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# A Guide to the referendum on the 33<sup>rd</sup> Amendment to the Constitution

## **Introduction**

On October 4<sup>th</sup>, voters will be asked to approve or reject the 33<sup>rd</sup> amendment to the Constitution which proposes to establish a Court of Appeal. If passed, this will allow the Oireachtas to establish a new Court named the Court of Appeal which will hear appeals from cases decided by the High Court. It will also introduce important changes in the functioning of the Supreme Court.

## **The courts system in the Constitution**

As it stands, the Constitution provides for “Courts of First Instance” – in particular, the High Court – and a Court of “Final Appeal”, the Supreme Court. The Constitution says that the Supreme Court will have “appellate jurisdiction from all decisions of the High Court”. Effectively, this means there is a right of appeal to the Supreme Court in all cases decided by the High Court (although this can be restricted in certain situations by ordinary law).

Therefore, the Irish Supreme Court – unlike equivalent courts in other countries – does not select the appeals it hears; by default it hears all appeals from High Court judgments. Consequently the Supreme Court deals with a comparatively large volume of appeals. In recent years, the time taken for appeals to be decided has grown to roughly 4 ½ years.

The Constitution also contains specific rules about judgments on the constitutionality of laws passed by the Oireachtas. Usually, in cases involving more than one judge, each judge may publish separate judgments. Occasionally judges may disagree on the correct ruling in a case, the case then being decided on a majority basis. In such cases the court may publish a “majority” judgment and “dissenting” judgments. However, where the High Court or Supreme Court rules on a case concerning the constitutionality of a law, only one judgment – the majority judgment – may be published. In such cases, it is not disclosed whether or not there were any dissenting judgments or what the arguments in those dissenting judgments were. This is called the “single judgment rule”. It applies to cases where the

Supreme Court considers the constitutionality of a bill referred to it by the President under Article 26 of the Constitution, as well as judgments concerning the constitutionality of laws already in force.

### **The proposed changes**

If the referendum is passed it will result in three important changes to the functioning of the courts system.

Firstly, a new Court of Appeal will be given jurisdiction to hear appeals from decisions of the High Court (subject to exceptions that may be defined in legislation). It may also be given jurisdiction to hear certain appeals from other lower courts. Therefore, most of the appeals from High Court cases that are currently heard by the Supreme Court would be heard by the new Court of Appeal instead.

Secondly, the Supreme Court will effectively be able to choose which appeals it hears, whether from the Court of Appeal or directly from the High Court. There will no longer be an automatic right of appeal from the High Court (or the Court of Appeal) to the Supreme Court. Instead, the Supreme Court will decide to hear an appeal from either of these lower courts where it is satisfied that “the decision involves a matter of general public importance” or if this is in the “interests of justice”. Usually, the Supreme Court will hear appeals from the Court of Appeal; only in “exceptional” circumstances will it take appeals directly from the High Court. Essentially, the Supreme Court will become a more specialist appeals court, hearing appeals only on points of law that it deems to be of sufficient importance.

Thirdly, the “single judgment” rule that currently applies in constitutional cases will be abolished, at High Court, Court of Appeal and Supreme Court level. This would mean that individual judges’ dissenting judgments could be published in cases concerning the constitutionality of laws. However, the rule will still apply to Supreme Court judgments on bills that have been referred from the President under Article 26.

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**What are the arguments for and against?**

Arguments for a 'Yes' vote	Arguments for a 'No' vote
<p>The establishment of a Court of Appeal is necessary to deal with the backlog of appeals waiting to be heard in the Supreme Court. The current delays undermine the right to access justice as well as public confidence in the administration of justice: "justice delayed is justice denied."</p>	<p>The problem of excessive delays does not in itself justify the establishment of an entirely new court. The backlog of cases might be dealt with using existing resources, in particular through a more efficient approach to managing the appeals list. There may be ways of reducing the duration of hearings with the current system, thus achieving the same result.</p>
<p>The Supreme Court should be allowed to concentrate on clarifying and developing points of law of public importance. This is the role played by courts of final appeal in many other countries.</p> <p>This may assist in making the courts system as a whole more efficient by allowing the Supreme Court to develop clearer guidance to lower courts on complex or difficult issues of law.</p>	<p>In a small jurisdiction such as Ireland it may not be necessary to create a final-appeals court with a selective jurisdiction over appeals.</p>
<p>Abolishing the "single-judgment rule" will make constitutional adjudication more transparent. It will improve the overall quality of constitutional jurisprudence as competing arguments and interpretations will be available to lawyers and the general public.</p> <p>The concern which originally led the rule to be adopted – that is, the concern that dissenting judgments might weaken the authority of the court's decision – are no longer relevant in today's political climate.</p>	<p>The "single-judgment rule" still serves a valuable purpose. It allows the Supreme Court to stand as a single authority in politically sensitive cases.</p> <p>At times of political crisis, there is a risk that controversial constitutional judgments might prompt a political backlash or an attack on judicial independence. If it is disclosed that a constitutional judgment, which creates difficulties for a government, was decided based on a narrow majority, it might result in a government challenging or failing to accept the judgment.</p> <p>Thus the rule helps to secure the authority and independence of the Supreme Court. The countervailing benefit – that of dissenting judgments being published – is of very slight academic value.</p>