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A DANGEROUS CONSTITUTIONAL FORAY

I will be voting No in the referendum this week on the proposal to give each House of the Oireachtas new constitutional powers of inquiry because I believe that the proposal is very dangerous, goes far further than is necessary and is very badly thought out. The phrase "mad, bad and dangerous" truly applies to it.

The Government's proposals were finally published on the 6th of October, 2011, and have received virtually no public scrutiny, and only a pathetically inadequate, toothless legislative consideration by the Dáil and Seanad.

The text of the proposed constitutional amendment amounts to an ill-judged over-reaction to the decisions of the High Court and the Supreme Court in the Abbeylara case.

While I do support, and have always supported, the right of the Oireachtas to restore its rights to those which were generally believed to exist prior to the Abbeylara judgments, the terms of the proposed constitutional amendment go far, far further than is necessary.

We are, in effect, being asked to accept that two egregious wrongs make a right.

I have always believed that the High Court and the Supreme Court in the Abbeylara case failed to strike the proper balance between the rights of the individual and the rights of parliament under our Constitution and failed to give due weight to the constitutional separation of powers.

Because the courts in question (correctly in my view) found unlawful the process whereby a group of elected politicians were conducting their own mini inquest/tribunal of inquiry into the shooting of an armed civilian at Abbeylara, they upheld the claim by the gardaí involved that the Oireachtas inquiry was an impermissible invasion of their constitutional rights.

I think that the High Court and the Supreme Court in the Abbeylara cases, arrived at the right decision in respect of the Abbeylara inquiry, but did so on the basis of a fundamentally flawed reasoning process which left the Oireachtas power of inquiry largely emasculated.

The courts' errors, at High Court and Supreme Court level, in dealing with the Abbeylara case have now created a constitutional mess in which the Oireachtas is asking the people to compound the original judicial error by granting to the Houses of the Oireachtas virtually unlimited powers to establish McCarthyite "star chamber", highly politicised inquiries to investigate whatever and whomever future politicians of the day believe to be

of *"general public importance"* - a frighteningly wide category which potentially includes virtually everything.

This highly politicised power of inquiry would well be used to justify, say, the establishment of the Irish equivalent of a McCarthy-era congressional committee on Un-American activities. It also includes a vast range of public controversies.

This is a dangerous proposal in principle.

Since the elected politicians (principally the Government) are now attempting to bounce us into acceptance of this dangerously flawed proposal, it is incumbent that the media speak out loudly and clearly against the proposed amendment to the Constitution and demand that the Government abandons the proposal so that it can abide by its constitutional duty which is to widely consult with the people and to carefully consider and debate how the constitutional balance can be properly restored post the Abbeylara judgments in a manner that respects the fundamental rights of ordinary citizens.

I should say here that, as Attorney General, I notified the Government of my intention to intervene in the Supreme Court appeal from the judgment of the High Court in the Abbeylara case.

In the independent role of Attorney General, I sought to persuade the Supreme Court that the High Court decision had gone too far and that a fundamentally different approach to striking the balance between parliamentary and personal rights should be taken by the Supreme Court.

Although the submissions made by us on behalf of the State found some traction among a minority of the Supreme Court, it was unfortunate that a majority of the Court appears to have adopted the same erroneous analysis that characterised the original High Court decision.

We sought to persuade the Supreme Court that the Oireachtas and its Houses did not have an unlimited power of inquiry but, on the contrary, that the Constitution did allow for parliamentary inquiries by each House of the Oireachtas where that power was clearly and proportionately deployed in aid of the constitutional function of that House.

We submitted to the Supreme Court that Dáil Eireann was not merely a legislature. It was also envisaged by the Constitution to be a democratic organ of Executive accountability.

The Government is answerable to the Dáil for the manner in which the executive power of the State is exercised. The Seanad, by contrast, is a purely legislative body. The Government is not answerable to the Seanad in the same way that it is answerable to the Dáil.

We submitted to the Supreme Court that the general right of each House of the Oireachtas to establish a committee and to summon witnesses before it had to be exercised, in the case of the Dáil, primarily in respect of its legislative and accountability functions, and in the case of the Seanad in respect of its legislative function only.

The thrust of our submission to the Supreme Court was that the issue as to whether or not the good name of a citizen (elected or un-elected) could be damaged by the findings of a properly constituted parliamentary inquiry was not the central element of a test of constitutionality. We urged that the status of the person whose reputation was potentially concerned (i.e. was he or was he not a member of the Oireachtas) was not the appropriate determining factor in deciding whether a parliamentary inquiry was legitimate.

We sought to persuade the Supreme Court that the power of each House of the Oireachtas to establish an inquiry was derived solely from its own function and was not to be tested by reference to whether the inquiry had implications for the reputations of non-politicians.

Unfortunately, the middle way between the more obnoxious aspects of the Abbeylara inquiry and the rights of the Oireachtas that we argued for was not accepted by a majority in the Supreme Court.

The common elements of the majority decisions were seen as radically curtailing the conventional parliamentary powers of inquiry as far as the Oireachtas was concerned

The reaction of most democratic politicians to the Supreme Court's decision in the matter was to view it as a *"bull in the china shop"* event that had damaged the delicate balance of the separation of powers.

This view, I regret to say, has now spawned the present grotesque overreaction which seeks to accord to each House of the Oireachtas not merely the limited functional power of inquiry that we argued to retain in the Supreme Court, but a power to inquire into *"any matter stated by the House or Houses concerned to be of general public importance"* – a wide power that few imagined to exist pre-Abbeylara.

If the middle way proposed by us had been adopted by a majority in the Supreme Court, the Oireachtas would have retained what was generally supposed to be its conventional powers of establishing inquiries directly related to the constitutional functions of each House of the Oireachtas.

Unfortunately, the effect of the proposed amendment is to make *any* citizen answerable to either or both Houses of the Oireachtas in respect of *any* matter considered by either such House to be of *"general public importance"*.

Arguably, a judicial calamity is now about to spawn a political calamity. An error in relation to the separation of powers made by the courts is being availed of to accord to the Houses of the Oireachtas very dangerous powers of a highly political kind to summon

before each House or its committee ordinary citizens for judgment provided that the House in question considers the issue to be *"of general public importance"*.

The proposed amendment also seeks to seriously reduce the power of the courts to protect the rights of ordinary citizens in such inquiries

This is, frankly, a horrific outcome. And it is about time that those who know what is afoot speak out clearly and loudly against it.

Nor should we forget that we are amending our Constitution the only protection we have against a Government's abuse of power.

The terms of the Government's draft legislation, insofar as they are relied on as an assurance to the people that this power will not be abused, are largely irrelevant.

The difference between ordinary legislation (such as the draft Bill) and a constitutional amendment is that *any* future majority in the Dáil (assuming that we also proceed with the madcap scheme to get rid of the Seanad) will be able to amend the legislation so as to avail of the fullest scope of the power of inquiry on matters of *"general public importance"*.

That this is potentially a form of political *"star chamber"* should not be doubted.

The proposed amendment provides that the conduct of any person (whether or not a member of either House) might be investigated and that the House or Houses concerned may make findings in respect of the conduct of that person concerning the matter to which the inquiry relates.

This would allow any future Government of the day and its political supporters in the Dail to establish, say, the Mahon Tribunal, the Moriarty Tribunal, or the Smithwick Tribunal, or the Beef Tribunal, as "committees of inquiry" populated by politicians chosen by the self-same Government or its self-same supporters in the Dáil. It could be used by the Government to investigate the opposition (but not vice versa).

We could, for instance, have the question of where the truth lay in relation to Bertie Ahern's financial dealings decided by a committee of his enemies or, for that matter, his friends. The same applies to Michael Lowry. Politicians would be free to reject testimony of their opponents, effectively branding them as perjurers.

We could have political inquiries into press stories of public importance and into journalism.

As long as the subject of a parliamentary inquiry was a matter of *"general public importance"*, *any* citizen, private or public, could be hauled before such a parliamentary inquiry for investigation leading to findings against him or her.

The Kenneth Starr process started with a public issue, suspected corporate fraud in Arkansas, and ended with Monica Lewinsky before a Grand jury testifying about her clothing!

Even the implementing draft Bill published (which as the Chairman of the Referendum Commission, Bryan MacMahon, points out may never be enacted and could be amended or repealed at a later stage) already envisages the appointment of a parliamentary investigator who can appoint authorised persons to interview any witness considered relevant and to require them to sign statements of proposed evidence.

A person authorised by the investigator may be given power to enter at any reasonable time any premises where it is believed there are documents or information in any form relevant to the inquiry and to secure for inspection such documents and to copy or remove documents or information and to direct any person on the premises to produce any document or any information.

The investigator will also be entitled to get a court warrant to have authorised persons search your home in the company of members of An Garda Síochána.

Is this the fantasy of Robespierre or the Christmas wish-list of the Stasi?

These proposals amount to a form of collective political insanity. They go far, far beyond anything that was necessary to restore the imbalance created by the Abbeylara judgments.

They set the stage for a new form of *"democratic"* tyranny and for political witch-hunts along the line of Senator Joseph McCarthy's worst excesses in 1950s America.

I confess that I am absolutely shocked by what I find in the proposed constitutional amendment and in the proposed legislation (for what it is worth since it can be amended at any later stage). This proposed amendment of the Constitution is utterly disproportionate, disgraceful and completely unjustifiable.

A different, moderate, well thought out, balanced amendment might well be justified.

This amendment is simply disastrous. It isn't merely a matter of throwing out the baby of our constitutional rights with the bath water of recent controversies. It is a permanent charter for political bullying and tyranny of the worst kind.

It proposes to accord to any future Government (no matter who is in it) dependent on the majority in the Dáil the right to haul before parliamentary committees ordinary citizens to have their behaviour examined on the pretext that the Dáil considers that the subject matter of the inquiry is a matter of *"general public importance"*. This is sick.

Combined with their proposal to get rid of the Seanad on the ground of cost, this sets the scene for a malign future majority in the Dáil in the near future to be able to remove the

President, remove judges, to haul ordinary citizens before them for behaviour to be condemned, to have the homes of citizens searched under court powers by investigators accompanied by gardaí, etc., etc., etc.

This mad-cap proposal has crept in under the radar without any proper democratic scrutiny.

If nobody in the present Government has had the courage to speak out against it when it was being cooked up in secret, how can we trust the Government in future not to abuse these powers?

All of this is truly shameful and the only thing standing between us and its terrible consequences is the voice of the people in the privacy of the ballot box this week.

Finally, lest it be said that I am motivated by the interests of *"fat-cat tribunal lawyers"*, I am not. I publicly spoke out repeatedly against the cost and length of Tribunals. I established the successful alternative, the Commissions of Inquiry system. I initiated the reform process of excessive legal fees which is still undone five years later. I am not the mouthpiece of the judiciary or of the legal profession or of any greedy vested interest.

I think I can see this proposal for what it is – and isn't. Permit me to point out that the emperor is totally naked.

Vote No - while we still have a democracy.