Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

Address on the theme of 'Judicial Dialogue'

Delivered by Mr Justice Donal O'Donnell, Chief Justice, at the Irish Association of Law Teachers' Spring Discourse on 24 May 2022

As I think some of you know, I was born in Belfast. My father became a judge in the High Court in Northern Ireland as part of the civil rights reforms in 1971 and was appointed to the Court of Appeal in 1979. I came to Dublin in 1976 and graduated from UCD and the King's Inns before obtaining an LLM from the University of Virginia and commencing practice in 1983.

At times some of us I think allow ourselves to be distracted from the task in hand by thoughts about parallel lives or at least perhaps the low budget Netflix series that could be made of our own lives and possibilities. When I left Belfast for UCD I still had in mind the idea of going back to practice in Northern Ireland and if that had happened, maybe I would have aspired to being in Lady Chief Justice Keegan's position tonight. When I returned from the US I certainly aspired to be a law teacher, but the market was very depressed and there were no openings, but if things had turned out a little differently maybe I could have been sitting in the audience tonight. Most of all however, I can see the Netflix executives shaking their heads sadly at the idea of a person whose two parallel lives and one real life would all bring him into this room this evening. But at least this explains why I am very pleased to speak to a Spring Discourse of meetings of law teachers coming from all parts of the island.

The theme of this Spring Discourse is "judicial dialogue". I am a strong believer in the benefit of dialogue with other judges, but also with academic lawyers, and with the other institutions of State. In the words of an old but classic advertising campaign; "it's good to talk".

I would like to discuss the benefits of judicial dialogue in the specific context of the system of judicial appointment. Some of you will know that the government has recently published a Judicial Appointments Commission Bill which is now before the Oireachtas. That is the latest step in a process that began in 2013.

But, perhaps the first question is whether I should be speaking at all. There has in the last decade been occasional criticism of the fact that the judiciary made submissions in 2014 and 2016 in relation to the system of judicial appointment, and offered to discuss the detail of the proposal further. I think I understand where this view may come from: it relates both to the separation of powers and the proper role of the judiciary in public discourse. I am a believer in the principle that judges should not engage in public controversy. Most judges should speak once and once only about the subject matter of a case, and that is when a decision is being given. The Bangalore Principles of Judicial Conduct, which form the inspiration for the code of conduct recently adopted by the Judicial Council, says this. A bench is not a substitute for a pulpit or an online blog and the opinions of members of the judiciary, outside the confines of a case are just that: opinions, and the position imposes real constraints on the degree to which judges should express opinions on matters of public controversy, and while that is a limitation on a freedom which other citizens enjoy and in the era of social media now more than ever, that discipline is an important part of the judicial role. However, the Bangalore Principles, and the commentary on them specifically recognises that judges may and should speak with regard to issues relating to or which affect the judiciary especially. Furthermore, judges may comment on technical and procedural aspects of draft legislation and may speak on legal matters particularly when discussing law for educational purposes. It is also I think more appropriate for holders of senior judicial office to speak on matters concerning the judiciary and the administration of justice. That seems to cover all the bases this evening.

In truth, what is remarkable is how little the judiciary has spoken about this matter and how when it did speak it spoke collectively through a Judicial Appointments Review Committee. That also is no more than is appropriate. I think members of the public are entitled to expect that judges will not behave in the same way as other interests' groups seeking some private benefit, whether that is spinning stories lobbying decisionmakers or conducting social media campaigns. However,

I do think it is necessary to appreciate that the constraints upon the judiciary should not result in their views being ignored, or misrepresented in soundbites which play to broad brush caricatures of the judicial task.

As some of you may know, change in the judicial appointment process was proposed by the then Minister for Justice in late December 2013, and written submissions were requested by the following month. A Judicial Appointments Review Committee, made up of judges from across all court jurisdictions, was established and made very detailed submissions which I think are still well worth reading today.[1] Subsequently, in 2016, a new proposal emerged in the shape of the Heads of a Bill and that was the subject of another detailed submission by a successor committee on behalf of the judiciary. In the context of tonight's theme, it is worth noting the 2014 submission in particular made references to academic commentary in this jurisdiction and elsewhere, and contained a very detailed appendix setting out a system of judicial appointment in a number of other countries, including Northern Ireland.

The first and fundamental recommendation made in 2014 was this:

> *"The present system of judicial appointment is unsatisfactory. The opportunity should now be taken to appoint a high level body to carry out research, receive submissions, and within a fixed timescale develop comprehensive detailed proposals in a structured, principled and transparent way to make a radical improvement in the judicial appointments process in Ireland."*

It is now eight years later, and it is unfortunate that that recommendation was not adopted, and we still have had no comprehensive, independent expert survey of the system of judicial appointment that could have taken account of academic

[1] Judicial Appointments Review Committee Preliminary Submission to the Department of Justice and Equality's Public Consultation on the Judicial Appointments Process (January 2014, available at http://www.supremecourt.ie/SupremeCourt/sclibrary3.nsf/(WebFiles)/51E71A71B9961BD680257C70005CCE2D/$FILE/A%20Preliminary%20Submission%20of%20J.A.R.C.%2030.01.2014.pdf

commentary, the experience of other jurisdictions and heard the views of the judiciary and indeed others.

Tom Hickey, David Kenny and Laura Cahillane have recently said publicly that the 2022 Bill is a significant improvement on what has gone before.[2] I agree it would be very wrong not to recognise and indeed welcome the fact that the 2022 Bill finally adopts two reforms which were key recommendations contained in the 2014 report. First, there is now an unambiguous requirement that recommendations for judicial appointment or promotion be made on the basis of merit. Section 39 of the Bill provides that:

> "*A decision by the Commission to recommend a person for appointment or for nomination for appointment or election to judicial office shall be based on merit.*"

This indeed was the third recommendation of the 2014 report:

> "*The merit principle should be established in legislation*".

This is a principle of legislation in the UK jurisdictions, and the only question, although an important question, is why there should be any reluctance to adopt it.

The ninth recommendation related to the number of candidates whose names should be submitted to the government for appointment. The committee recommended that:

> *"The number of candidates for a single judicial post submitted by the Judicial Appointments Board for governmental decision should be reduced to three. Where there are multiple vacancies in a court, the number of candidates should be increased by no more than the number of additional vacancies."*

[2] Changes to Judicial Appointments a Progressive Surprise, Irish Times April 2nd : https://www.irishtimes.com/opinion/changes-to-process-of-choosing-judges-a-progressive-surprise-1.4861582

For the eight years between 2014 and 2022, proposed legislation provided for the recommendation by the Judicial Appointments Commission of five names to the government. However, the current iteration of the Bill now provides in s. 47 that the Commission shall recommend three persons for appointment to judicial office where there is one judicial office to be filled in a court. Where more than one judicial office is to be filled, the Bill provides for the recommendation of two additional persons for each second and subsequent vacancy. This rather complex provision provides that where for example, there are two vacancies there will be five candidates nominated and where there are three vacancies there will be seven nominees.

It is very much to be welcomed that the principle of limiting recommendations to three names is now to be embodied in the Bill, but the astute reader, or listener, will note that the Bill does not accept the second part of the recommendation: namely, that where there is more than one vacancy, the number of candidates should be increased by one. I do not wish to delay by discussing the merits of this, although it seems to run counter to the idea of reducing the numbers of candidates recommended. What is more interesting to me, and something worth discussing tonight, is why the various iterations of this legislation since 2014 did not accept the principle of limiting recommendations to three, and why now the Bill wishes to have two additional candidates for each additional vacancy. To answer those questions of course involves some educated speculation, but it is the very fact that it is speculation rather than fact which is of interest to me. The fact is that this issue has never been the subject of detailed, considered, open and transparent review. We do not know how, or more importantly, why these decisions are made, even though it seems likely they reflect either philosophical views, or considerations of practicality, or both, all of which can be debated.

It is worth taking a step back. Why was the judicial appointment procedure thought unsatisfactory and in need of reform? I think the answer is obvious and not merely speculative. Prior to 1995, it was certainly the perception that the system of appointment to the judiciary had echoes that which had existed in the United Kingdom before 1922, and where Lord Halsbury famously said that, all things being equal, a conservative was preferable to a liberal. Prior to 1995 it was certainly perceived in Ireland that party political allegiance had effect in either

helping or hindering a candidate for judicial office. This was by no means universal, it depended on the Judicial Appointments Advisory Board ('JAAB') which was established in 1995, but it has been criticised as being insufficient to completely remove political influence from the appointment process because first, it did not have any requirement of merit. The criteria for recommendation by JAAB was negative, it provided in effect for the exclusion of unqualified candidates. Second, it provided that a minimum of seven names could be forwarded and there was no requirement of appointment only from within the candidates JAAB recommended. Furthermore, the government was provided with a list of all persons who had applied. I should say that since October of last year I have been the Chair of JAAB. In my limited experience, it discharges its functions conscientiously and, so far as possible, rigorously, and produces lists of competent and qualified candidates, but there is no doubt that there was an appetite for reform, and aspects which deserved reform.

If these perceived defects in the JAAB structure had been addressed, then it is very likely that that in itself would have been a very significant improvement in the system and enhanced public confidence in the process. However, the system, and by that I do not mean just politicians, but would include the administration more generally, seemed slow to accept the principle of appointment solely on merit and also the limitation on numbers. This seem to indicate a reluctance on the part of the system more generally and not just the political system, to give up the degree of control which it traditionally had on the appointment system. It is worth saying and repeating this is not to criticise any appointments or to engage in some parlour game of attempting to reduce entire careers to a question of who knew who. Any debate should always recognise that Ireland has been well served by its judiciary in the past almost 100 years. Ireland consistently comes out at the very top of the EU Justice Scoreboard under the headings of perceptions of the independence of the judiciary. In my view however the perception of political influence on appointment, even if is an oversimplification, is damaging to the administration of justice.

Sometimes that process has been defended on the basis the criticism is theoretical and perhaps academic and the system works in the real world or that the political system and the civil service is entitled to have a significant say on the appointment

of judges who make important decisions which can shape society and that it is naïve and impractical to ignore that.

First, I am flattered by the idea that judges at every level of the courts are shaping society, but I would have thought that we would only have to look west to the position which currently obtains in the United States, or east to the struggles which the European Union is having in respect of the Polish and Hungarian judicial systems, to conclude that whatever the arguments in favour of a system in which political allegiance has any influence on appointments, they cannot be accepted today.

In 2004, I spoke about this as a senior counsel and long before my own appointment, it is something that touches on the theme of this evening's discourse.[3] I can still see, in my mind's eye, a pamphlet to which my father contributed published by either the Northern Ireland Civil Rights Association or the Northern Ireland Labour Lawyers and which is probably still available in the Linen Hall Library criticising the system of appointment to the judiciary in Northern Ireland because of the strong influence that membership of the Unionist Party, and sometimes the Orange Order, played. In 1969/70, that was a particularly sensitive point for the Northern Ireland administration because appointments to the senior judiciary were made by London, and since 1945, it was an article of faith in Great Britain that politics should play no part in judicial appointment. For my own part, I have never heard a satisfactory response to Thurgood Marshall's observation in 1977 that he could think of no task that a judge was properly called on to perform that required prior experience as a friend or backer of the appointing official or his party. But, in a sense, that is the point; this was never considered in public, and anyone who supported some measure of political involvement in the process (whether with a large or small "p"), have never had to explain or defend those views in the course of an expert review, rather than in passing in newspaper articles or soundbites.

[3] A comparison of Art. 6 of the European Convention on Human Rights and the due process requirements of the Constitution of Ireland (2004) Judicial Studies Institute Journal Vol 4 No. 2, 37 at 65.

The 2022 Bill refers in the long title to the recommendations by *The Council of Europe's GRECO (Group of States Against Corruption)* that the system of selection, recommendation and promotion of judges target the appointment to the most qualified and suitable candidates.[4] The recommendation of GRECO continues that such system should be "without interference from Executive political powers" and it would be very welcome if, as the 2014 submissions recommended, the principle was officially adopted and recognised. Reduction to three nominees chosen on merit significantly reduces the risk to the system if political allegiance affects the ultimate choice; but why should it? Why should a qualified meritorious person be helped or harmed by their political allegiance – why indeed should the person without political affiliation be treated differently? I think that participants in tonight's discourse with experience of Northern Ireland or indeed other jurisdictions in the UK would be surprised to hear this seriously debated and one of the benefits of dialogue between jurisdictions is that we get to see ourselves through the eyes of outsiders and what appears normal can look very different.

I hope that the reference to the GRECO in the long title, and the clear provisions of s. 39, means that we have taken a decisive step in this regard.

This development of the reform of the appointment process would make an interesting case study of the process of legislation. In and around 2016, it was proposed that a new commission should be comprised of a lay majority with a lay chair. Again, that has altered, and in my view, for the better in the current Bill which now provides for four judicial members of the commission, four lay members and the Attorney General as a non-voting member. However, it is legitimate to question why no practising lawyers are included, and why there has to be an equal number of lay and judicial members.

In discussing this issue, I want to say three things as clearly as possible:

[4] GRECO (Group of States Against Corruption) FOURTH EVALUATION ROUND Corruption prevention in respect of members of parliament, judges and prosecutors EVALUATION REPORT IRELAND (2014) at p. 32, available at https://www.justice.ie/en/JELR/Greco%20Eval%20IV%20Rep%20_2014_%203E%20Final%20Ireland.pdf/Files/Greco%20Eval%20IV%20Rep%20_2014_%203E%20Final%20Ireland.pdf

(1) The only consideration as far as I am concerned is that the system of the appointment of judges should be one which finds the best person for what I believe is an important and difficult job at whatever level of the judiciary is involved;
(2) I am absolutely in favour of strong lay representation which may bring both expertise in the area of recruitment or management, and can in any event, protect against the possibility of group thinking;
(3) I also understand and accept that what appears desirable from the perspective of the judiciary may not indeed be correct. To paraphrase what Judge Learned Hand said famously nearly 80 years ago: the first principle for any judge should be to consider that they might be wrong. I accept that ultimately decisions made on legislation are made by the government and the Oireachtas in the exercise of a democratic process, and that the views of any particular group may not be accepted, but my main concern today is simply that there has been no process under which these views are tested or contrary views put forward. This is important indeed, more than important, because a significant component in confidence in the administration of justice is connected to confidence in the process of appointment.

The Bill in its long title states that it is adopted "having regard to recommendations CM/Rec (2010) 12 of Committee of Ministers of Member States". This is an important document which was referred to in the 2014 submission which has now been referred to by the European Commission in its rule of law report on Ireland[5] and the European Court of Human Rights in its recent decision on the Icelandic judicial system[6] – and it provides that where a body provides advice to the Executive on nomination, and does not itself appoint or recommend the appointment of a single candidate, then the body should have a majority of judges: "*an independent and competent body drawn in substantial part from the judiciary should be authorised to make recommendations which the relevant authority follows in practice*". No one has discussed, still less explained, why this recommendation is not appropriate for Ireland.

[5] Rule of Law Report SWD (2021) 715 Final 20/7/2021
[6] Astradsson v Iceland Case 26374/18 judgment 1/12/20 para 121

In order to fit some unexplained and untested template which requires an apparent equality of judicial and lay members, the expertise of the judicial members is very thinly spread, and representatives of practising lawyers are excluded for the first time, even though experienced practitioners have obvious experience of the requirements of the job and the qualities of candidates. Even more strangely however is that two of the requirements for the appointment of a lay member of the commission stipulate experience of the courts and the operation of the justice system and the importance of protection of human rights, but no person who is or has been in the previous five years a qualified lawyer (who may quite possibly satisfy both those qualities in spades) can be a member of the commission.[7]

I know that part of the argument in favour of a lay majority or equality of lay and judicial members is to prevent the views of one group being overborne and to protect against what might be described as a form of self-replication. However, I think in that regard we are entitled to ask how that decision was arrived at, and on what basis, and whether such a view could survive scrutiny and debate in any considered expert analysis. Nothing I have seen suggests that there is particular identity of views between all judges in all courts and I am not aware of any of the lay representatives of JAAB in the last 20 years complaining publicly or privately that their views had been overridden or that they perceived group think on the part of the legal members of the body. Furthermore, the Minister and the department get not just the recommendations from JAAB but also the names of every person who has applied, and therefore, are in a position to form some view as to whether there is a discernible pattern which favours certain types of candidates. In my view, the significant dilution of the judicial component, and the exclusion of practising lawyers altogether, weakens the process. A brief survey of the system for appointment as a university professor or other senior posts in the professions would suggest that such a heavy influence of persons with no experience of the system of third level education is not a general requirement. The Bill also contrasts rather starkly with the method of appointment to the

[7] Section 13 sets out criteria for lay membership. Section 2 defines lay person as a person who is not and was not for the relevant period a practising barrister or solicitor. The relevant period is 5 years. Section 2(2)

International Protection tribunal or the Workplace Relations Commission, both of which make very significant decisions concerning individuals.

However, the exclusion of practising lawyers has another strange knock on effect. The four judicial members of the commission are the Chief Justice, the President of the relevant court to which appointment is being made, and two members elected by the Judicial Council under a complex provision set out in section 12. One must be drawn from an electorate comprising the District and Circuit Courts, and one from the High Court, Court of Appeal and Supreme Courts. There must also be gender balance. Finally, the Bill provides, for the first time, that one must also be a former barrister and one a former solicitor. [8]

It is difficult to know whether the objections to this process from the point of view of principle or practicality are more compelling.

In principle, I think the idea of judges being understood to be "barrister judges" or "solicitor judges" is very undesirable. A judge once appointed owes no obligation of loyalty to his or her former profession. But the logic of the provision is to actually encourage the very thing which is presumably the justification for the exclusion of practising lawyers from the appointment of the commission in the first place; the idea that they will in some way favour members of their own, or in this case, former profession.

The objections on the basis of practicality are just as potent. There are now three different filters that have to be satisfied before the person can fill a position on the commission. It is important to remember that this is not a job specification offering a post for which there will be many eager applicants. This is an appointment to a function which involves taking on additional responsibilities on top of the judge's current workload. Anybody who has tried to get applicants to carry out the post of say head of department or dean of a school can appreciate that it is not always an easy task.

Imagine now that you have five candidates for one of the groups and there is general agreement that a former male barrister is the least qualified of the five

[8] S. 12(2)(b)

candidates. If, however, the District Court and Circuit Court go first and choose a female former solicitor judge, then that person must be chosen and the four superior candidates excluded. I understand the desirability of providing for some spread across the judiciary and for having gender balance, but once these have been achieved, I find it hard to understand what is wrong with the principle of letting the judges choose who they think would be best to carry out the function? More fundamentally, we do not know how this decision was made or what factors influenced it. The press release accompanying the Bill announced that it was the subject of consultation with a number of groups including the Chief Justice. In fact, I was invited to discuss the matter with departmental officials and did so and made clear that I was addressing only some technical issues in the Bill, and discussed this issue. The Bill as we know was published without any amendment in this regard. I understand that other people make the final decision in this regard and my views are only views and can be rejected, but it surely is more than a little disappointing that there is no process which requires the factors concerned to be identified and at least explained. This adds to the deficit I identified at the outset: there was no paper in advance setting out the thinking behind proposed changes, no scrutiny of that by an expert group which could consider comparable international structures, and now no explanation of the choices made in the proposed legislation.

The current Bill also provides for mandatory interviews of the candidates whose names are to be submitted to the government for appointment.[9] The 2014 submission pointed out that this structure could put very considerable additional responsibility on the Chief Justice in particular, and that there were already significant demands on the Chief Justice. That was said in 2014 and before, for example, the Legal Services Regulation Act 2015 added the obligation to chair the committee that recommends candidates for patents of precedence, and before the passage of the Judicial Council Act which requires the Chief Justice to chair the Council, the Board of the Council and the Judicial Conduct Committee at least. Since all appointments, nominations, elections and promotions to judicial office are now to be dealt with by the commission, it seems likely that the commission could deal with up to 20 such appointments in any given year. If three names

[9] S.46(b)

have to be provided to the government, then a minimum of five interviews might be required. There is nothing wrong with requiring a body being established from scratch and which may have no other function or requirements than to carry out 100 interviews, but this is surely something that could have been considered in the light of all the other demands that were being made of some of the members. In particular, it does not seem impossible that it would be equally satisfactory to have committees for appointment to the various courts, chaired by a lay member, containing the President of the Court and one other person nominated by the commission, and which would then report back to the commission with their assessment of the interviews.

One other aspect of the Bill deserves some comment. It had been proposed that there would be a specialist group for appointment to the senior judicial positions and to the Supreme Court. It is said apparently that it is now considered that there is no compelling case for adopting this mechanism which exists in the United Kingdom. Again, this raises the question of whether it would not have been better to have this matter decided after some research and some comparative analysis, and discussion. Again, that has a resonance in the context of tonight's discussion. The UK system has its critics, but one of the strengths of the system is that it makes provision for the involvement of senior members of the judiciary in other jurisdictions within the UK. Obviously it would not be possible to do exactly the same here, but the experience of other senior judges would be valuable.

I wish to repeat that there are aspects of the Bill which deserve a warm welcome. These include the emphasis on the merit principle and the reduction of the numbers to be recommended by JAC, which are significant improvements over the various iterations of this legislation which have been promulgated. I also understand that legislation is inevitably an exercise that is somewhat ad hoc and influenced by events, and that even if it was possible to devise some perfect system on paper, it might not work in practice. Equally, it is more than possible that if a defective system is operated by people of ability and goodwill, that it can function adequately, and in this case produce some excellent judges – that is after all what has generally occurred in this country over the last century since 1924.

Tonight, we discussed the merits of communication between judiciaries in different jurisdictions, between judiciaries and law teachers, and between the judiciary and the other institutions of state. I think it disappointing that the time which has been taken since a reform of the system was first proposed in a formal way has not been taken with a process of producing a green paper or white paper, or having some expert group to report and give a justification for its proposal. I think also that it is a positive benefit that the voice of the judiciary should be heard in any such discussions as long as those discussions are recorded and consultation is clearly structured, and meaningful. I know that some people maintain that the separation of powers and the principle of the independence of the judiciary requires that judges should not be consulted on these matters. I do not agree. The commentary in the Bangalore Principles states that the complete isolation of the judiciary from the community in which a judge lives is neither possible nor beneficial. Judicial independence should not mean leaving judges in some form of judicial isolation. In the words of the old advertising campaign: "It's good to talk".