THE STATUS OF THE JUDICIAL POWER

MICHAEL MC DOWELL S.C.

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Last week, in the context of exploring the implications of the concept of the separation of powers and the question of whether there should be justiciable social and economic rights of constitutional status, I advanced for your consideration the view that there was, in the Irish constitutional order at least, a clear basis to be found both in the Constitution and in its drafting, for the exclusion of judicial activism at a constitutional level in the area of what are now termed social and economic rights. You will recall that I mentioned that Article 45 has, in my view, two important constitutional effects which should be taken into account by the Courts: (a) that the Constitution as a whole must be interpreted as one document and that no argument should succeed if it is based on an interpretation of the other articles inconsistent with Article 45, and, (b) that Article 45 clearly shows that it was an integral part of our constitutional order that huge areas of economic and social policy were expressly excluded, as regards their implementation, from the prevue of the judicial power.

I want to, if I may, change the focus of our discussion today to the broader issue of the status and influence of the judicial power in a western democracy.

In particular, I want to advance the proposition that the common law system, not exclusively but above most others, elevates the judicial power to one of enormous influence and effect in its constitutional order and, in particular, when combined with a written constitution, creates a series of checks and balances on the executive and legislative powers which exclude the emergence of internal tyranny.

I am not arguing that common law states with written constitutions are perfect; they are not. But what I am suggesting is that the judicial power in the common law state is such as to very powerfully negate political and social movements or impulses towards absolutism or tyranny.

Looking back across the 20th century, it is noteworthy that the defence of human rights largely fell, in the last analysis, to the common law states. Even if the alliance with the USSR to defeat fascism and the huge role played by the USSR in the defeat of the axis powers is taken into account, over the period of 70 years from 1920 to 1990, from the end of the Great War to the end of the Cold War, it was, in my view, the common law world that represented the last and surest bastion and most effective defender of the concept of civil liberties and human rights across the world.

That is, of course, a broad-brush statement. Britain was in the business of Empire from 1900 to 1950 and Imperialism was not, despite what some of its advocates said, an enterprise based on democracy and human rights.

But if you look to those societies where a powerful independent judiciary existed, they also happened to be the societies where neither extreme right or extreme left seriously challenged the stability of the state nor attempted a revolution in pursuit of their ideological aims. By contrast, all of the great dictatorships emerged in societies where there was not an independent common law type judiciary and adapted the models of the civil law system to put a veneer of judiciality on their regimes.

My point is not to argue that the civil law system is fatally flawed. It is to argue, on the contrary, that the common law system has huge internal strengths which deserve to be acknowledged, require to be understood and, I think, make a compelling case for demanding our loyalty.

I asked you, on the last occasion, to ponder what I termed *"the Rio Grande question"*. In essence, I asked why it was that North and South America had such profoundly different experiences in terms of democracy, stability and the rule of law.

I think it cannot be coincidence that there was a radically different experience north and south of that river.

There were obvious historical differences in the Anglo-American and Latin-American cultures and histories. But there were similarities too. Both societies ruthlessly oppressed major populations that they encountered. Many of the Latin-American states had a system of slavery, even if of a lesser order than that in the United States. Both Latin-America and Anglo-America to this day have huge inequality. In the United States, the abolition of slavery nonetheless left many states with official segregation laws aimed at the black communities. It should be noted, however, that it was the judiciary, in the end, which brought down the era of segregation in the United States. And it was done by reference to the United State's Constitution. Looking at the United States and Canada, however, it is fairly clear that they have relatively stable political orders which have adapted to changing times without revolutionary phases in their history.

My thesis is that it is the rule of law and an independent judiciary which is the cement which has maintained the political and systemic integrity democracies.

It is noteworthy that the Anglo-American system (of which Ireland is philosophically part) contemplates the appointment of judges from outside the state apparatus to be independent arbiters in the administration of justice. The very concept of selecting judges, not from a career path within a state judicial system, but from the broader legal community, deserves a little examination. In my view, it is quite remarkable. The diplomatic service of the state is almost exclusively in Ireland staffed by members of the diplomatic service who have progressed through a system of promotion and evaluation within the broad public service.

Our judiciary, by contrast, are selected from outside the public service. This is of huge significance in my view. It demonstrates in a very clear way that the judge is appointed to be an independent arbiter, often between the state and the individual and that the state comes before the independent arbiter as an equal. This notion of equality of status before an independent arbiter is also reflected in the adversarial system of justice as contrasted with the inquisitorial system of justice. The judge has no *"state agenda"*. He or she is, subject to his constitutional obligations, entirely neutral. His or her function is not to inquire and to determine the truth of a situation. His or her function is to adjudicate between the arguments and evidence offered to him by the parties. It is not his or her function to create the issues or to define them or to find solutions to the dispute. His or her function is to evaluate which of two points of view in terms of evidence and law shall prevail over the other.

Another feature of the adversarial system which fits closely in with the notion of the judge as independent arbiter between the state and the citizen and as between citizens is the mode of trial itself. The administration of justice in public, a constitutional requirement, means that the evidence and argument is publicly presented in a process that is observable to the public and in which the resolution of the issues between the parties is carried out in public. The immediacy of *viva voce* evidence and the capacity of parties to cross-examine in a single process lasting from a finite beginning to a finite end, oral evidence and persons who supply evidence on affidavit is, in my view, hugely important in underlining the independence, neutrality and arbitral quality of the exercise of the judicial power in common law states.

Although some may see the legal procedures of the common law jurisdictions as being clumsy and confrontational, the truth is that they are transparent and public.

I would add that the constitutional right to trial by jury on every offence other than minor offences is yet another demonstration of the common law traditions' preoccupation with arbitral neutrality.

Combining this common law genetic code of arbitral neutrality with a justiciable constitution and making the citizen and the organs of state equal parties in disputes about that constitution or in disputes about the exercise of constitutional powers under the rubric of judicial review gives to the common law order a unique characteristic which, I believe, is its defining characteristic and which must go some way, at the very least, to explaining the robustness and durability of the common law system in managing social change and internal threats. This raises questions about the emerging architecture of the European Union. What kind of legal system is the European Union to have? In particular, is the emerging EU legal order to be based in large measure on the civil law system or is it to be based on the common law system? Is adversarial trial, even on constitutional issues, to be the norm within the European Union? Is the role of the judge advocate a demonstrable part of a fair system of independent arbitration? The *corpus juris* project intended by enthusiastic euro federalists to be beginning of a European federal system of criminal law raised many of the same questions. Were the procedures

envisaged in that project to be inquisitorial or adversarial? Given that we were invited down the road of establishing an EU system of criminal law, what were its characteristics going to be? What were its values going to be? If the European Union was going to be transformed into something which would investigate, try and punish its citizens, what kind of legal system and constitutional values were to hold sway?

Turning to the broader issue as to whether the European Court of Justice is really *"neutral"* between the individual and the European Union, or between the Union and its member states, there is a strong perception that the ECJ is aggressively federalist in its approach to its own jurisdiction and the powers of the European Union institutions and that its commitment to the principle of subsidiarity is at best intermittent and very patchy.

This is of significance in the context of the Charter of Fundamental Rights and Freedoms of the EU which is at issue in the Lisbon Treaty.

The question arises as to whether the Charter of Fundamental Rights and Freedoms is, in reality, what Giscard d'Estaing envisaged that it would be and what Joschka Fischer asked for it to be – a federalist constitution.

Of course it is true that it claims to be directed to the institutions of the Union itself and to member states only when they are implementing EU law.

But what does *"implement EU law"* actually mean? Does the Charter of Fundamental Rights and Freedoms apply to a person accused in an Irish court of an indictable crime where that crime is required to be or was created to be an implementation of, say, an EU directive requiring proportionate and dissuasive sanctions for some form of activity? And if so, do the provisions of the Charter avail an accused person in those circumstances when faced in trial in the Irish courts?

And in that context does, say, the European Court of Justice's view as to what access to a lawyer in the course of police interrogation hold sway?

Or to take another example, it is well known that the definition of marriage in the European Convention on Human Rights is expressly confined to men and women. A deliberate choice was made, in the drafting of the Charter of Fundamental Rights and Freedoms, to exclude that explicit confinement in relation to marriage. Does this mean that the ECJ could, in the fullness of time, decide that same sex marriage is covered by the article? In those circumstances, would a decision by the ECJ to that effect mean that in implementing social welfare rights for EU citizens in Ireland, Ireland was effectively bound to recognise such unions?

These are two examples of issues which will arise if the Charter of Fundamental Rights and Freedoms is adopted by the member states (Ireland doing so on a second referendum).

The crucial point to remember, however, is that it will be the ECJ's view of what the Charter of Fundamental Rights actually means that will prevail. And because of the way that we have transposed the various treaties into Irish law at a constitutional level, Irish judges will, in effect, be bound by the ECJ view of the meaning of the Charter of Fundamental Rights and Freedoms and be bound to implement it.

It was interesting in the context of the recent Lisbon Treaty debate in Ireland that these issues were not canvassed at any length or in any depth. It seems to me, however, that in adopting measures which will have a constitutional status, some of which amount to social or economic rights, we must be circumspect. Our judiciary will not merely be entitled, it will be obliged, to implement EU law as it is found by the ECJ across all the areas of rights, civil and political and social and economic. By way of footnote, I would say that one of the parts of the Charter of Fundamental Rights and Freedoms that attracted my attention during the recent Lisbon debate was the set of provisions in relation to the collective rights of workers. Do they mean that workers have the right to make their union recognised? Does this mean that the assurances given by the Irish government to Intel and Dell are misleading? Or does it merely mean that the matter is in doubt and will finally have to be decided by the ECJ? And if that latter possibility turns out to be true, does it mean that we are in effect being asked to surrender a very significant part of our own social and economic policy-making function to the European Court of Justice to wait and abide its decision?

I intend to elaborate on these issues next week. However, for today, I think it is sufficient to raise questions as to whether or not a sufficient debate is occurring in Irish academic, legal and political circles and in the broader Irish society about the nature of the judicial power and the factors which may change it either with or without our consent.