The Future of Ireland's Legal System

Address

by

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Introductory:

I am very honoured and grateful to have been asked to contribute to this conference of the Law Reform Commission, an institution which is a major asset for our State, our legislature and for the people, and one whose work is never sufficiently acknowledged by politicians and commentators, except perhaps when commentators seek yet another lash to apply to the backs of elected politicians.

Our Judicial System Unique In Europe

With the imminent departure of the UK from the European Union, a development which I very much regret but which

still seems inevitable, Ireland is set to be the only significant common law jurisdiction in the EU.

That lonely status (Cyprus and Malta being mixed civil and common law systems) will mean that we will in future have to defend those characteristics of our legal system when they come into conflict or tension with the civil law system much more vigorously than was the case when the UK was a natural ally on such issues.

Ours is the only European state in which the primary court of first instance (as distinct from courts of local and limited jurisdiction), the High Court, can, by the decision of a single judge, invalidate, at the instance of any citizen having standing, any act of the Executive or the Legislature, by reference to the laws and to the constitution which can only be amended by the people themselves.

That judicial power in a court of first instance is not to be found in any other member state of the European Union.

Because that power is so great a power, it is a power that is itself constitutionally confined. As Article 45 of the Constitution makes very clear, it does not extend to the sphere of economic or social policy or to the allocation of state resources, which sphere is the exclusive domain of the legislature and the executive and for their joint determination alone.

That demarcation is necessary in a functioning parliamentary democracy. The legislature can, of course make provision by law for statutory economic and social rights which can, in turn, be enforced in the courts as against the executive, for example in the areas of health, social welfare and housing, but, in the final analysis the nature, extent and enforceability of such rights is for the legislature to determine.

In short the separation of powers, partial as it is in our system is a cornerstone of our democratic system and a necessary part of the justification for the immense power of judicial review, constitutional and statutory, which we confer on our judges.

Those who call for social and economic rights to be made justiciable in our courts of law by reference to a different constitutional order are in my view deeply misguided insofar as any such judiciary would be deeply politicised both as to their appointment and as to their status in office if it were to wield such power.

In my view the present balance of power between the legislative, executive and judicial arms of the State is both justified and is necessary.

Independence in relation to decisions concerning the allocation of Exchequer resources is not sustainable intellectually or in practice. These decisions require accountability through the ballot box to the people as a

constant; that is the precise opposite of what we expect from an independent judiciary.

The economic advantages of excellence in our judicial system

Ireland is geographically peripheral in the European Union and will become more so in the wake of Brexit. The centripetal forces which have effect in the European Union, sucking economic activity into the centre in terms of location and size, are forces which Ireland needs to counter when attracting foreign direct investment on which so much of our current relative prosperity depends.

As a location for foreign direct investment and economic activity, we can seek to offset those centripetal forces by taxation policies, by language, and most especially by a rule of law which is at once understandable and beyond suspicion as regards its independence.

Our legal system is not just a matter of concern domestically; it is one of the key elements in our economic prosperity and viability.

The quality of those appointed to exercise the judicial power is a matter entirely within our own capacity to determine. We can aspire to excellence in our judiciary or we can choose

to be satisfied with mediocrity. That choice is entirely for us to make. But it is a choice which is replete with consequence.

If Ireland is to attract and retain investment and economic activity, we must aspire to a legal system which is the best we can make in terms of the quality and capacity and integrity of those exercising judicial power and the effectiveness of the legal processes and procedures with which they are equipped.

There is much controversy about proposals to change the identity of persons involved in making recommendations to the Government as to who should be appointed judges.

I am very clear that the real issue of greatest concern is the need for excellence in judicial appointments, not a tokenistic change in the composition of the Judicial Appointments Advisory Board or the proposed Judicial Appointments Commission. Under our Constitution the final choice as to who should be appointed to judicial office lies with the Government itself. No legislative change can alter that power and duty of the elected Government.

The present proposals for change in this area say nothing about how it is proposed to attract the best women and men among our legal practitioners to forsake private practice and take on judicial office.

That is the single most important issue facing us collectively. And yet it is the issue on which there is the greatest silence.

One thing is clear. A system which promotes District Judges to the Circuit Court, to the High Court, to the Court of Appeal and to the Supreme Court is very definitely not the best way of attracting excellence into the Superior Courts. And yet the latest proposed legislative reform envisages making District Judges eligible for appointment to the Superior Courts. This is a mistaken and weak-minded change which will bring no improvement to the quality of our judiciary.

Delay in the law

All across the legal system, processes and procedures are becoming lengthier and more unwieldy and more expensive.

Whether in criminal or civil law, the Irish legal system is far slower than other common law jurisdictions in the disposal of its case load. In the United Kingdom it is commonplace for persons accused of murder to be tried, convicted and imprisoned inside a timeframe of six months; in Ireland, as recent high profile cases show, huge delays running to years are commonplace. Criminal trials which would have taken between one and three days when I commenced practice as a barrister now appear to last twice that length.

The same picture applies in civil law. Despite the very worthy initiative in establishing the Commercial Court, and despite the best efforts of judges in the other divisions of the High Court, the great delay between the institution of proceedings and their final determination at first instance is very disappointing. While the newly created Court of Appeal is struggling with a backlog handed to it at its inception, appeals from High Court decisions can take between 18 months and two years to be decided.

Appointing more judges is essential if we are to confront the truth of the old adage that *"justice delayed is justice denied"*. But appointing more judges to a system which is delay friendly is not a sufficient response. The crucial issue is to speed up the legal process as regards assembling the evidence and distilling from that evidence what are the issues to be resolved.

Case management, I regret to say, is largely confined to laying down timetables. It does not adequately address the need for the narrowing of issues for determination.

Case loads of the judicial system

We have to ask ourselves whether it is wise or sustainable to constantly increase access to the Superior Courts in respect of large areas of economic and social dispute and regulation.

We have, for instance, created new jurisdictions in respect of disciplining doctors, dentists, nurses, teachers, pharmacists, etc. Is it really necessary to involve the court system, as such, in all such professional regulation to the extent that we do? We have also created a vast area for judicial activity in respect of asylum-seeking and immigration matters. This begs the question as to whether such matters might not properly be dealt with by specialist tribunals with internal appeal processes.

Such change would, of course, require that non-court tribunals were adequately resourced and properly managed. Lengthy delays in resolution of landlord and tenant matters equates, to a large extent, to a complete failure of resolution.

The Judicial Council

We seem to be approaching the end of a 20 year process designed to bring about a Judicial Council. As someone who did my best for five years to progress that project, with very limited success, and even less appetite during those years on the *"judicial side"*, I welcome the light at the end of the tunnel.

Let me say that the suggestion that complaints against judges should be dealt with in private appears to me to be misguided. I fully appreciate that frivolous or vexatious or

malicious complaints about judges should not be given the oxygen of unwarranted publicity but, once that threshold is passed, I can see little or no reason why the great majority of such cases should not be dealt with in a manner which is fully transparent.

I am also strongly of the view that the judiciary must collectively address issues which concern the judicial power.

Acting Collectively

While each judge is fully independent in relation to the decision-making process in his or her court, that does not mean that the judiciary should remain silent on issues which directly concern the judicial power itself.

I am strongly of the view that the judiciary need to voice their concerns collectively and constructively in defence of and in support of the judicial power in the State. It is wrong that they should remain collectively silent in respect of issues that affect their collective functions and status.

The Courts Service which was established in 1999, is controlled by a board of which the judiciary compose a clear majority and yet, during my period as Attorney General from 1999 to 2002 and as Minister for Justice from 2002 to 2007, it always appeared to me that individual judges saw the Courts Service as being something over which they had no real control or responsibility. That is a pity.

It seems to me that the judiciary must play an increased role in the process of reforming the way in which the judicial power is exercised.

I see no problem with the collective wisdom of the judiciary on matters to do with law reform, reform of court practice and procedure, and matters concerning the scope or exercise of the judicial power itself being fed into the legislative process directly. The UK parliament has always had the benefit of the presence of senior members of the judiciary. While I am not suggesting that judges should be members of the Oireachtas, I can see no reason why a considered and representative view of the judiciary should not be communicated to Oireachtas committees when considering legislative change and law reform issues.

Resources- Putting Our |Money Where Our Mouth Is

Lastly, I strongly believe that we must be willing as a society and as a State to resource the judicial arm of the State to the extent necessary for them to carry out their functions to an excellent standard. I am not only speaking in terms of salaries which would attract practitioners to become judges; I am speaking of support systems to enable our judges to discharge the very heavy intellectual and managerial burden which they carry at present.

A barrister seeking such support for the judiciary inevitably runs the risk of being castigated as an aspiring *"teacher's pet"*. It is for that reason that I believe that the judiciary must collectively find their voice and use it as necessary and appropriate in matters where up to this point they have remained silent or confined to their representations to the back corridors of Government where they can be so easily ignored.

I fear that our judicial system may buckle under the weight of increased activity, inadequate reform, outdated procedures and starvation of resources.

If public confidence in the judiciary is undermined by perceptions of cost and delay in the administration of justice, profound damage will be done to the fabric of our Constitution. The matters which I am canvassing today are not some *"can to be kicked down the road"* for want of public interest. If we allow our legal system to decay and deteriorate, we will all be the losers. And repairing a damaged and discredited system of justice would be no easy task.

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