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AT

THE OPENING OF A CONFERENCE ENTITLED

"THE IRISH CONSTITUTION 1937-2017"

CITY HALL, WATERFORD

7.30 PM FRIDAY 30TH JUNE 2017

It is a great honour to have been invited to deliver the keynote address at this conference which not merely honours John Hearne, the great Irishman and state-builder, credited as the principal architect of Bunreacht na hÉireann, but also the celebration of 80 years of the life of the Irish State under that Constitution.

This conference promises to be an extremely valuable symposium and reflection on our Constitution and a timely recognition of one of Waterford's great sons, John J. Hearne.

As someone who has lived his entire life under that Constitution, and who has pursued his political and legal professional career in the shade of that great and growing constitutional tree, I have come to honour, respect and to hold an affection for Bunreacht na hÉireann as a cornerstone for the development of a modern, inclusive, liberal and republican society, the type of society for which, in different times and in different ways, all our great republican patriots have worked and for which a great many devoted their lives - and many indeed sacrificed their lives.

I believe that Bunreacht na hÉireann is one of the great constitutional documents of the European continent and of the common law world, and that its enactment by the Irish people in the darkening valley of Europe in the late 1930s was, and remains, an achievement of which the Irish nation should be justly proud. Ireland is almost unique in Europe as being a Republic in which the people as sovereign have established a tri-partite separation of powers – legislative, executive and judicial – in which the power to interpret the Constitution and to invalidate laws by reference to that Constitution is entrusted to an independent judiciary subject only to the entitlement of the same sovereign people by majority in a referendum to amend that Constitution as an exercise of popular sovereignty.

The Central Role of the Judiciary

Central to the architecture of the Irish Constitution is the establishment within the court system of the judicial power of the Irish people to be exercised there by judges who are

wholly independent of the executive and the legislature in the exercise of the judicial function.

The great merit of the common law system, as it emerged in the English speaking world of the 18th, 19th, and 20th centuries has been the central function of the judicial power and its independence. The great strength of common law justice is that it is conducted in public, is adversarial in nature, and that the judiciary act as arbiters rather than inquisitors standing independently between the parties to litigation even when, as in Ireland, the State itself is one of those parties.

That defining characteristic of the common law tradition – namely that the judiciary are arbitral rather than inquisitorial in the administration of justice – is, in my opinion, the bedrock of the integrity of our republican democracy.

The Clear Constitutional Role of the Government

In recent days, there has been great controversy and debate about proposed reforms in the law relating to the tendering of advice to the government of the day in respect of the appointment of judges under Article 35 of the Constitution.

It is timely, then, to remind ourselves that Article 34 clearly states that *"justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution ..."*. Bunreacht na hÉireann clearly mandates that the **only way** in which judges may be appointed is the way set out in the Constitution itself.

Article 35 of the Constitution provides that all judges must be *"appointed by the President"*.

But Article 13.9 of the Constitution clearly states that the power of appointment of judges conferred on the President *"shall be exercisable and performable"* by the President *"**only** on the advice of the Government"*.

Article 28.4 provides that the Government must *"meet and act as a collective authority"* and be collectively *"responsible to Dáil Éireann"*.

From these separate but integrally connected constitutional provisions, it is self-evident and beyond argument that the Irish people have conferred on the government of the day the **sole and exclusive right** of determining who will or who will not be appointed to serve as judges in any or all of our courts.

That function is part of the executive power of the State and cannot be exercised either by the legislature or the judiciary. Any Act of the Oireachtas which sought, for instance, to make judicial appointments contingent upon the approval of the Houses of the Oireachtas or to force the hand of the Executive by presenting the Executive with little or no choice as to whom it might appointed as judges would be *ultra vires* our parliament and unconstitutional.

Advice On Appointments Under The Present System

These considerations, however, do not prevent the government, either of its own volition or pursuant to a statute, seeking or having available advice or recommendations to assist it in the discharge of its sole discretionary power in relation to the appointment of judges.

But, in the last analysis, the absolute limit to any such advisory procedure is that it must be regarded solely as that – purely advisory and in no sense coercive.

It was for that reason that, in the context of a previous controversy in relation to judicial appointments, the legislature in 1995 established the Judicial Appointments Advisory Board, consisting of the Chief Justice, the President of the High Court, the President of the Circuit Court, and the President of the District Court, together with the Attorney General, a practising barrister nominated by the Bar Council and a practicing solicitor nominated by the Law Society and three other persons appointed by the Minister with knowledge of commerce, finance, administration or having experience as consumers of the services provided by the courts.

The purpose of the JAAB was stated to be:

> *"identifying persons and informing the Government of the suitability of those persons for appointment to judicial office."*

As the law stands, a person who wishes to be considered for appointment to judicial office is entitled under the 1995 Act to inform the Board of that wish and to provide the Board with such information as it requires to enable it to consider the suitability of that person for judicial office.

Under existing law, where a judicial office stands vacant or a vacancy is anticipated, the Board, on a request from the Minister, is obliged to inform the Minister of the names of **all those who wish to be considered for appointment** and the Board is also obliged to recommend *"at least seven persons"* for appointment by Government to that office. In relation to the recommended persons, the Board is obliged to give the Minister particulars of education, professional qualifications, experience, and character, of such persons.

The Act only goes so far as to provide that *"in advising the President in relation to the appointment of a person to a judicial office the Government shall firstly consider the appointment of those persons whose names have been recommended to the Minister pursuant to the 1995 Act."* That is as far as the advisory process can constitutionally go.

The present Board is expressly prohibited from recommending any person for appointment unless that person has displayed in his or her practice as a barrister or solicitor a degree of competence and probity appropriate to and consistent with the appointment concerned, suitability on grounds of character and temperament and overall suitability.

Under the existing law, where the Government proposes to advise the President to appoint to a vacant judicial office a person who is *already* a judge or its equivalent in European law, the JAAB procedure does not apply. It is now proposed to change that.

It is crucial to an understanding of the existing law and, indeed, the current Bill before the Oireachtas which proposes to replace the JAAB with a Judicial Appointments Commission that both measures expressly acknowledge, as they must do, that it is the right of the Government to appoint an eligible person to a judicial position even if that person has not been recommended by JAAB or by the proposed Judicial Appointments Commission.

In other words, neither the present Act nor the proposed new Bill in any way attempts or could attempt, as a matter of law, to circumscribe or reduce the right of the Government to make an appointment of an eligible person not recommended by the advisory body.

What is the Present Debate All About?

Some people might wonder, then, why there is so much heated debate and controversy over proposed legislation which is purely advisory in its effect and which acknowledges explicitly that the Government is free to appoint persons to any judicial position without any such advice or recommendation.

However, there are very significant differences between the existing law and the Bill that the government has placed before the Houses of the Oireachtas for consideration.

The new Bill has attracted controversy for a number of reasons. Some of the reasons offered as objections to the new Bill carry more weight than others.

The language of the new Bill is, I regret to say, tendentious and misleading. It claims that the function of the proposed Commission would be *"to **select** and recommend persons to the Minister for appointment to judicial office"*.

The term *"select"* in this context is highly misleading. The idea that the Commission is selecting persons for appointment to judicial office is simply untrue. This is a case of legislative language being used to ignore the constitutional realities, and to create an illusion that judges will, in some sense, be **selected** in future by this Commission.

But buried away in Section 50 of the Bill is a telling requirement that notice of appointment to judicial office must be published in Iris Oifigiul and the notice shall *"**if it be the case"***, include a statement of the name of the person appointed was recommended under the provisions of the Act.

That vital phrase *"if it be the case"* is the only acknowledgment in the wording of the new Bill that the selection from among eligible persons appointees to judicial office remains

wholly and exclusively the constitutional prerogative, right and duty of the government of the day.

There is, therefore, a linguistic sleight of hand in the Bill published by the Government.

Minister Ross has falsely claimed that the purpose and effect of the Bill is to *"take judicial appointments out of the hands of politicians".*

The Government is composed of democratically elected politicians; it cannot delegate its function to outsiders. And no law can take the right and duty of the Government to consider and decide who should be appointed out of the hands of those democratically elected politicians who comprise the Government of the day.

Harmful change proposed by the legislation

The Bill proposes, at Section 42, that only three persons shall be recommended for consideration in respect of any judicial appointment. The change from "at least seven" to "three" is favoured by some.

I have grave doubts about the wisdom of doing that – ***especially*** in the context of the other terms of the Bill

Those other confidentiality provisions of the new Bill prevent the proposed commission from informing the Minister of the identity of any other persons who applied to be considered under the terms of the Act for recommendation by the Commission but are not among the three recommended. That information must remain totally confidential.

Under the existing law of 1995, the Minister must be informed of, and the Government is entitled to know, the names of *every* applicant who has applied to be considered.

So, it is now proposed for the first time that the Government will have no idea from reading a recommendation of the Commission which persons have *not* been recommended by the Commission or to compare those recommended with those applying for recommendation. This is a very grave fault in the proposed new system.

The system seems designed to keep the Government in the dark as to who is available for appointment, and therefore to leave the Minister completely unaware of the value to be attached to the three recommendations by reference to the other persons who applied for consideration to the Commission.

That proposed deliberate change to the law is deeply disturbing.

Unsuccessful applicants will not be informed whether they were among the three names recommended to Government, and the Government will never be aware of the identity of other applicants which the Government might well consider more suitable.

That proposed change in the law strikes a damaging blow to the right of the Government to be fully informed of the choices available in the exercise of its constitutional power and duty to appoint persons whom the Government considers most suitable to high judicial office.

That change in the law is intended to reduce the Government's power of choice by leaving the Government wholly ignorant as to whether it should accept, agree with or disagree with, the recommendations of the proposed Commission having regard to other candidates whose suitability or standing in relation to judicial appointment might well be considered by the Government to justify their appointment instead.

Constitutional Implications

This clearly intended policy embedded in the legislation is completely at variance with the spirit of the Constitution and quite possibly with its letter.

We must remember that the Government's role in appointing judges under the Constitution is not some paper or formalistic role.

The President's role in appointing judges, because it must be done only on the advice of the Government, is an entirely formal role. The appointment of a judge has been found in case law to be, in effect, that of the Executive.

But we cannot constitutionally create a situation in law in which the Executive, when advising the President, also adopts an entirely formal rubber-stamp role and function in the discharge of that function.

It is the inescapable collective responsibility of the Government itself to ensure that it appoints the best candidates to judicial office. It is not merely their right; it is their constitutional duty so to do.

That duty cannot lawfully be alienated or abrogated or delegated to any other body. The Government ***itself*** must be satisfied that it is making the correct decision. It certainly cannot be so satisfied if it is kept in the dark as to the identity of all applicants and is merely provided with the name of three persons recommended by third parties, a majority of whom are inexpert, for appointment.

This fundamental flaw which lies at the heart of the proposed legislation strongly hints of unconstitutionality.

The only escape clause from manifest unconstitutionality is the right of the Government to ignore completely the recommendations of the Commission.

And that is why there is a deep dishonesty lurking at the heart of this legislation.

It appears to the lay person to somehow divest the government of its constitutional prerogative right and duty in this area while at the same time putting in place a system designed to keep the Government in ignorance of the real choices available to it in terms of those who have signalled a desire to be considered for appointment to judicial office.

Promotional Appointment of Senior Judges

Another quite extraordinary, if separate, feature of the proposed *reform"* is the intended outcome that existing High Court judges or judges of the Court of Appeal who wish to be considered for appointment, say, to the Supreme Court as ordinary judges of that court, should, for the first time, be required to make application to the proposed Judicial Appointments Commission to be interviewed by them, and then remain ignorant as to whether, in the final analysis, they were or were not recommended for appointment by the Government or as to whether the Government even knew of their interest.

Again, the idea that the Government's function in making appointments to the Supreme Court from among sitting judges of the Superior Courts should be preceded by an interview and recommendation procedure by a lay body is utterly unrealistic and deeply misconceived.

When Government decides on appointments to the appellate courts and, in particular, the Supreme Court, issues which properly arise for consideration in that context, such as the ideological outlook of the existing court and of any proposed appointee, and the jurisprudential outlook and attitudes of any candidate for appointment are carefully considered by Government. That is their sole right and their duty.

For instance, the Government must take into account the candidate's general philosophy of life and jurisprudential attitudes as known to the Government.

To appoint someone whose views, for example, are known to be extremely socially conservative or extremely libertarian to the Supreme Court is a matter entirely for consideration by the Government alone, and definitely not by anybody else.

The achievement of a satisfactory balance of attitudes and outlooks in the Supreme Court on issues to do,say, with liberalism, social conservativism, the relationship of Irish and European law, and the jurisprudential outlook of the entire Supreme Court is a matter exclusively for decision at Government level.

Astonishingly, the proposed legislation seeks to introduce an entirely new evaluation system for appointment to the appellate courts, including the Supreme Court itself, in respect of

sitting judges. Such involvement on the part of the Commission is entirely redundant and wrong and tends to usurp the role and responsibility of the Government to determine the character and outlook of the Supreme Court.

The proposed commission is simply not in a position to second-guess the Government's considerations and evaluations in respect of such appellate appointments. In this respect, the proposed legislation is entirely misconceived and dangerous.

Who or What Decides is Merit In Appointing Senior Judges?

The Bill suggests at Section 7 that decisions by the commission to recommend should be *"based on merit"*. What else could be the criterion?

But no attempt is made - or can be made - to define what that means in the context, say, of choosing between High Court judges or judges of the Court of Appeal for elevation to the Supreme Court.

Who is *"meritorious"* in this context? Why is an independent commission in any better position than the Government itself to determine what "*merit*" means in that context and/or to rank applicants in accordance with merit?

Likewise, Section 7 also states that subject to appointments being based on *"merit"*, regard is to be had to *"the objective that the membership of the judiciary should comprise* ***equal numbers of men and women****"* and *"the objective that the membership of the judiciary should, to the extent feasible and practicable, reflect the diversity within the population as a whole"*.

These proposed statutory criteria for recommendation need to be very carefully considered.

Men and women, in any public context, are equal before the law. And as the representation of women in the top ranks of practising lawyers has increased significantly in recent years, the appointment of women judges has correspondingly increased hugely.

But mathematical equality in gender balance in the courts is not a constitutionally mandated criterion for appointment of judges. Still less is the vague-minded statement that the membership of the judiciary should *"to the extent feasible and practicable"* reflect "*the diversity within the population as a whole"*.

What the term *"the diversity within the population as a whole"* actually means is unclear. The legal profession from whom judges are appointed is what it is – lawyers simply are not reflective of the diversity within the population as a whole in any society – even if simplistic type-casting suggests wrongly that all lawyers belong to some homogeneous caste. Looking at the present Supreme Court, can anyone say that it fails to reflect diversity in any way that any other common law supreme court does.

But if it suggests that the senior judiciary should be in future selected on the basis of some form of *"positive discrimination"*, so as to have a socio-economic, cultural, racial, religious or irreligious reflection of society, the real issue that emerges is as to whether we are serious about having top class lawyers, men and women, with the best legal brains and judgment, as our judges or whether we are engaging in some kind of tokenistic dumbing down process in pursuit of some elusive form of political correctness.

I know from experience in Government that very careful consideration has been given to the principle of equal opportunity regardless of gender in judicial appointments. But that is a matter for Government in the last analysis. We cannot seek to impose it on Government from the outside or to have a recommendatory procedure which is willing to sacrifice the quality of our judiciary and its excellence on the altar of such vague-minded ideological considerations.

The Outgoing Chief Justice To Be Centrally Involved In Selecting His Or Her Successor?

Another fundamental flaw with the proposed legislation is the proposed special procedure for appointing the Chief Justice, the President of the High Court, and the President of the Court of Appeal, respectively. It is proposed, for instance, that the Minister for Justice should convene a meeting an advisory committee of the outgoing Chief Justice, the chairperson of the commission and the Attorney General to prepare a shortlist of three for the appointment to the position of Chief Justice.

This proposal is an entirely new and dangerous departure. The outgoing Chief Justice was never, in my experience, in the past involved in the selection of his or her successor.

The appointment of a new Chief Justice is, quintessentially, a matter for the judgment of the Government of the day **alone**. It does not need the opinions of the outgoing office-holder or the chairperson of an independent commission in this respect. The provisions of Section 46 of the Bill, requiring such an advisory committee to be unanimous, are equally disturbing.

Outgoing judges may well have opinions as to who should succeed them but their opinion in this respect has no particular weight and should not be specially provided for in law. The idea of judicial self-selection or provision for such continuity in outlook among judges is simply redundant and vaguely repugnant.

Curiously, only in the case of the presidencies of the Supreme Court, the Court of Appeal and the High Court, does the he Bill envisage that the names of ***all*** the applicants for consideration should be made known to the Government but in no other case.

Excluding The Chief Justice From Chairing An Advisory Body

It is hard to rationalise the absolute exclusion of the Chief Justice from being the chair of any advisory body except as a statement that our chief judge cannot be relied on to be fair in chairing an advisory process. Why, then, give her a special role in choosing her successor?

Deterring Good Applicants

Persuading highly experienced and highly capable legal practitioners to apply for or undertake senior judicial office is already quite difficult. This I know well from personal experience.

I am equally certain that a massive process change involving lengthy interviews with lay persons, evaluation and rejection, all without any knowledge as to whether the rejection took place at the level of the Commission or at Government, will deter many, many fine candidates for judicial appointment from engaging with the process at all.

The very elaborate procedures envisaged for the proposed Commission which involve delegating to it ***even*** the function of determining criteria for selection for appointment are not going to produce better judges.

We are being invited to create an expensive, cumbersome and counter-productive quango, the purpose of which is to pretend to the public that the selection of judges has somehow been "taken away from the politicians", shifted away from the Government and put into the hands of *"independent"* and unaccountable persons in the majority lacking hands-on knowledge of the likely consequences of the decision they will make. That cannot legally happen. The cost of the new body is estimated to be between €500,000 and €1 million annually compared with €35,000 for the existing JAAB.

A future government would be better advised to use its inalienable right to seek out its own appointees as can be done now rather than deal with new appointments through the misguided and counter-productive thicket of obstacles that the proposed commission would constitute for the selection of our judiciary.

Independence

There is also the question of judicial independence.

The very idea that serving members of the High Court or the Court of Appeal ought to be repeatedly interviewed and evaluated by a majority lay Commission on their suitability to be promoted to the Court of Appeal or to the Supreme Court respectively, and should spend

valuable time preparing for interviews by lay persons who are not aware, on a day to day basis, of the attributes, skills and energies required of such candidates, is wrong.

We do not want our judges, especially in a small society such as ours, to be looking over their shoulders for approbation to a commission of lay men and women when it comes to the filling of important positions such as that of appellate judges in the Court of Appeal or the Supreme Court.

Nor do we need to introduce a new culture of *"promotion"* from the District Court to the Circuit Court or from the Circuit Court to the High Court.

Still less should two years' service on the District Court bench be made grounds for appointment to the High Court as the Bill astonishingly proposes.

Those local courts of limited jurisdiction are important in their own right. But they are not the superior courts provided for under the Constitution. They are not rungs on a ladder. The qualities needed to be a good and efficient District Court judge and a Circuit Court judge are often quite different from those needed to be High Court judge or a judge in the Court of Appeal or the Supreme Court.

We need some new system of ladder promotions for "career judges" from the District Court to the Supreme Court like "a hole in the head". The danger to judicial independence in such a culture of judicial promotion is obvious.

Our biggest priority must remain that of attracting independent minded, experienced legal practitioners to leave successful practice and to make their skills available to the community for ten, fifteen or twenty years as judges in our superior courts. That has been the secret of the success of the Irish judiciary. And we substitute another, untried system or culture at our peril.

Not Broken And Not Needing Mending

Since the foundation of the independent Irish State in 1922 the function of appointing judges has been that of the Executive. That system has served us well. Our judiciary have been politically impartial, morally upright, independent of spirit and loyal to the Constitution and the law.

The system of appointment is not problematic as long as the Government of the day upholds the standards that have given us such an excellent judiciary in the past. The system is not broken; it is not in need of mending. There can be no perfection; but the present method of appointing judges has served us very well.

The proposed composition of the Judicial Appointments Commission, which is intended, in the main, to consist of people who are not expert or experienced in the day to day operation of the legal system is not needed.

The underlying political agenda in this legislation is based on a proposition which is not merely unproven, but which is demonstrably false – namely that we are, in general terms, not getting the best and most suitable people appointed to the bench.

The spirit of the so-called *"reform"* entirely ignores the reality of the constitutional responsibility that lies within government of making the best appointments to the bench.

Where Is It Coming From?

Finally, we should all collectively stand back from these proposals and consider whence they come.

This proposed legislation with very serious risks for our constitution bears all the hallmarks of legislation which is being foisted on a minority government by a tiny minority within that government.

We have to be circumspect when we recall that the chief promotor of this Bill, who now falsely claims to be "*taking the appointment of judges out of the hands of the politicians*", himself proposed another Bill in the Dáil in 2013, to amend the Constitution to require all judges to be approved by a committee of TDs consisting in the majority of opposition TDs.

We have a minority government led by a party that has always prided itself on its constitutionalism and on upholding the law. It should remember its traditions and values.

It should not allow its numerical weakness to be used do untold damage to our institutions of state at the behest of someone who authored a book entitled:

"The Untouchables – The People Who Helped Wreck Ireland And Are Still Running The Show".

Devoting an intemperate and ill-informed chapter of that book to a virulent attack on the judiciary, and making no attempt at all to show how our judiciary *"helped wreck Ireland",*comes ill from someone who spent years castigating our more conservative bankers for their failure to emulate the example of Anglo-Irish Bank.

This Bill will damage our constitution and it should not become law.