

Symposium: Jurisprudence and its Impact Upon Public Policy

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Thank you to the society for the honour of inviting me to participate in this matter and also thanks to two previous speakers bringing very different perspectives to the topic for this evening's discussion and the very clear views expressed by them. Listening to Paul Gallagher he was talking about the importance of statistics, obviously bearing in mind the name of the Society, and he was he was impressing upon us the importance of scientific fact and how statistics plays a role in assessing what is scientific fact in many respects. On the real issue that I think that the crisis that we that he's describing is that people are talking absolutely enthusiastically 10 or 15 years ago about the Information Society. But now we come face to face with the monster, the Misinformation Society, and how that is affecting politics and public opinion and public faith in democracy, public faith even in the law. And it seemed to me I recently saw an article in the Sunday Times where Mr. Justice Peter Charleton was quoted as saying that a judge doesn't decide the case, the law decides the case, and that could be true. But there is a question mark over it because it does raise the question, what is the adjudicative process itself? And it occurs to me that when the 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 shambles of a system whereby different systems of law, different jurisdictions, chancery law, common law and all competing with each other as internal jurisdictions in the English system, which applied in Ireland as well. But in the 1870s, when the last major discussion of jurisprudence took place in the Society, according to your introduction, there was a raft of legal reforms in the forms of the Judicature Act, which actually amalgamated a lot of the and fragmented legal systems operating both in England and Ireland. And we're talking here and Margaret was very strong on this issue of the potential of the common law, the potential of common law in Ireland to influence Europe, perhaps the potential of common law in Ireland to generate economic activity and to encourage people to have to resort to Irish law.

Firstly, our Irish courts. Secondly, to resolve their disputes and to make a few points about the common law system. I think its defining characteristic is not so much whether the law is codified. I mean, there are codifying statutes in common law countries. And the defining characteristic, in my view, a common law is that the process involved. And the central aspect of the process involved in a common law court is adversarial trial of issues. Some people sort of think this is slightly primitive, and there was a time in the 12th and 13th centuries when there was such a thing as trial by combat of disputes between people.

And there was a simplistic view that somehow the adversarial tradition in common law is a primitive hangover from some previous system and that the modern scientific Napoleonic view is to have, instead of an adversarial system, to have a system inquisitorial determination of matters that a judge effectively takes over the management of a case, judges takes over the process of deciding it, and the oral tradition to which Margaret referred, the oral argument is discarded largely, and it becomes an investigation, a judicial investigation of the facts and a judicial investigation about what applicable law is economically, 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 it is. 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 a dispute is going to be resolved in the Irish courts has an instinctive grasp of our system based on adversarial law. They know there will be a hearing and our Constitution requires that the hearing be in public and so that they know that the process will be public. It's not just a matter of sending in a few documents and getting an ATM type

judgment from some process and you don't actually see how it works. And the whole process is predicated on there being a dispute allowing both parties to the dispute to articulate their case, to make their points to the judge, to contradict each other or invite the court to draw different influences. And then the judge in the economic system is an arbiter between two conflicting views, not just somebody who is coming with an idealized view of justice and imposing it on parties. He is arbiter between the correctness of one side or the other side in litigation. And that brings me to this idea 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, which, by the way, is obviously topical these days, and which brings people to the function of deciding cases from outside of the state's legal system completely. So you've become a judge and you're expected to be independent. And in Ireland, for instance, a high court judge can decide that having heard a case that a law enacted by the legislature is unconstitutional. Or that an act of the executive home policy, home regulation and practice of the executive is unconstitutional and can annul the unlawful actions or the legislation which is deemed to be unconstitutional. That's hugely important because it differentiates us slightly from the United Kingdom, where parliament is sovereign and although there has been a dramatic change and evolution in United Kingdom law, we now have a Supreme Court in the United Kingdom which does have a very strong arbitral role as between Boris Johnson, for instance, and the people who contested his decision to prorogue Parliament.

In the end, Parliament in the British system is sovereign, whereas in Ireland the sovereign is the people expressing themselves through the Constitution. But to me, and the one of the things that we should consider and I admire Margaret's optimism on this point, but I'm slightly more sceptical about it, is whether or not you know of the Court of Justice of the European Union is, in fact a model to which we should aspire, my own experience on it 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 is not an unalloyed pleasure. And the reason is this, that you bring your case to the Court of Justice, you put it in writing and an Advocate General expresses an opinion to the court as part of the system, you have a hearing and the hearing is utterly different from anything that we would have in our courts. And the judges that you appear before rarely ask you any questions. Now, this is up at the top tier of the European legal process and given five minutes to comment on the case. And the decision is then handed down. And the decision in the European Court of Justice of the European Union is a single decision and there is no indication of any minority dissent. So if there are 12 or 15 judges hearing the case, nobody has any idea was it decided eight / seven or 15 / zero or whatever, nobody has any impression as to how the decision was made. And that isn't a very satisfactory situation because it tends to leave the court in a situation where its judgment doesn't actually analyse why the defendant, or the losing side lost and why the arguments of the losing side were wrong. It tends to be much more. This is how we're deciding the case and we are applying these precedents to arrive at that result. And curiously, if you go down the road from Luxembourg to Strasbourg, where the European Court of Human Rights, which was established in the 1950s largely inspired by United Kingdom law, it does permit minority opinions to be expressed. And I think that the capacity to see that there were at least six people to say in the 15-person court who agreed with the defendant is an important builder of confidence in the judicial process, at least. And the six say why the loser should have won and the majority have to, in effect, defend themselves against the minority opinion and show by the minority in the majority's opinion is wrong. And that's a hugely important aspect of adversarial procedure and which is, I think, missing in some respects from European jurisprudence.

Another point that's hugely important about 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 that 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 are advanced by either party out there to be seen by everyone the media and other lawyers, whoever is interested in being in court or people who have similar disputes and who want to see precisely how this dispute would be decided.

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

Can I go to a second point, and that is in terms of international capital. Confidence in the rule of law is hugely important. What I think is hugely important from 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, our people who are not merely people of sound judgment, but people who are able to articulate why it is that they're 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, an American corporation was a party to proceeding in large 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 law, and this is the point that I think Margaret, as I understand, is that it's desirable that Ireland should be the place where cases are decided. And I share her view as an Irish lawyer. That that's obviously something which is good for lawyers. But our system of justice also requires that the State resources the legal system adequately to try to carry out such a sophisticated 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 the people are concerned about is that law is becoming more complex and more costly and the people feel that it will go into law and go into an adversarial court is it is economically difficult to bear in many cases. And just over my lifetime as a barrister which started in the mid-1970s, just seems a long time ago now. And at all I can say is that there has been a dramatic change in the extent to which the determination of the cases has become more complex. And 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 under the obligation to make discovery 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 the party to make a discovery of its documentation. And that's making the law more complex. Secondly, in the 1970s and 80s, the use of written submissions to an Irish court was very, very small. Whereas now in virtually every case that happens and there are written submissions demanded by the court and consequence of that is that it should be, at any rate, 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 of this in court. Rather than have people elaborate all the law, all the previous case law, all the facts that they are alleging and all the rest of it by oral testimony. And so I think in some senses, 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. I did as Minister for Justice. 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, for instance, the Supreme Court justices have what they call clerks who do a massive amount of research and negotiation among themselves to sort of give their particular justice a view of the law in accordance with the judge's particular philosophy and approach to legal cases.

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

And then 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 notion that a judge or a number of judges in a collegiate court would not be independent is massively subversive of confidence in a legal system. And you have the Polish controversy at the moment. and you have controversies here now in our own country centering around the same thing. And I just wanted to make a few points, perhaps the topical at the moment. One of them is this, in appointing a judge, the primary characteristic is to choose somebody who is intelligent and independent. 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. So we don't have a specialist constitutional court like many European courts, like the Germans have a constitutional court separate from their ordinary court system, our 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 characteristic of an appointee to the bench as independent is not merely competent, but also independent is hugely important. And the idea, for instance, if you were a United States corporation coming to Ireland, the idea lurking in the back of your mind that the person deciding the 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 leaned against you or disposed to being against you is crucial to the question of whether you invest in Ireland and whether you are happy to adopt Irish law and to submit your commercial interests to adjudication by the Irish system.

So, going to the consequence of Brexit, I will finish on this point if I may, as Margaret just 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 system of incorporation European law into our Constitution, we did something that not even the Germans have done, and that is we acknowledge that European law trumped 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 put 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, I'm very optimistic that there will be a deal and a lot of poker playing and shape throwing is going on the United Kingdom for the reasons Paul Gallagher mentioned. And whatever happens, Ireland misses Britain very, very seriously in Europe, British analysis of proposed European legislation, British thought processes as to the appropriateness or inappropriateness at the Council of Ministers that I served on the Justice and Home Affairs Council, which was particularly to do with law for five years. British values, where they weren't always identical with Irish values, but largely coincide and so did their interests with Ireland. So I hope with my hand to my heart that Margaret's optimism is correct. But I say that European jurisprudence and I think will be weakened rather than strengthened by the departure of the United Kingdom and 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 states. So 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.