

Symposium: Jurisprudence and its Impact Upon Public Policy

Jurisprudence and its Impact Upon Public Policy – An Address

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President, thanks to the Society for the invitation and I was delighted to hear, I think perhaps one way of putting it, as you said, that it was thought a good idea that jurists or lawyers and economists, sociologists, statisticians should all be friends. So thank you very much for the very warm welcome into the fold. I am taking your invitation to treat jurisprudence in its broadest of forms and terms. Happily for me, because I do remember studying jurisprudence for my degree and it reminded me of the dusty, very philosophical books that I found more difficult to get to grips with at the beginning of my degree. But in its very broad form what I'd like to look at in the context of a specific topic is the role of Ireland's common law in society and then the very specific context of the jurisdiction of the Irish courts - agreements for that jurisdiction to be conferred in Irish courts as regulated in particular by EU law but then mixed up in the context of the Withdrawal Agreement and Brexit and how that might influence, in turn, public policy and also Irish law itself.

What I'd like to look at Irish law within the Irish legal system within the context of the EU, and then try to narrow that to look at some of the interesting issues that I think arise whenever we consider how we might bring a focus to promote Irish courts and Irish law such that Irish jurisprudence in its broadest sense, is used as a way of determining disputes. And that's particularly key in the EU sphere, also in the international plane, and particularly when, as Paul Gallagher said, we do stand on the cusp of a pretty exceptional time, and not least for the reasons that Paul spoke about in depth as regards what we've all encountered during the last year in relation to covid-19, but also in relation to the EU Withdrawal Agreement and the Ireland/Northern Ireland protocol and the challenges that are going to be thrown up by that for Irish courts, Irish law, and EU law. So that's a broadening out of my thesis if you like. And then the narrowing down to look at some of these issues might find their way into Irish courts and why we would want them to do so. And so I propose to look at four broad headings during my presentation.

The first is just a brief introduction to what we might understand by our common law and how that has been affected perhaps more than we might imagine by our continued membership of the EU, particularly in circumstances where the UK, the other very significant common law member state is no longer making a significant contribution to the development both of policy and how that finds its way into legislation on the legal concepts within EU legislation and equally in relation to driving jurisprudence both within the member state courts and also in the European Court of Justice. And then secondly, I'd like to look a little bit about the role that law and the courts might play in that development. Thirdly, then why we want to have disputes and why parties, particularly parties who aren't already in Ireland, might want to have their disputes settled here and how that can come about. And then fourthly, perhaps a bit of crystal ball gazing about what might happen next. And perhaps whenever people look back at the minutes of this meeting, they'll see that in 2020 the Society was considering the issues of moment of the day, just as I imagine in 1847 when you were thinking about what was about to happen in Europe in 1848 and what was happening, obviously very, very close to home, that these events are very much events to be debated and recorded.

So firstly, back to the idea of what is the common law and how does that fit into a broader theme of jurisprudence and its impact on public policy? Well, and I think perhaps as a complement to what Paul was speaking about also in relation to the importance of evidence-based decision making of facts and precision that that is all absolutely what the best jurisprudence is based on and is developed from. But there's also, I think, another element which is that obviously the law is a reflection of our lives and our lives are far from perfect. And there's a gentleman who I'm just going to introduce you all to. For those who don't know him, this is Mr. Oliver Wendell Holmes. And he famously said, 'The life of the law has not been logic. It's been experience'. And that's something which we see,

in fact, reflected and phrased and paraphrased in a lot of our superior court case law, and also in extra judicial musings of our judiciary. And what Mr. Holmes said was that and I'll just read the rest of the quotation. That's a quotation that also has been woven into a very fine article by former Chief Justice Keane in an article in the *Irish Judicial Studies Journal* where he traces the development of law and the common law through a number of seminal cases which were reacting in many respects to societal impacts and events of the time, including actually the membership of the EU.

But what Mr. Holmes said was:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.

And in some ways, that's a very true reflection of actually the common law being considered to be something that's less books of stale rules and rhetoric and more something which embodies the life and breadth of social norms and the organization of public and private lives and a commonality of purposes than between the judiciary and the nation that are determining the law's path as it develops. And in some respects, this is one way of thinking about the distinctions between, on the one hand, the common law and on the other hand, what we talk about as civil law systems. That is something which then can be explored in more detail through the lens of European Union law, where you see those systems collide or collaborate or meld or cross fertilize or whatever way you want to look at it.

I suppose in a nutshell there have been a number of ways of summarizing what the common law might stand for as regards as distinct from the civil law, and Paul has already introduced those main traits when he was speaking earlier. But just to recall, the common law is based on judgments and precedent, a very strong tradition of looking, as Wendell Holmes says 'what it has been' so that we can work out what it might tend to become - a flexibility associated with the common law and its development. And that's something which in turn has lent itself to business and commerce liking the common law as a way of organizing their arrangements and agreements as compared to the civil law, which is code and rule based, and perhaps that's why you might in some respects say that the experience versus logic division lends itself to that distinction. But I believe that on the departure of the United Kingdom from the European Union and that major public policy impact will have another felt impact on Ireland's role as a common law member state within the EU, because even just looking at a couple of examples of what's happened so far as a result of Ireland's membership of the EU and the impact of policy and legislation in certain areas, if we take even that the example of commercial agreements and contracts, there was a marked change as a result of certain number of ways of trying to regulate contractual agreements and particularly for consumers as a result of EU legislation. The unfair contract terms directive was the main legislative provision, which was very code-based with provisions and legislation, which was something which was not familiar at all to Irish lawyers or to UK lawyers who would not have approached the interpretation of contracts in that way. And that's now something which has to be addressed and is overlooked at the peril of lawyers advising clients. But it's also something which has changed very greatly the way regulation interpretation of contracts is now approached.

Another example and one which I'll come onto in a bit more detail that I would like to explore is the idea of the jurisdiction of courts and the arbitration of disputes. And again, the distinction between the civil law approach, which is very much rules and code and very logical way of approaching, determining where a dispute ought to be heard on the one hand, as compared to the common law approach, the Irish law approach, which really well should be the most convenient forum and the court which is most closely associated with whatever the subject matter of the dispute between the parties is. Bearing in mind also that there is a presumption - a premium - on a defendant to a dispute with rights of defence being able to be sued in the courts of his domicile or his seat of a corporation in the case of a company or other legal persons. So there are very interesting examples and very practical examples of how public policies which have found their way into legislative provisions in different member states as against precedent and other ways of protecting fundamental principles and norms in common law jurisdictions like under our jurisdiction then met within the EU crucible and created these codes and rules and systems that then we now have to apply and use in our Irish law and Irish courts. So that's the broad introduction to where the common law, civil law and the dispute mechanism process that might fit in in that analysis.

So the second point is then what role has the law of the courts to play whenever we're looking at these issues, particularly as regards where there might be these points of conflict or melding of the common and civil law systems, as has happened within the EU and where disputes have arisen what role can become the courts play? And in particular, what role might we see for Irish courts playing? And what are the advantages of the Irish courts being involved here? I will just speak in very broad terms at the moment, but the most traditional aspect of the role of the law is the dispute settlement function - the court - and whenever the forum of the court has been encroached upon, then there are broader issues of public policy, which then play back into that in circumstances where we're now at the very sort of apex of these issues that I'm putting out for consideration, which is, does the court or does an Irish court, does it have any jurisdiction to consider these issues, to hear the dispute and to make a judgment and then to contribute which as Paul says is absolutely fundamental to the development of a strong legal system, reasoned judgments and a body of jurisprudence which is based on sophisticated reasoning and a respected, independent, informed and expert judiciary.

So how do you actually get the cases in to allow all of that to build up? Well, obviously, there are disputes happening before the Irish courts every day. But there are body of other disputes that it would be of benefit for our legal system for a number of reasons, societal reasons, economic reasons and then the broader reason of the development of Ireland's status and profile within the European Union in the first instance, particularly on the departure of the of the UK for these disputes and for Irish law to be at the forefront and for Irish courts to be able to seize these disputes. And I don't say that purely out of self-interested motives of being a lawyer. Lawyers obviously need clients and they need cases to advise on. But also there is a broader issue, not just economic reasons, but it's self-perpetuating as regards the impact and the input and the influence. I believe that Ireland can have a substantial role within the EU. So what is required in order to do that? Well, in the last couple of years, there has been a significant increase in this profile that the courts have had, that the legal profession, largely through the Law Society, also the Bar Council, has been promoting use of Irish law and Irish courts as forum and as a seat of arbitration also, particularly as regards the potential of a likely decline of London as a choice of a forum for the settlement of international disputes. The Court Service and the Department of Justice has devoted resources to increase what is available for the courts. And the Chief Justice has also been very vocal in supporting the efforts in promoting Ireland as a forum for dispute settlement. So assuming that there is still a desire for the common law to be used, particularly for commercial parties, and given that the US is also a common law system. So assuming that those things are in place and there is a desire, how can the disputes come to court? How can a court be certain whenever it has a case before it that it has jurisdiction to determine the dispute that is there?

I've spoken of the necessity at EU level to put in place a certain code which governs the jurisdictions between different member states, and that's something which has developed from a number of conventions, the Brussels Convention being the significant one back in the 1960s. And that's been developed, now it's a regulation, the Brussels regulation, which sets out in a very logical fashion the rules that apply in order to determine whether or not a court within the EU has jurisdiction to hear a dispute or not. So there are a number of reasons how a court will know and how disputes might be capable of coming to be heard in Irish courts. The first is whether they are a company here that has or a party that has a seat in Ireland and wants its dispute heard here. Obviously, the more investment and the more companies that are already here, then the more likely that that is to happen. But equally, if the defendant is not based in Ireland, then we have to look to see is there an agreement in relation to the jurisdiction of Irish courts. And this is a very key issue because this is one way that public policy or an awareness of the possibility of agreements as to jurisdiction and choice of court can assist with feeding back into this increased development of Ireland as a dispute resolution centre. And the idea of there being an agreement as to jurisdiction is something which is included in the Brussels regulation and the code itself. It is heralded in the code and it has been interpreted unsurprisingly by the Irish courts as something which has to be respected in accordance with the fundamental principle of freedom of contract or freedom to agree. So if you're a court that's interpreting an agreement between parties, you are going to look to see what the parties have agreed. If they have agreed that the Irish courts should hear a dispute or if a dispute is raised in an Italian court, for example, and there is a jurisdiction clause which designates the Irish courts as a dispute, the Italian judge should be very slow, provided that the requirements in the Brussels regulation code have been met for the Italian judge to be very slow to take jurisdiction of a case.

So is there a jurisdiction clause? This is something which there already have been moves to try to increase the prospects of disputes being heard in Ireland, at least in relation to arbitrations. An example is that there was a very concerted move in the arbitration forum in relation to international swaps and derivatives of agreements which formerly had favoured English law, English seats, as places for the resolution of disputes arising in relation to those agreements and now there is a specific move to address these in Ireland and provide agreements for Ireland to be a seat for the arbitration of disputes arising in relation to those agreements. So there are very simple remedial steps that can be taken, pre-emptive steps, in order to facilitate this. And that's how these are public policy issues

that that can be debated outside of legal circles, but in relation to the best way for business is in this instance to have their disputes, arbitrated or determined in a way that helps to develop, inform and support the development of the Irish legal system and Irish law when it's looking at these issues. Interestingly, there is a well-known Irish airline which also has in relation at least to certain of the disputes that arise under its general terms and conditions, and as regards how those disputes would be determined, it has Irish courts for the forum for certain issues arising and Irish law as the choice of law for any issues arising in relation to the general terms and conditions governing their contracts of carriage. So getting in at the ground level in that way is one way of allowing policies to filter up into how the law then might develop and the opportunities for the law to be adjudicated upon and interpreted by Irish judges as informed by Irish lawyers.

So the last point that I want to make is what might happen next? I suppose there are a couple of things that strike me here. One is that there can continue to be support for the type of practical approaches that I've just outlined as regards keeping things at home or keeping things local by inserting these kind of clauses into agreements. I mean, the bottom line is courts are there to sort out agreements. There are always going to be arrangements and issues that arise in relation to purely domestic disputes. But there are other ways of public policy moves, provided that there is support for it, to influence how disputes involving private parties and cross-border disputes could be determined by the Irish courts in particular, where that is something that can be perhaps systematically approached. And this goes for all kinds of subject matter if you think about the potential. There has been an increase before the Irish courts, I think we see recently, of intellectual property disputes, of patent disputes, which will often involve companies which might be based here but the interests are much wider than that. And the potential for those kinds of issues to continue to be developed here with input from the Irish common law, but then feeding back into the broader EU framework is really very significant, particularly when we see the UK fading away as a forum for those kind of disputes, but also as an actor having an influence in how the policies behind the codification of the legislation, which then informs how the regulation of those kinds of issues in relation to, say, for example, marketing authorisations or patent certificates would be regulated at EU level. So there's a very definite opportunity there.

And my last point is just going to be this, which is that there's also a role, I believe, for the Irish courts to continue to play not only where they are seized of jurisdiction because of a choice of law clause, but also in relation to the role for the Irish courts vis a vis the European Union Court because an increase in litigation, an increase in interventions by Ireland before the European Union Court, and possibly even questions that are being referred to the European Union Court can raise the profile of the Irish judiciary and Irish lawyers, something that there was certainly comment whenever the common law judges joined the European Union Court. The Italian judge wrote that the joinder of the insular judges had significantly contributed to the quality of hearings. Another aspect of the common law, the oral tradition was very important, the questioning of those judges and in turn, the contributions that the lawyers played before the court where were seen as very beneficial. So there is a crystal ball gazing exercise, I think, to be done there as to what might happen in the future. And the last point is that, of course, that requires support from our public institutions. We have a very strong Office of the Attorney General which is very much getting, and continuing to be, involved. The interesting thing is going to be in relation to another aspect of the dispute settlement of remote hearings, because it does allow a participation in the adjudication of disputes in the EU in a way that one might have never even considered would be possible only six months ago. But that's another way that contributions can continue to be made and the engagement that is absolutely necessary can be maintained.