

## Ian Mitchell's Law-related BOOK RECOMMENDATIONS

06 – *Supreme Court* – Mac Cormaic

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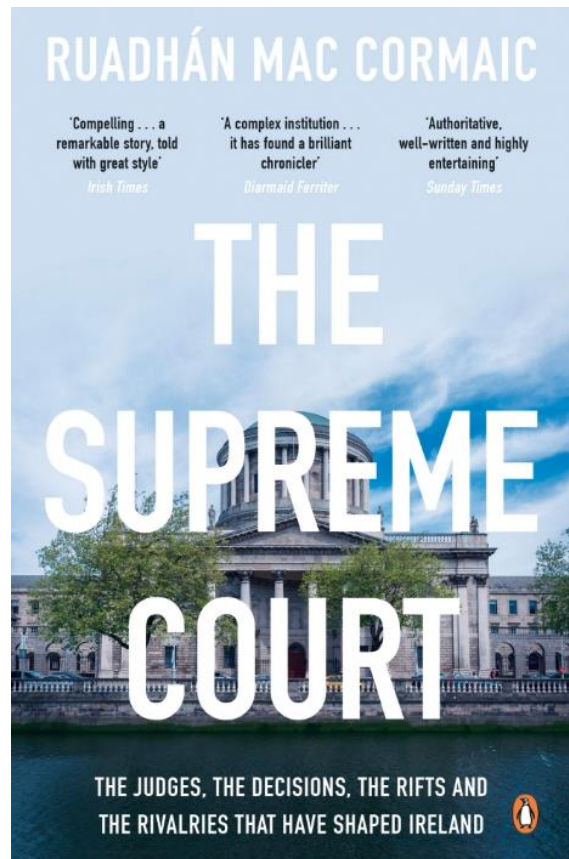
**Title:** THE SUPREME COURT – THE JUDGES, THE DECISIONS, THE RIFTS AND THE RIVALRIES THAT HAVE SHAPED IRELAND

**Author:** Ruadhán Mac Cormaic

**Publication info:** First published in Ireland 2016, by Penguin Books 2017  
(available on Amazon, [click on cover image for link](#))

**Keywords:** Law, Ireland, judges, courts, constitution

**Reviewer:** Ian Mitchell, 19 July 2018



**Reason to read:** This book tells the story of how independent Ireland has come to be as it is at a constitutional level. It is the first history of the Irish Supreme Court. It also offers an insight into the politics of the judiciary in a small country with big ideas about its constitution. The author writes with authority yet also with a strong narrative drive—as you’d expect from a professional journalist.

### ***Main talking points:***

1. After leaving the United Kingdom, which has an unwritten constitution, Ireland decided it needed a written one, and a Supreme Court to adjudicate on interpretations of it. For forty years, the court did little more than act as the highest appeal court in the land, rather along the lines of the House of Lords in London. Starting in the 1960s it began to offer interpretations of the Constitution which had elements of the then fashionable (in the United States) tendency towards “judicial activism”. This has continued with varying levels of intensity since then, and has allowed the court to exercise a much greater influence over the legal environment in Ireland than the House of Lords did in Britain. The result has often been bitter quarrels between a conscientious court and an often partisan and manipulative, and occasionally corrupt, political class. The politicians seem to have been extremely insensitive to the needs of the Irish people, and to have resented the court’s attempts to make them bear some of the moral responsibilities of power.

2. Despite the court's vigilant defence of its own independence, it is astonishing the extent to which the judges have been selected on party political lines. It is equally striking how, once appointed, the judges have judged according to conscience and their view of the law, ignoring the party which appointed them. This is similar to the way in which the Republican Party-appointed judges on the US Supreme Court in *US v Nixon* (1974) voted against the man whose party appointed them (in two cases who appointed them personally). The best judges everywhere completely ignore any ideas about "accountability" that politicians from time to time try to impose on the judiciary. Ireland is not deficient in this respect.
3. The disappearance of the British Ascendancy from Ireland did not mean the end of ascendancy. It merely made way for the Dublin Ascendancy (see "Surprising points" below) Mac Cormaic evokes this mood when he says, "Ministers would occasionally bump into judges at social or sports events. ('You would not meet the judiciary at Croke Park, and less again Lansdowne Road for soccer matches,' says one disgruntled minister. 'But rugby matches, they would be there in strength.')" (p. 359)

***Incidental interest:*** There is quite a bit about the EU referendums in Ireland. The first one concerned the Single European Act in 1986. (Ireland has to have a referendum on any meaningful change to the Constitution.) The state argued that when Ireland signed up to the EEC in 1972 voters in the referendum held then knew that the body they were joining was likely to evolve with time into a closer union. Therefore, as no fundamental change was contemplated, no referendum was required. In April 1987, the Supreme Court rejected this argument, holding *inter alia* that the idea of a single European foreign policy went beyond the "essential scope and objectives" of the EEC. (p. 259) They argued that, though the government had the right to pursue any foreign policy it liked, it had no right to give away the foreign policy-making power to an outside entity like the European Commission. Rather as the Scottish government did in 2014, the Irish government used taxpayers' funds to argue for a "yes" vote. Unlike in Scotland, that sort of banana-republic partisanship was adjudged unconstitutional by the Supreme Court in a later referendum on changes to the divorce laws.

***Style:*** Clear and fast-paced, but journalistic and entirely devoid of either personality or wit. (Not very "Irish", unlike the legal profession)

***Surprising points:*** In a word: cronyism, which includes, but is not limited to, nepotism. The higher levels of the courts in Ireland were until recently substantially staffed by middle-class Catholic men who had been to private schools, University College Dublin (why not Trinity? presumably because of its Old Ascendancy Protestantism), and supported Fine Gael (centre-right). But even Fianna Fail were at it: Jack Lynch appointed his old golfing friend Billy FitzGerald, Chief Justice in 1972. (p. 153) When FitzGerald died in 1974, Lynch's successor, Liam Cosgrave of Fine Gael, appointed Tom O'Higgins to replace him. Tom O'Higgins was related to Kevin O'Higgins, the Minister for Justice, who was his uncle and godfather. The new Chief Justice's father, Thomas O'Higgins, was a minister in the government, and his brother, Michael O'Higgins was the leader of the Irish Senate. (p. 178) The practice has moderated since, but by no means disappeared.

The corollary of cronyism is patronage. Here too, Ireland seems to have been ahead of the pack. Mac Cormaic describes lobbying for judicial appointments in the lower courts in these terms: “Local solicitors would contact their TDs (i.e. MPs), who would call or write to ministers or their advisors to convey the message. Candidates’ election agents would seek preferment on the basis of their service to the party. Family members of would-be judges would turn up at weekend hurling matches, where they would, supposedly by accident, bump into a TD or a minister.” (p. 356) As recently as July 2011, when nominations were open for no less a position than the Chief Justice, one judge lobbied hard for the job. “He canvassed ministers, knocked on TDs’ doors at night and went to Mayo to approach several people whom he had never met but who happened to be acquainted with the Taoiseach. One day, in the run-up to the government’s decision, the wife of a senior minister was pushing a trolley along a supermarket aisle when a woman approached her, introduced herself as this judge’s wife and said he would make a great Chief Justice.” (p. 378)

**Link(s):** Nothing direct, but here is a short clip of the Irish Supreme Court in action recently (filmed live for the first time): <https://www.youtube.com/watch?v=ijzcyIm-Blc>

**Negative issue(s):** One major issue never discussed is what the authentically Irish tradition of law is that is so often mentioned in the text? There are many references to the Irish judges wanting to get away from the British approach to a more distinctively Irish one. But what is that? It is never described, leaving the reader to conclude that the nepotism and cronyism are the most authentically Irish features of the law in West Britain—along with the judges’ admirable disregard for any such unjudicial connections when considering the cases that come before them. Their disinterested approach is not reciprocated by the politicians their decision affect. When the mood takes them, they sulk, attack, leak, cheat, manipulate, cold-shoulder, pontificate, posture and pose—like politicians everywhere. You get the impression that most of them would, as much as in Scotland, happily get rid of the burden of an independent judiciary and run the country unfettered by the rule of law.

**Overall recommendation level:** High.