

**A Targeted Consultation
for the 2021 Rule of Law Report
Situation in Ireland**

rule-of-law-network@ec.europa.eu

Submitted by

Brian Doolan

briandoolan945@outlook.com

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A. Non-nationals and Jury Trials

Non-nationals including EU nationals excluded from jury service:

1. Article 38. 5 of the Irish Constitution¹ provides that save in certain stated exceptions no person shall be tried on any criminal charge without a jury. In Irish law a jury consists of twelve nationals who decide the guilt or non-guilt of the accused in secret without being obliged to give reasons for their verdict. The Supreme Court ruled in 1974² that the panels from which juries are to be drawn should be representative of the community at large. In that case the court struck down, as unconstitutional a law which confined jury service to certain property owners and by and large excluded women. To correct that situation the Oireachtas passed the Juries Act 1976³ Which remains the current law. This law extended the obligation to serve on a jury to citizens over the age of 18 who complied with certain local residential requirements.⁴ This law was enacted at a time when there were few non-nationals living in Ireland.

¹ <http://www.irishstatutebook.ie/eli/cons/en/html>

Article 38:

1 No person shall be tried on any criminal charge save in due course of law.

2 Minor offences may be tried by courts of summary jurisdiction.

3 1° Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.

2° The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law.

4 1° Military tribunals may be established for the trial of offences against military law alleged to have been committed by persons while subject to military law and also to deal with a state of war or armed rebellion.

2° A member of the Defence Forces not on active service shall not be tried by any court martial or other military tribunal for an offence cognisable by the civil courts unless such offence is within the jurisdiction of any court martial or other military tribunal under any law for the enforcement of military discipline.

5 Save in the case of the trial of offences under section 2, section 3 or section 4 of this Article no person shall be tried on any criminal charge without a jury.

² De Burca v Attorney General [1976] IR 38.

³ <http://www.irishstatutebook.ie/eli/1976/act/4/enacted/en/html>

⁴ Ibid: section 6 - it should be noted that the upper age of 70 years of age was removed by a later statute.

2. By the time of the 2011 Census of Population the demography of Irish society had changed dramatically. That census revealed that 12% of the population were non-national, with large numbers of nationals of other EU member states residing in Ireland. For example, there were 122,585 persons of Polish nationality living in Ireland. Most were working, had children who were in Irish schools and were well settled here. This figure had grown from 2,124 in 2002 to 63,276 in 2006 and up to 122,585 in 2011. In total, this 12% figure had doubled from 5.8% in 2002.⁵

3. By the 2016 Census of Population while the number of persons of Polish nationality had remained almost static at 122,515, the number of Spanish nationals increased by 78% from 6,794 to 12,112 between 2011 and 2016 and Romanian nationals increased by 69% from 17,304 to 29,186 during the same period. While overall there was a slight decrease of 1.6% on the 2011 census the fact remained that by April 2016 there were 535,475 non-Irish nationals living in Ireland out of a total population of 4,761,865 or 11.6%.⁶ The presence of a large percentage of non-nationals, the bulk from member states of the EU, has thus become a permanent feature of the Irish demographic landscape.

4. After the publication of the 2011 Census figures the Law Reform Commission, an emanation of the State, in April 2013 published a 'Report on Jury Service'.⁷ That Report, in Chapter 1, set out the history and law on juries and discussed the *de Burca* case that established the constitutional requirement that panels from which juries were randomly selected should be representative of the community at large. The Report then examined in detail the exclusion of non-nationals and went on to make recommendations. The principal recommendation was that jury panels should be based on electoral registers which would allow not only Irish nationals but also EU nationals and other long-term residents (those with a minimum residency requirement of at least 5 years) to be selected for jury service. If this were done it would add about 200,000 persons to those qualified for jury service.

⁵ <https://www.cso.ie/en/census/census2011reports/>

⁶ <https://www.cso.ie/en/census/census2016reports/>

⁷ https://www.lawreform.ie/_fileupload/Reports/r107.htm

5. It must be recorded that in the eight years since the publication of that Report nothing whatsoever has been done by the legislature to amend the law to extend jury service to non-nationals. It is also somewhat surprising that no institution of the EU has raised the matter with Ireland.

Non-nationals tried exclusively by jury of Irish nationals:

6. All EU nationals, including Irish nationals, are convicted by juries composed exclusively of Irish citizens who, in addition, are essentially Christian. This can lead to a perception by non-nationals that convictions obtained in such cases are racially biased. As of 31st January 2021 there were 4,052 prisoners in Irish jails of which 600 were non-nationals. This is 14.8% of the total prison population ⁸ There were 110 Polish nationals and 81 Romanians.

7. This figure of 14.8% is disproportionately higher than the percentage of non-nationals in the population (11.6%). This disparity could be accounted for by the willingness of courts (including juries composed exclusively of Irish nationals) to convict non-nationals more readily than nationals or because of a bias by sentencing judges towards non-nationals.

8. A non-national who is tried by a jury exclusively composed of Irish nationals is not being tried by his/her peers which is his/her constitutional and legal right and is a clear breach of the rule of law which demands equality of treatment in the judicial trial processes.

9. One of the pillars of the EU Treaties and EU law and policy is the free movement of EU nationals around the territories of the member states of the EU. To exclude EU nationals from the administration of justice in one of the member states, as Ireland does, by prohibiting EU nationals from other EU member states living in Ireland from the possibility of serving on juries on the sole basis of their nationality is a clear breach of the letter and the spirit of the EU Treaties, laws, policies, and aspirations.

⁸ <https://www.irishprisons.ie/information-centre/statistics-information/monthly-information-note/>

B. Prohibition on Juries in Criminal Cases to Give Reasons for their Verdicts

General requirement for decision makers to give reasons:

1. One of the singular features of the rule of law is the requirement that those who exercise powers against the individual, which are likely to detrimentally affect that individual, give reasons for that decision. This is a principal applied in virtually every aspect of Irish life. A local authority who refuses a planning application must give reasons, a school expelling a pupil must give reasons, an applicant refused a social welfare payment must be given reasons and an employee dismissed from employment must be given reasons.

Criminal juries do not give reasons for verdicts:

2. There is one glaring omission in this regard within the Irish legal system. Juries in criminal trials do not give reasons for their verdicts. juries merely render a one word or two word verdict such as 'guilty' or 'not guilty'. There is absolutely no legal obligation on a jury to elaborate in any way on their verdict. In a sentence, they are not obliged to give reasons for that verdict.

3. This appears to be a practice rather than a legal rule. This practice has been in existence from time immemorial despite monumental changes in societal, democratic and human rights values in recent years. The right that those who exercise power explain the rationale for that exercise was hard won and is entrenched and to the forefront in the concept of the rule of law. The continued requirement that juries in criminal trials in Ireland are not required to render reasons for their verdicts is utterly antiquated, indefensible, unexplainable, unjustifiable, a failure of due process and should have no place in a society which claims to uphold the rule of law. It is an alien practice in an open and democratic society.

4. The superior courts have guarded the secrecy of the deliberations of juries with the threat of contempt of court. It is therefore virtually impossible to know what goes on behind the closed doors of the jury room except anecdotally which of course may not be reliable. A recent case might throw some disturbing light on what actually can happen in a jury room. A juror involved in convicting a man of rape has alleged that fellow jurors engaged in bullying and that they did not understand the basic principles of a criminal trial.⁹ This case is currently before the Court of Appeal.

Other criminal courts give reasons:

5. If every criminal court did not give reasons for their verdicts then the stance of juries would not in any way be usual. But that is not the case. Other courts exercising criminal jurisdictions give reasons for their verdicts whether it be one of conviction or one of acquittal. The District Courts hear thousands of minor offences annually and a reason is given in each case. Most are rendered verbally immediately with the occasional decision being adjourned and given later in writing. The Circuit Court hearing appeals from the District Court behave in precisely the same manner. The non-jury Special Criminal Court (which hears serious criminal cases similar to those heard by criminal juries) gives detailed written reasons for each verdict. Indeed, all courts exercising civil jurisdictions, all kinds of bodies and individuals who make decisions in a myriad of situations always render reasons. This is an indispensable feature of a democratic society founded on the rule of law and is now the norm rather than the exception. Thus each exception to this norm must be absolutely justified.

6. All criminal verdicts rendered by juries have serious consequences both for those accused of crimes and for society in that the cases heard by juries relate to serious crimes. For the convicted person, the consequences are grave and devastating. Apart from a long period of imprisonment, reputational damage and financial loss there may be family and personal upheaval. In the case of acquittal the accused person and, more importantly, society is entitled to know why the prosecution was unsuccessful. Was it

⁹<https://www.irishtimes.com/news/crime-and-law/courts/juror-alleges-bullying-by-fellow-jurors-during-trial-court-hears-1.4458760>

because the evidence was so flimsy that the prosecution should not have been brought or some breach of the legal rights of the accused had occurred? Or was there some failure in the investigation or the prosecutorial processes?

Civil juries answer specific questions:

7. Contrast the laconic verdict of a criminal jury (one word or two words) with the much more profuse and targeted verdict of a civil jury. Juries in civil cases are drawn from the same panels as in criminal trials and from which, of course, non-nationals, including EU nationals, are excluded. While there are very few juries in civil cases (in defamation cases for example) the jury will have heard evidence, maybe over many days, and will hear only once from the judge a great many legal definitions, rules of law and procedure. Instead of the jury being allowed to consider whatever it chooses or nothing at all, the practice of the judges in civil cases, after hearing submissions from lawyers for the litigants, is to set down a series of questions which must be answered by the jury in reaching a decision. It seems that the jury cannot depart from those questions. The interesting feature is that this flexible practice was adopted by the judges and is not founded in any legal rule.

8. This practice was seen very clearly in a defamation case mentioned in paragraph C3 below. In that case, the judge at the end of the evidence and after an explanation of the relevant law and evidential principles to be applied gave the jury a list of nine questions to answer. In this way, justice was served by the judge, the litigants and the public, knowing that the jury were compelled to direct their minds and attention to nine specific issues which had arisen in the course of the trial. This, at least, gave to the litigants and society the reassurance that the jury had directed their minds to those particular issues and were not left at large to pick and choose the topics they might or might not consider. This latter is precisely what a jury in a criminal trial is left to do.

Absence of justification for different practice between criminal and civil cases:

9. Juries in both criminal and civil trials, who it must be remembered are lay persons with mixed abilities and educational backgrounds, are drawn from the same panels. Each jury civil and criminal jury has to condense and process evidence (from different witnesses often spread over a number of days) and to absorb, comprehend and apply complex issues of law and evidence which has been explained to them only once by the trial judge. Each jury can, and often do, seek clarification from the judge in open court on any matter that they consider they need assistance with.

10. Why then is there a different practice between the civil and the criminal jury with regard to verdicts? Can it be said that the legal and evidential issues that arise in a defamation case with a civil jury are more complex than those that arise in a murder trial with a criminal jury where the defence may be provocation or self-defence? Can it be said that in a rape trial before a criminal jury that the issues of the definition of rape and the definition of consent and the definition of corroboration are less complex than the issues arising for a civil jury in a case of defamation? Why should the parties in a defamation case have a clear set of issues presented to the civil jury for decision whereas the parties contesting major and serious crimes, such as murder and rape, have to do with a simple 'guilty' or 'not guilty'? Why the different judicial approaches? This difference in practice is incomprehensible and indefensible. Indeed, this inequality in treatment in a judicial forum can be characterised as a travesty of justice, a patent discrimination and an egregious breach of the rule of law.

Common practice should be adopted:

11. This writer is not advocating any radical change with regard to the requirement of criminal juries to give reasons for their verdicts. He does not advocate that a diverse panel of twelve laypersons should write comprehensive reasons for the verdict. He acknowledges that would be a Herculean task. Nor does he advocate the requirement that the judge be present during the jury's deliberations and that the judge writes the reasons for the jury's verdict.

12. This writer advocates the simple solution that the practice of setting out specific questions for civil juries be transposed into the criminal jury system. In the absence of a clear justification advanced for the continuation of the difference in practices with regard to verdicts between civil and criminal juries there is absolutely no conceivable reason why the practice used in civil juries cannot become uniform across all juries, criminal and civil. To do so seems a relatively easy task to achieve in that it does not require any legislative change though it should, for transparency and clarity, be put on a statutory footing. The requirement to answer a series of questions in criminal cases, as in civil cases, would not in any way violate the secrecy of the jury's deliberations. On the contrary, it would go a very long way towards giving assurance to those on trial and to society in general that the jury carried out its task of rendering a verdict after due deliberations in accordance with the evidence and the proper application of the appropriate legal rules and procedures.

13. Such a change would enhance the quality of criminal justice by bringing a modicum of transparency to an existing opaque issue, would ensure trials in due course of law and would comply with the requirement of the rule of law that all entities making decisions which infringe on the rights of the individual should render reasons for those decisions.

C. Defamation and Privacy

Private sector media:

1. The various media in Ireland are all, with one exception, private businesses whose aim, one assumes, is to make profit. The exception, the national broadcaster (RTE), which is State owned and State controlled, is required to be self-funding which is achieved through a compulsory licence fee and advertising revenue.

Issue of 'damages' exaggerated:

2. The statement in the 2020 Rule of Law Report on Ireland ¹⁰ that 'frequent defamation suits, high costs of defence and high damages awarded by Irish courts are seen as an inducement to self-censorship and a constraint to media freedom, also to the detriment of the fight against corruption' has to be challenged. Not one fact of any description was produced to support any of these highly spurious claims. One case was used in an attempt in some way to support these claims. But how many defamation cases have been heard in Irish courts in the last five or ten years? A handful at the most. This is not a real issue and is more of 'a storm in a teacup' by media groups.

Legal costs an impediment to vindication of one's good name:

3. The high costs of defending a defamation claim is suggested as one of the reasons why the media should be given greater latitude to defame individuals. Legal costs in Ireland are astronomically high. This applies to all litigants. A private litigant who seeks to vindicate his or her good name by initiating a defamation action against a media outlet is put at enormous risk. The media organisation against whom the action is taken is, in general, a profitable and wealthy business. There are few defamation cases simply because media organisations know that the fear of losing and being saddled with enormous costs has a 'chilling' effect on those defamed and who consequently do not initiate litigation. In the two cases mentioned in the next section the legal costs of a successful litigant was €225,712 and for the unsuccessful litigant the legal costs were estimated as €1 million. Defamation actions are not for the faint hearted.

¹⁰ Section III on Media Pluralism.

4. The claim of self-censorship is self-serving by the self same media who feel it is their right to publish what they want without any legal consequence. It would have been a more valid point if the media organisations had indicated what kind or type of corruption cases they had been prevented from investigating and, more importantly, who were the targets of those investigations.

5. The 2020 Rule of Law Report on Ireland¹¹ highlighted only one defamation case from the very few cases that were heard in the Irish courts. That was extraordinarily selective. In *Independent Newspapers (Ireland) Ltd v Ireland*¹² decided by the European Court of Human Rights in 2017 held, in the context of a €1.25 million award in a defamation case, that unpredictably large awards of damages in defamation cases were considered capable, in principle, of having a chilling effect on media's right to freedom of expression and therefore require particularly careful scrutiny. The ECHR never alluded to the fact that the newspaper involved was a profit making business whose motivation in publishing the defamatory material - the suggestion that the injured party was having an extra-marital affair which was justified, inter alia, by the photo-shopping of photos of the injured party - was higher sales of the newspaper and not the furthering of freedom of expression. Nowhere in that section of the 2020 Rule of Law Report on Ireland was there any mention that a jury held that the newspaper had defamed the litigant who brought the action.

6. The 2020 Rule of Law Report on Ireland should have referred to another defamation case which was hugely reported on in the Irish media. That was the case of *O'Brien v Sunday Business Post*.¹³ In that case a very well known and wealthy businessman, who himself had a large shareholding in Independent Newspapers and in various radio stations, sued a newspaper for defamation. It is somewhat ironic that a large shareholder in a newspaper which went to the European Court of Human Rights

¹¹ Section III on Media Pluralism.

¹²[https://hudoc.echr.coe.int/eng#{%22fulltext%22:\[%22\%22CASE%20OF%20INDEPENDENT%20NEWS%20AND%20MEDIA%20AND%20INDEPENDENT%20NEWSPAPERS%20IRELAND%20LIMITED%20v.%20IRELAND\%22%22\],%22documentcollectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\],%22itemid%22:\[%22001-69398%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22\%22CASE%20OF%20INDEPENDENT%20NEWS%20AND%20MEDIA%20AND%20INDEPENDENT%20NEWSPAPERS%20IRELAND%20LIMITED%20v.%20IRELAND\%22%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-69398%22]})

¹³<https://www.irishtimes.com/news/crime-and-law/courts/high-court/denis-o-brien-loses-defamation-case-against-sunday-business-post-1.3811041>

claiming that the unpredictably large awards of damages (and costs) in defamation cases were considered capable, in principle, of having a chilling effect on his newspaper's right to freedom of expression should sue another newspapers for defamation thus impeding that newspaper's freedom of expression. The adage 'what is sauce for the goose is not sauce for the gander' comes to mind.

7. While the action for defamation failed in that case the most chilling effect was the fact that the businessman had the legal costs of the action awarded against him. The legal costs in that case were estimated to be €1 million. Had the litigant in the Independent Newspapers case lost she would have been faced with a similar catastrophic bill for legal costs. The real 'chilling effect' for a person who alleges defamation is the risk of losing and being straddled with a crippling bill for legal cost, often putting a family home at risk which could be seized to settle the legal costs bill.

Absence of Privacy Law in Ireland:

8. Ireland, unlike many other member states of the EU, has no statutory laws which guarantee privacy rights to the individual. While there is an implied constitutional right to privacy this has been developed, and continues to be so developed, on a case-by-case basis by the courts by individuals willing to litigate on the topic. And yet again the fear of losing and being faced with huge legal costs has stifled the proper development of this constitutional right to privacy.

9. That being so media organisations can say whatever they wish about individuals provided it is not defamation or a breach of the criminal law. The legislative and executive arms of government have shied away from providing an adequate statutory privacy law for its population. Accordingly, every individual is at the mercy of a media keen to advance its sales, and boast its advertising revenues and its readership and audience figures. The enactment of a statutory right to privacy coupled with a remedy for its breach might alleviate the necessity of tinkering around with the law of defamation. The media in Ireland have neither advocated nor supported the enactment of privacy rights.

10. The privacy of the individual should trump the needs of greedy private media businesses. Already the law protects the media with the defence of public interest. Accordingly, there is no necessity to reform the defamation law. The rule of law would be better served by the provision of a privacy law modelled on any one of those in place in other member states of the EU.

D. Accountability of Prosecutorial System

Office of the Director of Public Prosecutions:

1. The office of the Director of Public Prosecutions was established by the *Prosecution of Offences Act 1974*.¹⁴ The Director of Public Prosecution is appointed by, and removable by, the Government. The holder of that office is independent in the exercise of functions assigned to that office which, briefly, can be described as the prosecution of the serious offences.

Confusion between independence and accountability:

2. While it shall not be lawful to communicate with the Director of Public Prosecutions, or an officer of the Director, for the purpose of influencing the making of a decision to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings, it is perfectly lawful to communicate with the Director of Public Prosecutions on other matters. For example, the Director of Public Prosecutions can appeal the leniency of certain prison sentences. When that office was contacted by a concerned member of the public that a particularly light prison sentence was handed to a female whereas a male would have received a much higher sentence a reply came back pointing out that communication with the office was not welcomed.

Absence of accountability to the legislature:

3. When a member of Dail Eireann was contacted about this matter a similar response was received from that elected representative. This raised the legitimate suspicion that members of the Oireachtas seem, with regard to the office of the Director of Public Prosecutions, to conflate 'independence' with 'accountability'. The two are obviously different. At the moment there is no system in place by which the legislature can raise issues of accountability with the office of the Director of Public Prosecution. While other bodies dealing with criminal justice matters, as the police and the prison service, have come before the legislature the office of the Director of Prosecution seemed to be immune from scrutiny by the elected parliament so that issues, such as those raised below could be addressed.

¹⁴ <http://www.irishstatutebook.ie/eli/1974/act/22/enacted/en/print#sec2>

Gender bias in prosecutorial decisions:

4. This touchy reply mentioned earlier raised a general concern that all of the leniency appeals related exclusively to men and not a single one related to a woman. This led to a well grounded suspicion that a gender biased policy was being operated within the office of the Director of Public Prosecutions. From media reports on court cases it seems to be a common occurrence that women are consistently given much lighter prison sentences than men who commit identical crimes. This discriminatory practice is well illustrated in a case from last month where a married couple who together carried out sophisticated frauds pleaded guilty. The husband (a man) received four years whereas the wife (a woman) received a mere two years.¹⁵ While this disparity in sentences might be a criticism of the judges, the Director of Public Prosecutions can appeal the leniency of such sentences. When an attempt was made (not in relation to the case just mentioned) to discover what criteria was used in the decision to appeal the leniency or otherwise of such sentence the Director of Public Prosecutions became defensive. The rule of law requires that in all matters relating to the prosecution of offences and other legal functions conferred on the Director of Public Prosecutions these powers must be conducted in a gender neutral manner.

Tainting of the prosecutorial system:

5. It was somewhat surprising that the 2020 Rule of Law Report on Ireland¹⁶ noted that while the Director of Public Prosecutions has no investigative functions that office cooperates regularly with An Garda Síochána and other investigating agencies during the course of criminal investigations, particularly in providing relevant legal and prosecutorial advice'. This is extremely concerning. Where such contacts have been made at the investigation stage how can an impartial and independent decision be made whether to prosecute or not at a later stage? The rule of law requires that the prosecutorial authority is completely and totally separated from and uncontaminated by the processes of the investigation processes.

¹⁵ <https://www.thejournal.ie/solicitors-fraud-cork-5361914-Feb2021/>

¹⁶ Section II on Anti-Corruption Framework.

E. Anomaly of Twintrack Criminal Trials

‘Ordinary’ and ‘special’ courts

1. The constitutional and legal framework of the Irish State permits the establishment of courts of different jurisdictions. The first obvious distinction is between appellate courts and courts of first instance. Another is the distinction between courts exercising criminal jurisdiction and those exercising civil jurisdiction. Within the criminal jurisdiction a further distinction has to be made between ‘ordinary courts’, ‘special courts’ and ‘military tribunals’. ¹⁷ This expression ‘ordinary’ courts originated in a statute which permitted trial in a ‘special court’ where the ‘ordinary courts’ were deemed inadequate to secure the effective administration of justice and the preservation of public peace and order.¹⁸

2. Judges appointed to the ‘ordinary courts’ are appointed by the President, each must make a declaration to uphold the Constitution and the law, each can only be removed from office for stated misbehaviour on resolutions passed by both Houses of the Oireachtas, each must not hold any other office or position of emolument and each is independent in the exercise of their judicial functions. The recent innovative reforms such as the establishment of the Judicial Council, Judicial Appointments Advisory Board and, more critically, the Judicial Conduct Committee apply to the judges of the ‘ordinary courts’. ¹⁹

‘Special courts’:

3. The ability of the Government to establish Special Criminals Courts was provided for under Part V of the Offences Against the State Act 1939, as amended. The Act was, inter alia, to make provision in relation to actions and conduct calculated to undermine public order and the authority of the State.

¹⁷ See footnote 1 above.

¹⁸ <http://www.irishstatutebook.ie/eli/1939/act/13/enacted/en/html?q=Offences+Against+the+State+Act+1939> section 46.

¹⁹ <https://judicialcouncil.ie/about-the-judicial-council/>

‘Special courts’ under the exclusive control of the executive:

4. These ‘special courts’ are exclusively controlled by the executive arm of the State and fall outside, and in contrast to, the constitutional rules for ‘ordinary courts’ established under the Constitution. This stark executive control can be seen in numerous ways. Every Special Criminal Court shall consist of an uneven number (not being less than three) of members as the Government shall determine, and different numbers of members may be fixed for different Special Criminal Courts. It is the executive who decides whether a person should be tried in an ‘ordinary criminal court’ or in a ‘special criminal court.’

Membership of ‘special courts’:

5. Each member of a Special Criminal Court shall be appointed, and be removable at will, by the Government. No person shall be appointed to be a member of a Special Criminal Court unless he is a judge of the High Court or the Circuit Court, or a justice of the District Court, or a barrister of not less than seven years standing, or a solicitor of not less than seven years standing, or an officer of the Defence Forces not below the rank of commandant.²⁰

Members of ‘special courts’ do not enjoy constitutional judicial independence:

6. Members of a Special Criminal Court are appointed and removable by the Government without any role in that process by the Oireachtas, they do not make any declaration to uphold the Constitution and the law, they can hold other offices or positions of emolument. Most importantly these members are not constitutionally independent in the exercise of their functions. This omission is a fundamental, inexplicable and indefensible breach of the rule of law. The Judicial Court has no remit over the members of a Special Criminal Court.

²⁰ See footnote 17: section 36.

7. While it may be correct to say, as was said in the 2020 Rule of Law Report on Ireland that ‘a panel of serving judges from the High Court, Circuit Court and District Court are appointed to the Special Criminal Court’²¹ though it has happened that barristers have been appointed as members to a Special Criminal Court. It is not known whether it is a condition of appointment as a judge of the ‘ordinary courts’ that those appointed should be willing to serve as a member of a Special Criminal Court. Nor It is clear whether the Government invites judges of the ‘ordinary courts’ to become members of Special Criminal Courts. If so, is this invitation extended to selected judges or to all eligible judges. Since there is no President of a Special Criminal Court it is not clear who decides which members should sit to hear which cases. It is also not clear whether there is any advantage to be gained from a promotional point of view for a judge of the ‘ordinary’ courts to serve as a member of a Special Criminal Court.

8. Whether the operation of Special Criminal Courts breaches the rule of law as regards judicial independence is a highly debatable point. Since the membership of those courts fall outside the remit of the Judicial Council, and its related bodies, it is not then correct to say, as the 2020 Rule of Law Report on Ireland says, that: ‘A new body in charge of disciplinary proceedings against judges has been established, improving accountability of judges.’

²¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602583272454&uri=CELEX%3A52020SC0306> - footnote (1)