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Symposium: Jurisprudence and its Impact Upon Public Policy

Jurisprudence, Sovereignty and Judicial Independence – the Irish Example

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Thank you to the Society for inviting me to participate in this symposium and also thanks to two previous speakers bringing very different perspectives to the topic for this evening's discussion and for the very clear views expressed by them.

Paul Gallagher spoke about the importance of statistics, obviously bearing in mind the name of the Society. He e was impressing upon us the importance of scientific fact and how statistics plays a role in assessing what is scientific fact.

On the real the crisis that he described, it is true that people have been are talking absolutely enthusiastically for 15 years now about the Information Society. But now we have come face to face with a monster, the Misinformation Society. That is affecting politics and public opinion and public faith in democracy, and even public faith in the law.

I recently read an article in the Sunday Times in which a member of the Supreme Court, Mr. Justice Peter Charleton, was quoted as saying that a judge doesn't decide the case, the law decides the case. In one sense that is true. But, in another sense there must be a question mark over that statement because it does raise a fundamental jurisprudential question as to what is the adjudicative process itself? Is adjudication a science of discernment and application of the law or do individual judges act creatively in deciding cases before them?

It occurs to me that when this Society was established in the 1840s, the English and Irish system of law was quite different from what it is now. Yes, it was based on precedent. And, yes, it was described as a common law system.

But in many respects, it was a organisational shambles in which different systems of law, different concepts, and different jurisdictions, including chancery law and common law, were competing with each other as internal elements of the English legal system which applied in Ireland as well.

In the 1870s, when the last major discussion of jurisprudence took place in this Society according to Danny's introduction, there came a raft of legal reforms in the form of the Judicature Acts, which actually amalgamated a lot of the fragmented legal systems operating both in England and Ireland.

We are considering here today the potential of common law in Ireland to influence Europe and, perhaps, the potential of common law in Ireland to generate economic activity and to encourage people to have to recourse to Irish law.

First, I want to consider the role of Irish courts play in the resolution of disputes and to make a few general points preliminary points about the common law system.

I think its defining characteristic is not so much the extent to which law is codified. There are codifying statutes in common law countries. The defining characteristic, in my view, of common law is the court process involved.

And the central character of the process involved in a common law court system is the adversarial trial of issues. Some people consider that adversarial this is slightly primitive echoing a time in the 12th and 13th centuries when there was such a thing as "trial by combat" of disputes between people. There is a simplistic view that somehow

the adversarial tradition in common law is a primitive hangover from some previous age, system, and that the modern scientific ideal is to have an inquisitorial rather than an adversarial system., and that it would be better to have a system inquisitorial determination of matters, in which a judge effectively takes over the management of a case and takes over the process of deciding it, and that the oral tradition (to which Margaret referred)t is discarded largely. And in which every case becomes a judicial investigation as to what the applicable law may be.

I agree with Margaret. I think that economically it is hugely important for Ireland that we do have the rule of law here established along the lines that we have. And that's not just a conservative position on my part.

I'm saying that a Japanese business, an Australian business a South American business, a South African business, an American business coming to Ireland and wondering how disputes are going to be resolved in the Irish court system has an instinctive grasp of our system based as it is on adversarial law.

They know there will be a hearing and that our Constitution requires that the hearing be held in public. They know that the process will be carried out public. It's not just a matter of sending in documents and getting an ATM type judgment from a private process where you don't actually see how it works.

The whole process is predicated on there being a dispute and allowing both parties to the dispute to present evidence in public, to articulate their case and to make their submissions to an arbitral judge, to contradict each other or invite the court to draw different influences from the evidence.

The judge in the common law system is an arbiter between two conflicting views, not just somebody coming up an idealized view of justice and imposing it on the parties. The judge is arbiter between the correctness of one side or the other side's case in litigation.

That brings me to the concept of arbitral justice. Ireland and the United States and Canada now and most of most of the common law world has a system of appointing judges, topical these days, and which appoints people to the function of deciding cases from outside the state's administrative system completely. So when you become a judge, and you are expected to be independent.

And in Ireland, for instance, a single High Court judge can decide, having heard a case, that a law enacted by the legislature is unconstitutional, or that an action of the executive is unconstitutional, and can annul the unlawful action or the legislation found to be unconstitutional.

That's hugely important because it differentiates us somewhat from the United Kingdom, where parliament is sovereign, and although there has been a dramatic evolution in United Kingdom law, in which we now have a supreme court in the United Kingdom which has exercised a powerful arbitral role as between Boris Johnson, for instance, and the people who contested his decision to prorogue Parliament.

But, in the end, Parliament in the British system is sovereign, whereas in Ireland the "sovereign" is the people expressing themselves through the Constitution.

But one of the things that we need to consider (and I admire but do not necessarily share Margaret's optimism on this point) is whether or not the Court of Justice of the European Union is, in fact a model which we should admire.

My own practitioner experience of the CJEU is limited I have to say, I've only been there twice as an advocate. My own experience of the CJEU, the Court of Justice of European Union was not an unalloyed pleasure.

And the reason is this. You bring your case to the Court of Justice, you put it in writing, and an Advocate General expresses an opinion to the court, you have a very brief hearing utterly different from anything that we would have in our courts, the judges that you appear before rarely ask you any question, and you are given five or ten minutes to comment on the case. And later a decision is then handed down. The decision in the Court of Justice of the European Union is a single judgement and there is no indication of any minority dissent.

So, if there are 12 or 15 judges hearing the case, nobody has any idea whether it was decided eight / seven or 15 / zero or whatever.

Nobody has any impression as to precisely how the decision was made. That isn't a very satisfactory situation because it tends to a situation where its judgment doesn't actually analyse why the losing side lost, or why the arguments of the losing side were considered wrong.

The decision to be much more: “This is how we're deciding the case and we are applying these precedents to arrive at that result.”

Curiously, if you go down the road from Luxembourg to Strasbourg, where you find the European Court of Human Rights, which was established in the 1950s largely inspired by United Kingdom law, the system does permit extensive oral argument and for minority judicial opinions to be expressed.

And I think that the capacity to see that there were at least six people to say in a 15-person court who agreed with the losing side is an important builder of confidence in the judicial process. Where those six say why the loser should have won, the majority have, in effect, to defend themselves against the minority opinion, and demonstrate why minority opinion is wrong. That is a hugely important aspect of adversarial procedure which is absent in from EU jurisprudence.

Another hugely important aspect of our system is that the Constitution requires justice to be administered in public. So it isn't a question of a judge receiving two sets of papers and going off into a room and deciding the case; the actual process itself is subject to the public gaze and the questions that a judge puts to either party and the thesis which is advanced by either party is out there to be seen by everyone - the media and other lawyers and whoever is interested in being in court, including people who have similar disputes and who want to see precisely how these dispute would likely be decided.

So, for instance, a test case about the FBD’s business interruption insurance clause is currently going on. I think judgment may have been reserved in it in the Irish High Court recently. But at least everybody saw the argument, and subscribers to The Currency publication would have seen an extensive analysis of what was actually happening in court, who was saying what, what arguments appeared to have force, or whatever. That process is absent if you don't have publicly administered law and adversarial law.

Can I go to a second point, and that is the movement and investment of international capital. Here confidence in the rule of law is hugely important. What I think is hugely important for Ireland, from an economic point of view, is that the quality of our legal decisions is maintained at a very high level.

In other words, that our judiciary is composed of people who are not merely of sound judgment, but people who are able to articulate the reasons why they are deciding cases.

So the advantage, for instance, of an American corporation coming to Ireland is that they know that, roughly speaking, (and there are differences between American procedures and Irish procedures and in some respects), but fundamentally, that an American corporation party to proceeding in an Irish court actually can understand the whole system well, and can see precisely why they are winning or losing the case. And they have, of course, the right to appeal if there's an error of law which they can identify.

Our system of justice also requires that the State resources the legal system adequately to carry out such a sophisticated type of litigation and to give speedy results. And on that point, I think wearing your IBEC hat, Mr President, one of the problems that I think people are concerned about is that law is becoming more complex and more costly. Some people feel that it going to law and going into an adversarial court is too economically difficult to bear in many cases.

Over my lifetime as a barrister which started in the mid-1970s, which is a long time ago now, I can say is that there has been a dramatic change in the extent to which the determination of the cases has become more costly and complex.

When I started as a barrister in the 1970s, the discovery process in Ireland was minimal and it was only resorted to in a tiny minority of cases. Now it's become generalised and has become almost an industry in itself. There are young barristers who, when they're not getting briefs to appear in court cases themselves, become discovery counsel, and they spend many happy or unhappy hours, as the case may be, assisting parties to make discovery of documentation.

That's making the law more costly and complex.

Secondly, in the 1970s and 80s, the use of written submissions to an Irish court was very limited. Now in virtually every case written submissions are demanded by the cour.t The consequence of that should be that the oral

argument and the length of a case is reduced because the judge can say, “I understand what your cases in writing. Now, let's now let's test it out in court, rather than have people elaborate all the law, all previous case law, all the facts that they are alleging by way of oral testimony.

In some sense, Irish law is beginning to converge with American law in the proliferation of the use of discovery and the use of written briefs. A brief in Ireland and in England, is a document given by solicitor to a barrister, in America you file a brief with the court, which is set out of the substance of your case. And I don't know how many people here ever gone to the American Supreme Court. And it's a challenging place because, when you're called upon to speak in the American Supreme Court you may get 10 or 15 minutes and there is a traffic light system in front of you, its green then it goes to orange you are approaching the end of your submission. When it goes red, that’s it, sit down. And that's the case over. And in America, Supreme Court justices have what they call clerks who do a massive amount of research and discussion among themselves to give their particular justice a view of the law in accordance with the judge’s particular philosophy.

So, going back to what Mr Justice Charlton said, namely that it's the law that decides cases rather than the judge, you only have to look at the row about Ruth Bader Ginsburg being replaced by Justice Coney Barrett to understand that the theory of the law decides everything only goes so far; the identity of a judge can be hugely important.

Can I also throw out for your consideration, in the context of jurisprudence and the importance of appointing people to the courts who are genuinely independent, the possibility that a judge or a number of judges in a collegiate court might not be independent is massively subversive of confidence in a legal system.

In appointing a judge, the primary characteristic sought is to be intelligent and independent – someone who can and will act as an independent arbiter between the organs of state that appoint him and the citizen in conflict with that state. That's of crucial importance.

We don't have a specialist constitutional court like many European countries including the Germans have - a constitutional court separate from their ordinary court system. The full and original jurisdiction given to our Irish High Court judges is to determine all the issues, including the constitutionality of acts of the legislature and the executive.

And it's in that context that the characteristics of an appointee to the bench as independent - as not merely competent, but also independent - is hugely important. The idea, for instance, if you were a United States corporation coming to Ireland lurking in the back of your mind that the person deciding a case might be wearing the green jersey, or if you were having a row with the Irish state, if you were an airline, say, that the judge would be biased against you as in any way or lean against you is crucial to the question of whether you invest in Ireland and whether you are happy to submit to adjudication by the Irish court system.

Coming finally to the consequence of Brexit, as Margaret said, we are now effectively the only Common-Law country left in the European Union. It's a challenge in some respects, because under our method of incorporation EU law into our Constitution, we did something that not even the Germans have done, and that is we acknowledge that European law trumps even our constitution.

The court in Karlsruhe has never said that the German constitution is completely subordinate to the European Court of Justice in Luxembourg. And there's been some controversy and tension between the two, but we do now face a very challenging time as the only Common Law country left in the EU.

It is as Margaret sees it, (and I admire her optimism), a potential cause for hope that Ireland will become more important in Europe in the development of European law. That's true.

But viewed another way, the departure of Britain reduces the numerical strength and jurisprudential strength of common law very dramatically. And whatever happens in the next few weeks as between Michel Barnier and David Frost, whatever is decided, (clearly there will be a deal and a lot of poker- playing and shape-throwing)as Paul Gallagher said, Ireland misses Britain very, very much in Europe.

British analysis of proposed European legislation, British attitudes on the appropriateness or inappropriateness of proposals at the EU Justice and Home Affairs Council where I served for five years, while not always identical with Irish values, largely coincided.

So. I hope with my hand to my heart that Margaret's optimism is justified. But I think that EU jurisprudence will be weakened rather than strengthened by the departure of the United Kingdom, and that Ireland will be lucky to preserve the most valuable parts of our own jurisprudence and constitutional order in the face of pressure from the Civil Law states. I'll leave it at that.

DISCUSSION

Sean Barrett: Law and Economics has been neglected and you moved to restore that. I was shocked at the divergence between the impact rating of Journal of Law and Economics (0.3) and Econometrica (4.3), a divergence of almost fifteen times. Our committee moved to redress the balance as Danny said in the introduction. The Comptroller's finding that the suppliers of defective house building materials had managed to transfer 98.6% of the cost to the taxpayer is not much of a deterrent. The transfer by the Ministers and Secretaries Act 1924 of all the cost of administrative error to the Minister and thus to the taxpayer might even explain why we don't yet know either the cost or the completion date for the National Children's Hospital: ultimately, Leo Varadkar and Simon Harris were not the ones who went out to calculate the amount of piping and cladding required. The three Nobel laureates, Stigler on regulatory capture (1982), Buchanan on the peculiar economics of bureaucracy (1986) and Krugman on moral hazard (2008) illustrate for me why we need more law and economics meetings and academic interchanges. The high cost of law in Ireland needs scrutiny. Is it a high cost sheltered service along with construction and health? I actually like the way lawyers do business in terms of right of representation, open adjudication and independent decision-making. When I see a dud piece of legislation it is usually down to some breach by administrators of these basic rules and the spectre of moral hazard, regulatory capture and bureau budget maximisation - or all three - looms. There is much material to be mined in our topic this evening.

Eoin Flaherty: Eoin Flaherty thanked the speakers for their informative presentations. He then asked: "Much of the discussion focused on the merits of the Irish common law system compared to the civil law systems of other EU countries. However, I am also interested to know what we can learn from them. The Irish legal system seems to feature high legal costs (National Competitiveness Council, 2016). Ireland also seems to have relatively long trial lengths (OECD, 2013). Can we learn from civil law countries in these areas? More broadly, what can we learn from the legal systems of the EU and other EU member states?"

Ronan Lyons: Ronan Lyons raised the issue of the legal system being something of a parallel planning system, unlike in other countries (especially those in civil law settings), thus impeding housing supply. He asked the contributors whether they were aware of any feasibly reforms that might have the net effect of accelerating decision-making, at a given quality, in relation to planning and construction in Ireland.

John Flanagan: John Flanagan asked how judges manage to keep abreast of modern statistical methods and technologies, in order to ensure that a fair trial is heard.