Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

Law and Social Change: Opening Remarks

Delivered by Mr Justice Donal O'Donnell at The Voluntary Assistance Scheme of The Bar of Ireland Conference on 30 September 2022

About 200m from here and across from the rear entrance of the Four Courts, above the door of the Bridewell courts, is an engraving of the Latin phrase, *'Fiat justitia ruat caelum'*. In English, it translates to, *'Let justice be done, though the heavens fall'.* It is an old phrase perhaps most famously used by Lord Mansfield, Chief Justice of the King's Bench, in England in 1772 in *Somerset's* case when contemplating the economic and social consequences of releasing a Virginia slave who sought his freedom under the English common law.[1] A lot of modern scholarship has shown the degree to which the slavery debate was economic as well as moral: it is hard now to appreciate the extent to which slavery was built into the economic system in every part of the economy of the then United Kingdom, the wealth it had created and which was threatened by its abolition. The British Government borrowed 20 million pounds in 1837 to compensate slave owners for what was described as the loss of their capital. The maxim *Fiat Justitia Ruat Coelum* is often used to evoke the idea that a judge must administer justice in an individual case in accordance with the law, and regardless of the broader consequences, and of course that is both true and inspiring and sometimes demanding, but like almost every statement of law and about law it is not the last word but in fact the first. Indeed, *Somerset's* case looked at another way illustrates how decisions of the courts can have a significant impact – in fact Somerset's case was an important point in the ongoing campaign to achieve the abolition of slavery in the British Empire, and further afield.

Nowadays there is a greater understanding that decisions of courts are a vital strand in the fabric of society and have implications far beyond the immediate

[1] *Somerset v. Stewart* [1772] 98 ER 499.

impact on the parties to a case. The idea that the law can be an important catalyst in social change has been demonstrated in many areas, such as:-

- Civil legal aid: when in the late 1977, Johanna Airey, who sought a legal separation from her husband but could not afford the legal fees brought a case to the European Court of Human Rights which found that her right of access to the courts under Article 6(1) of the Convention had been breached by the absence of a civil legal aid scheme in Ireland. This paved the way for the introduction of a limited civil legal aid scheme.[2]
- Criminal legal aid: as a result of the ground-breaking case of *State (Healy) v. O'Donoghue*;[3]
- Marital privacy: identified by the Supreme Court in *McGee v. Attorney General,*[4] which had the effect of legalising the importation of contraceptives for private use;
- LGBTQ rights: which although crystalised in the right to marriage equality following the constitutional referendum of 2015, were long fought for in and prompted by cases such as *Norris v. Ireland*,[5] *Zappone & Gilligan v. Revenue Commissioners & Ors*;[6] and gender recognition in *Foy v. An t-Ard Chlaraitheoir.*[7]
- The rights of women: for example, to serve on a jury as a result of *De Burca v. Attorney General*, to information on abortion services abroad (*Open Door and Dublin Well Woman v. Ireland*) and to an abortion in certain circumstances (*Attorney General v. X.*);
- More recently, the impact of environmental law cases such as *Friends of the Irish Environment v. Ireland*.[8]

This list illustrates something important and not always recognised. Lawyers like to point to dramatic cases which had an unmistakeable impact on Irish society., but a cynic might say that there's only so often *McGee v. AG* can be rolled out to provide some respectability for the legal system in the eyes of those campaigning

[2] *Airey v Ireland* (1979) 2 EHRR 305.
[3] *State (Healy) v. O'Donoghue* [1976] I.R. 325.
[4] *McGee v. Attorney General* [1974] I.R. 284.
[5] *Norris v. Ireland* (App no 10581/83) ECHR.
[6] *Zappone & Gilligan v. Revenue Commissioners* [2006] IEHC 404
[7] *Foy v. An t-Ard Chlaraitheoir and others* [2002] IEHC 116.
[8] *Friends of the Irish Environment v. Ireland* [2020] IESC 49.

for social change. But doing justice according to law irrespective of the popularity or even the perceived desirability of the outcome is just as much the performance of the injunction over the Bridewell, and that might mean that cases may fail, but that does not mean they have no value – in fact they can be important exercises in consciousness raising. Sometimes you win when you lose, but even allowing for this, it is important to recognise that these are and are always going to be a relatively small number of high profile cases which fit a template where a legal action can have some prospect of a successful outcome – and that is the way it should be.

It is a serious mistake to think that every political issue (with a small 'p') can, after a quick costume change, be converted into a legal issue, and failure in the political sphere can be spun into success in the courts, and that the courts and lawyers are somehow remiss if that does not happen. The business of the courts is and has to be the law and the business of judges is to render decisions according to law. If you think it is acceptable for courts to promote decisions and outcomes simply because they appear to them to be socially desirable you cannot complain when the reverse happens. Perhaps better funded and resourced groups invite courts to make decisions you profoundly disagree with, but may be temporarily popular, or popular with an influential lobby, and if you think that judges should just make political decisions, you cannot complain if judges are then chosen on the basis that they will or might decide important issues in a particular way. So, the areas in which legal action is useful and successful is always or at least should always be limited and targeted. If so, the court decision may not always be the only or even the primary impetus for the change, but it is often an important contributing factor. The change to which the law contributes is a result of the collective efforts of the parties, the lawyers and the organisations which support those who bring cases that impact society.

Today's conference organised by the Bar Voluntary Assistance Scheme on the topic of 'Law and Social Change' provides a welcome opportunity to highlight the role of the advocate and discuss important topics under the umbrella of this theme such as:-

- the use of strategic litigation;
- the personal experience of litigants bringing claims for such change;

- third party intervention at the European Court of Human Rights as, *amicus curiae* in Irish courts, and contributing to other international forums; and
- finally, a distinguished panel will discuss Public Interest Litigation in the Irish Courts

I would like to congratulate the Voluntary Assistance Scheme of The Bar for organising this conference and for providing, since its establishment in 2014, voluntary services of barristers to charities and civil society groups. I think it is important to say that there were precursors to the scheme under the auspices of the Bar Council, and all those initiatives build on the strong culture in the Irish Bar where advocates were prepared to take cases without any expectation of payment of fees. That was necessarily an *ad hoc* process. But law and litigation has become increasingly complex and demanding of time and resources. One of the things I think is admirable about the Voluntary Assistance Scheme is not just that it is voluntary – but that it is a scheme. It creates a structure where resources can be channelled and applied in an effective way, and provides a point of contact with voluntary groups.

But it is critical that at the heart of every case in which the VAS provides its services is a person with a dispute to be resolved or a right to be vindicated, who would not otherwise be in a position to access justice in his, her or their case. In the US, for example, the response to strict standing rules has led to the practice of campaigners (whether liberal or as is increasingly the case conservative) advertising for plaintiffs and then engaging in a process of curating the facts of a case to form a vehicle for a legal argument that has been prepared earlier and which is seeking a litigant. I think it is important that in Ireland the engine of any case must be a real plaintiff or plaintiffs with real grievances. And that raises the issue of access of that real plaintiff to justice.

I have previously quoted an Irish judge in England, Mr. Justice Matthew, who, at the end of the 19th Century is reputed to have observed that "*in England, justice is open to all, like the Ritz Hotel*". This suggests perhaps that the issue of access to justice is not a modern problem. Anatole France said, "*that the law in all its majestic equality forbids the rich as well as the poor to sleep under the bridges of Paris",* and this suggests this is not a uniquely Irish problem. There is a big

difference between resort to court being a serious step not lightly taken, and access to justice being difficult if not impossible for ordinary people. If people cannot have disputes which are important to them resolved definitively by an independent court system, if indeed, many people do not even know of the possibility, then the law risks becoming dangerously disconnected from the public it is meant to serve, and a discrepancy opens up between what the law says, and what the law on occasion does, or is understood to do.

This is a bad thing in itself, but recent events in other counties have shown that the western liberal democratic model is a fragile one which we cannot take for granted. The existence of an independent court system in which justice is administered without fear or favour, affection or ill will, is not a luxury or optional extra. It is something, with all its inefficiencies and frustrations, that is central to the continued existence of a liberal democratic society.

My predecessor Chief Justice Frank Clarke established the Chief Justices Working Group on Access to Justice at the beginning of 2021, which I have been very happy to continue. It is modelled on a Canadian initiative. The Working Group includes a representative of The Bar, Joseph O'Sullivan BL, of the Law Society, FLAC, the Legal Aid Board and my colleague Mr. Justice John MacMenamin. The Working Group hosted a two-day conference in October 2021, a report of which is publicly available online. The conference opened with a series of keynote speeches which contextualised the concept of access to justice. This was followed by a plenary session on unmet legal needs and a series of breakout workshops on topics relating to access to justice, including 'the accessibility of courts: court procedures and representation', during which a representative of the VAS was one of the panellists.

The conference provided an opportunity to bring together a network of people and organisations with an interest in access to justice. Some of the key take aways from the event were that:-

- access to justice is multifactorial and involves complex, interconnected and overlapping issues;
- there is potential for greater coordination for relevant actors;

- injustices are generally 'clustered' so that people often experience more than one problem, and legal problems trigger health and social problems;
- it can be helpful to describe access to justice as a 'continuum', which includes: information; legal advice; advocacy; access to the courts; access to an effective remedy and fair and just laws. Dealing with the items earlier in the continuum may be most effective and least costly;
- Although there is much change in progress to remove barriers to accessing justice, many legal needs are not met by the current system.

These points put into focus the importance of the work carried out by The Bar's Voluntary Assistance scheme in coordinating with charities and civil society groups to meet the needs of people not provided for under the current system. I think there is potential for even greater potential for coordination between then scheme and the wider network which came together for the Access to Justice Conference.

The Voluntary Assistance Scheme seeks to address the gap in accessing justice in areas not catered for by State run initiatives such as the civil legal aid scheme. Another overwhelming issue highlighted in the Chief Justice's Working Group on Access to Justice conference was that the current civil legal aid scheme is in need of review.

A welcome development since the conference was the establishment by the Government of a civil legal aid review chaired by my predecessor, Mr. Justice Clarke. The Chief Justice's Working Group now plans to host an event on the topic of civil legal aid following on from the October 2021 conference, which I hope will bring together information, experience and ideas in order to contribute to improvement.

The civil legal aid review is one important initiative, but one of the lessons of the conference is there is a growing recognition that removing obstacles to access to justice is not a single problem with a single solution but a multi-faceted problem that requires many changes, large and small, in many areas. It requires education, outreach and support so that they have rights, may have a legal problem and how to enforce them. It requires voluntary initiative by lawyers, and the structured support by the organised branches of the legal profession, such as the Voluntary Assistance scheme. It also involves a stronger and more effective legal system

with a greater number of judges and optimising the efficiency of the system. The report of the Judicial Planning Working Group is expected shortly, and I hope that will mark a step change in our approach to judicial numbers. Improving access to justice may involve provisions controlling the costs of proceedings and as importantly controlling the procedures that lead to costs, and perhaps other initiatives involving representative actions on behalf of groups, and the possibility of third-party funding.

The availability of a professional structure offering assistance by way of advice and advocacy, and which can operate as a point of contact interest groups and NGO's requiring those services is an important part of the jigsaw. I would emphasise the word professional. It sometimes sounds old fashioned to refer to a profession, but at its best, it means that once engaged a professional person gives the very best of themselves in the interests of their client whether popular or unpopular, whether resourced or not. I think every judge is heartened to see a claim advanced that would not otherwise reach court. But nobody should expect that fact alone to win a case, or even obtain some indulgence or credit in the case. The Court's function is to do justice according to law, and to hold the scales of justice evenly between the parties and to apply the same law to all litigants. What I think is particularly admirable about the Voluntary Assistance Scheme is that it is a promise that the case will be prepared and advanced in a thoroughly competent and professional way and not just in the best traditions of the legal profession but to the highest standards of the profession. After all what citizens require and what they are entitled to is not just access to courts, it is access to justice.

I am very pleased to open this conference and wish you a very successful event.