age of 75.

Most senators strongly backed Brown's position that there should be a fixed age. While some supported Brown's suggestion of 75, other such as Senators O'Farrell and Gogarty believed 70 was the more appropriate age. O'Farrell, who supported the Executive having the power to extend the retirement age, noted that "three-quarters of a century is a very long time, and I think it is desirable that 70 should be the maximum and absolute limit up to which judges

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[80] Ibid.
[81] Dáil Éireann, *Dáil Debates—Dáil in Committee—Courts of Justice Bill, 1923*, December 4, 1923.
[82] Seanad Éireann, *Seanad Debates—Fisheries Bill, 1923—Seanad in Committee*, January 24, 1924.

should have the right to stay on."[83] Gogarty, who was a surgeon, pointed out that not being able to physically and mentally continue a job past 70 did not just apply to judges, but was almost universal in all professions in Ireland saying "It is almost anti-Scriptural to carry on after 70 years of age."[84] Brown stated that he was willing to compromise on the exact age of retirement, willing to accept any age between 70 and 75, but the point that the age had to be a fixed one was nonnegotiable.

After hearing the Seanad's demand to have fixed ages, Cosgrave assured senators that the Executive would not use the ability to extend judges' tenure as leverage against them. The President believed the Dáil had made its will clear in allowing the Executive to have the power to elongate a judge's career, but was willing to talk to other members of the Dáil to see if they were willing to accept fixed ages. The Executive must have received positive responses from those it talked to on this matter because Kennedy put forward a compromise in the Seanad. The judges on the Superior Courts would have to retire at the age of 72, Circuit Court judges at the age of 70, and District Court justices at the age of 65.[85] The Seanad appreciated the Executive's change in position and overwhelmingly passed the amendments needed to make these changes. When these amendments were returned to the Dáil for their approval, Redmond and Cooper strenuously objected to them, but could only find one other deputy to support them. With opposition leader Johnson and former Judiciary Committee member Hewat advocating for a fixed age, the Dáil approved the Seanad's amendments that reversed its proposal for a flexible age by a vote of 60 to 3.

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[83] Ibid.
[84] Ibid.
[85] The retirement age for the District Justices stationed in Dublin was set at the higher age of 70. The rational behind having these judges be able to serve longer was that their tenure was less taxing on the body than those justices outside of Dublin since they would not have to travel as much, which the Executive and others believed would not age them as quickly as their colleagues in the rest of the Irish Free State.

Judicial Independence: The Rule-Making Authorities and "Brown's Amendment"

Senator Brown vigorously challenged one more section of the Judiciary Bill: the rule-making authorities. Like the opposition in the Dáil, Senator Brown and others did not want any ministers to be on a rule-making authority. Glenavy was outraged that ministers would be on the organizations that determined the rules of courts, especially when no such recommendation was made in the report of the Judiciary Committee, saying "I confess I am wholly at a loss to understand or account for [this]… I want to say this, that it is the first time in the history of the British Constitution that the Judiciary have ever been exposed to such humiliation."[86] Brown believed for there to be a complete separation of the branches of government, the judiciary should be making its own rules. There was a double standard in his view if the judiciary had members of the Executive making its rules when the judges did not have a part in setting rules for the other branches, leaving Brown to wonder "Why should they not be masters in their own houses, and why should the Minister for Home Affairs be between them and their own rules?"[87]

Brown claimed that the sections of the Judiciary Bill creating the rule-making authorities with ministers on them violated the Constitution in three ways. First, it interfered with the independence of judges. Second, the rules created by the authorities were like legislation, yet they were not to be voted on by the Oireachtas, which Brown believed deprived both houses of their exclusive right to create and pass legislation. Finally, it violated Article 67 of the Constitution, which stated "The number of judges, the constitution and organization of; and distribution of business and jurisdiction among, the said Courts and judges, and all matters of procedure shall be as prescribed by the laws for the time being in force and the regulations made

[86] Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923—Second Stage*, January 16, 1924.
[87] Ibid.

thereunder."[88] Senator Brown interpreted this clause to mean that all rules for the judiciary's operation, which included structure, pay, hours of operation, rules of evidence, etc., should be legislation passed by the Oireachtas and not created and enacted solely by the will of a Ministry.[89]

While Senator Brown had the support of Glenavy and many other senators, the Executive, with supporters of its own, was insistent that ministers be on the rule-making authorities. Cosgrave believed that Senator Brown was making this section of the bill a bigger issue than it was, saying "I should say it did appear to me that a little too much stress was laid upon a clause which in its relative importance did not assume the same proportions, to my mind, as many of the other clauses of the Bill."[90] A full response by the Executive to Brown's objections was given by Kennedy. The Attorney General denied that having a minister on a rule-making authority would change a judge's ruling on the bench asking "How does that affect the independence of the Judges in the exercise of their judicial functions? I do fail… to see any interference with the Judge, as a Judge, in saying that the public requires him to sit so many hours a day… and to make certain provision for hearing and disposal of litigation."[91] The Attorney General told Brown that there could be no compromise on this issue, the Executive wanted the Minister of Home Affairs on the rule-making authorities. In the end, most senators could not see how a minister could interfere with judicial independence and Brown's amendment to remove the ministers from the rule-making authorities was defeated by just one vote.[92]

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[88] Irish Free State (Saorstát Éireann), *Constitution of the Irish Free State (Saorstát Éireann) Act, 1922*, Article 67.
[89] Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923 (Report)*, March 5, 1924, http://historical-debates.oireachtas.ie/S/0002/S.0002.192403050003.html.
[90] Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923—Second Stage*, January 16, 1924.
[91] Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923 (Report)*, March 5, 1924.
[92] Ibid.

Although disappointed by the close vote, Brown was not discouraged from continuing the fight on this issue. The amendment to remove the minister really only addressed the first objection he had to this section of the Judiciary Bill. The other two objections, which involved the exclusive right of the Oireachtas to legislate and Article 67 of the Constitution, were not addressed. Senator Brown put forward an amendment just one day after the vote on removing the minister from the rule-making authorities, that stated "All Rules of Court made under this Act made under this Act shall be laid on the Tables of both Houses of the Oireachtas but shall have no force or effect unless within six months from their date of being so laid they shall have been passed into law by the Oireachtas."[93] This would effectively turn the rule-making authorities into a body responsible for putting forward recommendations much like the Judiciary Committee instead of being its own unchecked entity. As the Judiciary Bill was originally worded, the Oireachtas could not change any rule created by the rule-making authorities, only question the minister on it.

This amendment by Brown attracted the support of the majority of the Seanad and the Executive was willing to make concessions on this issue. While the wording was altered slightly the Attorney General put forward an amendment that called for all rules produced by the rule-making authorities to be passed by both houses of the legislature. Both Glenavy and Kennedy agreed that this change could only be attributed to Senator's Brown efforts and named the amendment after the man who consistently defended the independence of the judiciary.[94] The Dáil, especially those who opposed the minister having a part in making the rules of courts, were thrilled with Brown's amendment with Deputy Johnson saying "I think this is a great

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[93] Seanad Éireann, *Seanad Debates—Courts of Justice Bill, 1923—Report*, March 6, 1924.
[94] Seanad Éireann, *Seanad Debates—Courts of Justice Bill, 1923—Report*, March 6, 1924; Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923—Report Stage Resumed*, March 20, 1924; On March 6th, Glenavy said that this amendment "will always be known as Senator Brown's Section." On March 20th, Kennedy said that "This is to known as Senator Brown's amendment… [I] asked him to father it… and he is satisfied with it as it stands."

improvement on the section originally passed by the Dáil… It is an improvement, and meets most of the criticisms that were made against the original section."[95] This gave the Seanad, with its strong Unionist representation, the ability to protect the independence of the bench and in turn the rights of the minority.

Issues Considered by The Seanad: Decentralization

Some senators argued against decentralization on behalf of the legal profession and commercial interests using the same arguments as deputies in the Dáil. As in the Dáil, though, those opposing the principle of decentralization found themselves outnumbered. Even Glenavy, the embodiment of the *ancien regime*, defended the recommendations of his Judiciary Committee saying that the improved appeal process allowed for decentralization to occur without causing injustice.[96]

The representatives in the Seanad of the Bar and commercial interests adopted the approach suggested by Henry Hanna in the autumn of 1923. Instead of committing all of their efforts towards ensuring the judiciary would remain centralized, which was a losing battle, they advocated for modifications to the proposed decentralized system that would mitigate some of the harms caused by decentralization. Senator Brown led the fight on behalf of the legal profession, while Senator Jameson, who was a former director of the Bank of Ireland, represented the business community.

Brown's efforts were focused on giving the Circuit Courts the ability to handle its broad powers well. Jameson fought to have the language of the bill made more specific to protect against some possible loopholes that could hurt businesses and to allow companies to file suits to recover debts at courts closer to the businesses, which would be more convenient to those

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[95] Dáil Éireann, *Dáil in Committee—Courts of Justice Bill, 1923—From the Seanad*, April 2, 1924.
[96] Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923—Second Stage*, January 16, 1924.

collecting debts. This strategy proved successful for both interest groups as they achieved far more than the deputies in Dáil who opposed decentralization. Another stark difference between the efforts in the Dáil and the Seanad is that Senator Brown and Jameson were able to work together instead of operating separately as the barrister and business deputies had, which gave added weight to their proposals.

Senator Brown recognized that the shift that was occurring between the *ancien regime* judiciary and that set forth in the Judiciary Bill was drastic. He predicted from "my experience of the Bar that it will mean that fully one-half of the cases which are now dealt with by the High Court will in future be dealt with by the Circuit Court."[97] Brown was unsure whether the new Circuit Courts could handle the increased power, especially if they did not have High Court powers to require the presence of witnesses. In the soon to be abolished County Courts, the judges had no power to force a witness to attend a hearing by issuing a subpoena. The most a County Court judge could do was issue a summons for a witness to attend and if the witness failed to attend the judge had no authority to punish the person who failed to appear before the court. The only form of recourse for ignoring a summons was for the opposing party to sue the disobedient witness for a maximum of £5. Brown did not see how the powerful Circuit Courts could effectively operate if they had no real power to procure the attendance of witnesses. His solution was to modify an amendment originally put forward by Senator Jameson that stated "A Circuit Judge shall have the same powers for procuring the attendance of witnesses in the Circuit Courts as a judge of the High Court of Justice in Ireland formerly exercised for procuring the attendance of witnesses in the High Court."[98] Kennedy immediately accepted this proposal recognizing its value. So, while Brown adamantly opposed the extensive powers given to the

[97] Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923—(Committee Stage Resumed)*, February 7, 1924.
[98] Ibid.

Circuit Courts, he wanted to make sure they had the best chance of succeeding since decentralization was the path chosen.

Jameson was able to achieve two major victories on behalf of commercial interests in the Seanad. The first was in regards to a section where vague wording worried companies about where their debt collection suits may be heard. Under the Judiciary Bill that was passed by the Dáil, companies had the right to bring their claim directly to the High Court instead of the Circuit Court, but the High Court would have the right to send the case to the Circuit Court it would have been originally heard if it had not been brought to the High Court. The wording also gave the High Court the right to send it "to any court that may appear suitable and convenient."[99] What Jameson and others feared was that this section allowed the High Court to send any case up to £300 to a District Court. Businesses thought it was bad enough that cases larger than £100 would be heard in Circuit Courts, but District Courts would have been absolutely unacceptable to them. Jameson asked the Executive to make the wording more specific so the High Court could only remit a case to a jurisdictional level that had the power to originally hear the case. Kennedy admitted that the "idea is that any remittal of an action shall only be transferred to a Court where it might originally have begun" and not to allow the High Court to send a large case all the way down to a District Court.[100] The Attorney General put forward an amendment to close the unintentional loophole originally in the Judiciary Bill, which appeased commercial interests.

An interesting compromise put forward by Lord Glenavy, which was backed by Senators Brown and Jameson, helped settle the dispute that had occurred between commercial interests and the Executive. To briefly repeat the grievances of commercial interests that were stated in the Dáil and in the Seanad, businesses did not believe they could get a fair trial in the court

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[99] Seanad Éireann, *Seanad Debates—Seanad in Committee*, January 30, 1924.
[100] Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923 (Report)*, March 5, 1924.

located where the debtor lived and it was inconvenient for businesses to bring all their records and witnesses to where the debtors resided to recover the money owed to them. On the other side, the Executive was steadfast in decentralizing the administration of justice. Glenavy, who had many friends in the upper echelon of Irish society, had heard concerns about recovering debts not just from businesses, but from other professional classes such as doctors and engineers. He understood their concerns about going to where the debtor lived to recover debts, as he expressed personal view saying "For the life of me I have never been able to understand… why in the case of an ordinary debt a creditor should be compelled to go to the place where the debtor lives."[101] To Glenavy, why should the creditor be the one forced to travel to the debtor when he had already be inconvenienced by not being repaid. The head of the Seanad proposed that the Judiciary Bill should be changed so that the creditor could sue to recover a debt in the circuit where the broken contract was made instead of having to sue in the county the debtor lived. He believed this would satisfy everyone because the creditors' concerns of unfair juries and inconvenience were addressed while at the same time the Executive would still have decentralization with Circuit Courts still being able to hear cases up to £300.

This proposal initially met resistance, but after Kennedy considered the issue, he was willing to give this concession to the professional class of the Irish Free State. The Attorney General put forward an amendment that was passed, which allowed the plaintiff in a contract case to elect to have the matter heard in the circuit where the contract was made. Senator O'Dea, acting on behalf of the Council of the Chamber of Commerce and a merchant himself, said that he "was instructed to thank [Kennedy] very much for the great courtesy and great pains he took

[101] Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923—(Committee Stage Resumed)*, February 7, 1924.

with the matter we are discussing."[102] This concession was a brilliant political move by Kennedy because as Glenavy had stated when he put forward the proposal, it addressed the major concerns of the business community, which meant that although businesses still opposed decentralization they could not vigorously continue to oppose the principle since their specific objections had been addressed.

Overall, both sides of the decentralization debate won in the Seanad. Opposition to decentralization were able to secure important concessions that protected their interests. At the same time, the Executive managed to protect the principle of decentralization. The concessions that Kennedy gave either clearly improved the new judiciary system, as was the case with giving the Circuit Courts the power they needed to do their job, or was able to make the decentralized system more palatable to sectors of the Irish populace that opposed it from the outset of the process of creating a new judicial system. The more realistic and less confrontational approach taken by senators made them far more effective in securing change than the deputies in the Dáil who may have hoped for too much in opposing decentralization all together.

Issues Considered by The Seanad: Place of the Irish Language in Court

Since the Seanad was widely regarded as the more conservative of the two houses of the Oireachtas, it is surprising to see how the Seanad was willing to make more changes to accommodate Irish speakers than the Dáil was. It is also surprising which member of the Seanad became the most successful advocate for the language in the Oireachtas. Senator Kenny, who took no strong stand on any other issue in the Judiciary Bill, became the self-admittedly unusual champion of the Irish language. He took up the cause because others asked him to. But he personally believed that for an advocate for the Irish language, "a far better medium could have

[102] Seanad Éireann, *Seanad Debates—Courts of Justice Bill, 1923—Report*, March 6, 1924.

been selected, because I am not an Irish speaker."[103] Kenny was most likely approached because he was the nephew of William Williams, who was an expert in Ogham, which was the ancient Irish alphabet, and a founder of the Keating Society, which tried to publish works written in Irish. Senator Kenny wanted the Irish language to be part of the new judiciary because he wanted the new courts to be intertwined with Irish heritage. He believed that the Irish language was "the only link we have with our past, with the period in which the Brehon laws were evolved… That is a thing we ought not to lose sight of. We have this link, this living tongue, which is our heritage."[104]

Kenny also thought that for the new judiciary to be able to give people justice and to have the support of the public, Irish speakers would need to be on the bench in districts and circuits where many people primarily spoke Irish. As was said in the Dáil, finding Irish speakers for the District Courts was not an issue, but it was a problem to find qualified, Irish speaking barristers to serve as Circuit Court judges. He said that the lack of Irish-speaking judges was a problem that had for too long been left unresolved and this harmed people who only spoke Irish when "It is not their fault that courts are not constituted to enable the proceedings to be carried through in the native language. It is rather our fault, and it is up to us to meet the just requirements of these people in the interest of justice."[105]

To the senator, the use of English instead of Irish in certain areas of the country was the primary reason the people viewed the *ancien regime* judiciary as a foreign entity. Kenny used the example of Gaeltacht, which is a collection of various parts of Ireland where the people spoke only Irish. He said the residents "looked on the Courts of Law in those districts as hostile,

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[103] Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923—Second Stage*, January 16, 1924.
[104] Seanad Éireann, *Seanad Debates—Seanad in Committee—The Courts of Justice Bill—(Third Stage)*, February 6, 1924.
[105] Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923—Second Stage*, January 16, 1924.

because the language spoken in them was not known to them, and the Courts were, in their opinion, English, or the institutions of an alien country. They did not go into those Courts with any confidence."[106] Thus, Irish speaking judges must be on the bench of the new judiciary if Irish speakers were to support the new courts. The Earl of Mayo, who was a member of the Seanad, backed Kenny pointing to injustices that occurred when English speaking judges had to rely on interpreters to hear Irish speaking witnesses. The Earl told of an instance where "One litigant said: 'What did you give the interpreter?' The reply was: 'I gave him £5.' The other fellow said: 'I gave him £10.' That pretty well settled the matter in that court. That was the rule very often in the Irish-speaking districts."[107] This type of corruption and injustice is one of the aspects of the *ancien regime* the new nation wanted to eradicate; and in the opinion of many senators the only solution was to put Irish speaking judges on the bench.

While many senators supported the idea of putting Irish speaking judges on the bench in areas where Irish was the primary language, there was opposition from more conservative members of the Seanad. Glenavy, while he acknowledged the new courts needed to have accommodations for the native language, personally did not see the problem of having English speaking judges in Irish speaking regions. He countered the Earl of Mayo's story with a tale of his own. When Glenavy was presiding over a trial in County Galway, one of the litigants was "a very handsome old lady, a typical Irish country woman."[108] This woman claimed that she knew no English, so Glenavy as the presiding judge obtained an interpreter. The head of the Seanad explained that when her solicitor summarized the opposing litigant's argument, "Without waiting

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[106] Seanad Éireann, *Seanad Debates—Seanad in Committee—The Courts of Justice Bill—(Third Stage)*, February 6, 1924.
[107] Ibid.
[108] Seanad Éireann, *Seanad Debates—Dáil Éireann Loans and Funds Bill, 1923—The Courts of Justice Bill, 1923(Committee Stage Resumed)*, February 8, 1924.

for the interpreter the old lady burst out in the best Anglo-Saxon" and refuted it.[109] Glenavy's point was that most people in the Irish Free State could speak English, so they were overreacting to correct a problem that effected only a small portion of the population. Furthermore, Glenavy was concerned that in cases where only one of the parties spoke both Irish and English, the side that could not speak Irish would be at a disadvantage if the trial was conducted mostly in Irish.

The Executive was concerned about putting a clause in the Judiciary Bill that sought to have Circuit Court vacancies filled by Irish speakers. President Cosgrave believed that Senator Kenny and those who backed him put forward a strong argument for Irish speakers being judges, but believed the Government needed to approach the issue from a practical viewpoint. Just as the Executive could not allow the amendment in the Dáil that would have allowed for more Circuit Court judges for economic reasons, it was not comfortable passing Kenny's amendments regarding the Irish language that could not realistically be implemented. Out of the eight circuits that would be created by the Judiciary Bill, Cosgrave observed that four of them had districts that were primarily Irish speakers. As much as the President wanted to have Irish speaking judges, he said that under "the present circumstances, the Bar would not be in a position to man the Bench on the terms of [Kenny's proposal]. That is the sad side of the case. We may as well admit it."[110] Although the Executive initially hesitated at Kenny's proposal, it did assure the senator that it would take the matter under consideration.

The Executive decided that while it may not have been practical at the time, a judge who could speak the language of the people in his jurisdiction was the ideal the new court system should be aiming for. The Government put forward an amendment, which said that in circuits where there were Irish speaking districts, a judge who could speak Irish without the aid of an

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[109] Ibid.
[110] Seanad Éireann, *Seanad Debates—Seanad in Committee—The Courts of Justice Bill—(Third Stage)*, February 6, 1924.

interpreter should be appointed "So far as may be practicable having regard to all relevant circumstances."[111] While the legislative language was vague and it would be difficult to reject the appointment of a judge who could not speak Irish, the clause did indicate that Irish speaking judges would be preferable in circuits where many Irish speakers lived. While some senators wished the Executive would have done more, most of the Seanad was pleased by the amendment and it was easily passed. Senator Costello, a strong supporter of Senator Kenny on the Irish language issue, said "I should say that I am very grateful to the Government for the generous concessions they have made in this matter. It is only what we have expected from men who themselves were nurtured in the language movement… I think they met us in every way possible."[112] Kenny, while he may have been the unlikely advocate of the Irish language cause, was the most effective in either house of the Oireachtas by gaining this Government concession.

Passage by the Seanad Éireann

On March 28th, after some contentious debates and important concessions, the Seanad passed the Judiciary Bill. Tensions seemed to subside between Kennedy and Glenavy after the bill's passage. Kennedy, who believed the head of the Seanad was out to get him, thanked the Seanad for the courtesy it showed during the months it allowed the Attorney General to guide the bill. Glenavy, likewise moving on from the costume debate incident, told Kennedy "You have been of very great assistance to us, Mr. Attorney-General."[113] On a grander scale, the hostile stance taken by Cosgrave towards the upper house of the Oireachtas early on in the debate seemed to be all but forgotten. Instead of the Seanad being pushed aside, it did its constitutional duty by making changes it felt were necessary, which did improve the Judiciary Bill. Also, by

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[111] Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923 (Report)*, March 5, 1924.
[112] Seanad Éireann, *Seanad Debates—Courts of Justice Bill, 1923—Report*, March 6, 1924.
[113] Seanad Éireann, *Seanad Debates—The Courts of Justice Bill, 1923—Fifth Stage*, March 28, 1924, http://historical-debates.oireachtas.ie/S/0002/S.0002.192403280006.html.

going through the Seanad instead of waiting 270 days or calling for a public referendum, the Executive was able to have the legislation passed in a shorter period of time and obtained the backing of the house that represented the Protestant minority. While all changes made by the Seanad would have to be ratified by the Dáil, the lower house quickly approved the vast majority of amendments. Thus, the Seanad's consideration of the Judiciary Bill represented the last major hurdle the Executive had to clear to create a new judiciary system.

Conclusion: Breaking the Silence

On April 14th, 1924, the Courts of Justice Act was signed by Governor-General Timothy Healy and became law.[1] The new judiciary could have been established immediately if the Executive issued an order putting the law into force. The Government delayed issuing the order though as it was not prepared to launch the new courts system. It still had to find suitable judges to appoint to the new bench and begin to frame the rules of the new court system, which would take some time.

Besides having to establish the new system, the Executive also had to ensure the *ancien regime* was prepared to be phased out. First, there was the issue of the judges who were continuing to serve in the British created courts. On April 28, "It was stated in legal circles in Dublin… that the judges of the High Courts in the Free State have received official intimation that their services will not be required after the 28th of next month."[2] This meant that after the courts recessed at the end of the Easter sittings, they would never convene again. It was suspected that some of the judges of the colonial judiciary would be asked to join the new Irish court system, but any predictions of who would be asked to stay on the bench was entirely conjecture. The Executive wanted the new judiciary to start with as clean a slate as possible so it asked the Lord Chief Justice of the colonial judiciary "to have all pending business expedited, so as to leave the lists clear at the end of the Easter sittings."[3] The colonial judiciary was not able to satisfy this request and there were still cases left over for the new judiciary, although none of them were urgent. [4]

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[1] *The Irish Times*, "Judiciary Bill Signed," April, 15, 1924.
[2] *The Irish Times*, "The High Court Judges: Service to Terminate Next Month," April 29, 1924.
[3] *The Irish Times*, "The Judiciary: End of the Old System," May 29, 1924.
[4] Ibid.

Without the new judicial system, the public was left to wonder what system would preside over the Free State. On May 29th, it was confirmed the new system was not ready to be implemented, as *The Irish Times* reported Hugh Kennedy saying the "Order has not yet been made, and no judges have yet been appointed."[5] This led the major paper in the new nation to conclude the status quo would continue for at least several weeks.[6] The legal profession felt uneasy about the situation as their livelihoods depended on the state of the court system with one prominent member lamenting "We are all in a fog."[7] This fog would not be lifted for another two weeks.

Finally, on June 11th, the newspapers published that the judges had been named and that a ceremony on that day would launch the new judiciary. Hugh Kennedy, the architect of the new system, would be its apex and had already been sworn in as Chief Justice of the Supreme Court when his appointment was announced. Joining him on the Supreme Court were Charles O'Connor and Gerald FitzGibbon. Timothy O'Sullivan was appointed President of the High Court and the other members would be James Creed Meredith, Thomas Lopdell O'Shaughnessy, William E. Wylie, William John Johnston, and James Augustine Murnaghan.[8] Thus, the top nine positions in the new court system were filled with five members of the Judiciary Committee and members of both the colonial courts and Dáil Courts.

The men the Free State chose to sit on its highest courts clearly signaled that the court system was entering a new era where appointments would not be based on religion or politics. Before Irish independence, Nationalists lobbied the colonial government to appoint more Catholics to the bench. Now that they ruled the Free State, it seemed religion was not a factor in

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[5] Ibid.
[6] Ibid.
[7] *The Irish Times*, "In a Fog," May 29, 1924.
[8] *The Irish Times*, "Trinity Terms Opens," June 11, 1924.

selecting judges. This is evident by the fact six of the nine previously mentioned judges were non-Catholics, which was a decrease in the percentage of Catholics from the colonial judiciary when it adjourned in May 1924.[9] The Executive would also overlook political affiliations as it "would show continuing political courage in replacing the bulk of judges who retired under the Treaty by successors appointed as far as possible on legal merit. But this inevitably included a disproportionate representation of former unionists."[10] It is incredible that only two years of reforming the judiciary led to such a drastic departure from the toxic environment which was cultivated over centuries of colonial rule.

On June 11th, in Dublin Castle, the former seat of colonial rule, the third and final branch of government in an independent Irish nation came into operation. At this occasion, Free State soldiers were assembled "to give military *éclat* to the occasion," and crowds waited outside during this historic occasion despite a drizzling rain.[11] Some of the most important people in the Free State attended such President Cosgrave, other members of the Executive, Lord Glenavy, military leaders, former judges, and prominent members of the legal profession. This was clearly the inauguration of an Irish judiciary as many British traditions, such as the elaborate wigs and gowns, were not used on this occasion and the Irish song and later anthem, the "Soldier's Song," was played by a military band as the judges processed into the ceremony.[12]

This is a crucial moment in Irish history as the last pillar of the fledgling democracy was established and the importance of this new court system cannot be understated in creating a new order in the Free State. After working on this thesis for two years, I would like nothing more than to explain what an important moment this was and what it meant for the new nation, but I find

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[9] James O'Connor, *History of Ireland: 1798-1924*, 369.
[10] J.J. Lee, *Ireland: 1912-1985*, 129.
[11] *The Irish Times*, "The Free State Judiciary," June 12, 1924.
[12] Ibid.

myself lacking the ability to do the new judiciary justice. Therefore, I would like to offer the beginning of the speech Chief Justice Hugh Kennedy prepared for the occasion for the task I am not up to:

> This is surely a precious moment—the moment when the silence of the Gael in courts of law is broken, and that, within what was once the Pale: the moment when, after a week of centuries, Irish Courts fashioned in freedom by an Oireachtas again assembled—are thrown open to administer justice according to laws—made in Ireland by Free Irish citizens for the well-being of our dearly loved land and its people. It is for us here on the seat of justice a moment of compelling emotions, and for me especially, to whom has fallen under Providence the unique and sacred favour of presiding at this very time and place, the joy and emotion are well nigh overwhelming.
>
> Amongst the glories of our past history were the love of Justice and a highly developed juridical mentality. It will be for us in these newly established Courts to enshrine the ancient inspiration and to wake again the dormant reverence for the judgment by establishing confidence in its fearless and impartial justice and the assured expectation that as the law is made by the people so shall be the judgment. We will look to the legal professions, both of them, without abatement of learning, of courage, of independence, to cooperate with us in setting firm and paramount the rule of law and justice upon which rest peace and security for the people.
>
> The judicial authority which we shall exercise is (as has been declared by the National Constituent Assembly in the 2nd Article of the Constitution) derived under God from the people. With that authority, these the Courts of the Nation stand between the people and any and every encroachment upon its constitutional rights and liberties by whomsoever attempted.
>
> Facing these solemn responsibilities, in all humility we pray God give us strength and to guide us by the light of His Wisdom Justice and Truth.[13]

Final Argument

The creation of the new judiciary has been almost entirely overlooked as historians have focused on other aspects of building an Irish state. The little analysis done on the judiciary's genesis does not do this pillar of democracy justice and has often been misconstrued. Most historians claim that the Irish judiciary created by the Courts of Justice Act 1924 is essentially a continuation of the colonial court system it replaced. J.J. Lee, in his brief analysis of the creation

[13] UCD Archives, Kennedy Papers, P4/1056, Final MS text by Kennedy of his Speech at the Opening of the Courts, June, 1924.

of an Irish court system, states that "the changes were very limited… The institutional changes in the legal system made little practical difference to the actual role of law in the country."[14] James O'Connor, who had once claimed that the proposals of the Judiciary Committee would lead to disaster, wrote in his 1925 *History of Ireland*, "The Irish judicial system, framed upon British lines, was admirable, and in essentials has been retained by the Free State."[15]

The Free State courts were indeed heavily influenced by the colonial courts, so the common perception is not entirely untrue, just oversimplified. The bench and legal profession remained the fulcrum of the new court system as Griffith's vision of replacing them with an arbitration system never became a reality. The jurisprudence of the British created judiciary carried over into the new system. Barristers and solicitors were trained in the same institutions had they previously had been. Even some British traditions were retained by the Free State courts.

Yet these similarities do not meet the threshold for the claim Irish courts are simply just a continuation of their British created predecessors. One only needs to look at comparisons of other entities to their British predecessors. Few would characterize the Oireachtas as essentially copying the British Parliament, although there are many similarities between the two. In regards to the judiciary of the United States, few would characterize it as a mere continuation of its British predecessor even though American courts are based on the English common law tradition and some British case law remains precedent to this day. Those who have compared the Irish and British legislatures and the American and British Courts have taken more nuanced positions and so should those who study Irish legal history.

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[14] J.J. Lee, *Ireland: 1912-1985*, 128-129.
[15] James O'Connor, *History of Ireland: 1798-1924*, 209.

To claim or imply that colonial courts were the only source of inspiration for the new legal system entirely overlooks the important contributions of the Dáil Courts, the Judiciary Committee, and the Oireachtas. The colonial judiciary was highly centralized, did not meet the needs of the Irish people, was not created by the Irish, did not have the public's support, did not protect a large segment of the population's rights, and was not independent of the British executive. The Free State judiciary was quite the opposite because of the influence of other contributors. The Dáil Courts provided a model for decentralization and helped restore the public's faith in a judiciary. The Judiciary Committee was a collection of Irish citizens who proposed a system that was heavily influenced by the colonial courts, but also other systems and proposed new innovations. The debate in the Dáil gave the elected representatives of the Irish people an opportunity to help craft the Judiciary Bill and ensure the new court system would accommodate their constituents. Finally, the Seanad ensured that both the independence of the judges and the Unionist minority's rights were protected. Acknowledging these contributions in addition to the commonly held view of the role of the colonial courts is the more accurate and nuanced account of the genesis of an Irish judiciary that has for too long been overlooked and oversimplified.

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