Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

Nouvelles Technologies

Delivered by Mr Justice Donal O'Donnell, Chief Justice, at a symposium titled 'Dynamics of Comparative Law: Civil Law and Common Law in an Era of Globalization' held at the Cour de Cassation on 29 November 2024

First, it is a particular pleasure for me to be here at an event commemorating Professor Basil Markesinis. While I never encountered him in person, I feel I know him in the best way a lawyer can, by reading his writings and being impressed by his thinking. I recall his disdain for what he described as the common law's practice of producing practitioners' treatises, "*where the emphasis is on a wealth of citation and technical attempts to reconcile the irreconcilable*", quoting Benjamin Cardozo's criticism of judicial reasoning that "*march at time to pitiless conclusions under the prod of a remorseless logic which is supposed to leave no alternative*".[1] He insisted on a more theoretical approach and sought to interrogate the theory and deduce from that a principle. At that more elevated level, it was possible to analyse issues from a comparative perspective and, instead of becoming frustrated by the differences in detail between systems, derive a genuine insight from other legal systems. Indeed, in the same lecture, he referred to the "*cryptic judgments of the French Cour de Cassation whose judges are trained to keep their thoughts to themselves*". I am sure he would be very happy to see this conference, where the judges of the Cour de Cassation are doing anything but keeping their thoughts to themselves – to all our benefit.

This conference and this session are indeed good examples of the approach urged by Professor Markesinis because technology, and its impact on life and law, does not recognise national boundaries or distinct legal systems.

[1] Markesinis, B.S., (1994). A matter of style. *Law Quarterly Review*, 110, pp.607-625. An Inaugural lecture at University College London, 1994.

Science and technology are the same regardless of jurisdiction. While their application in different legal systems may be different or have different effects, we all have something to learn from our different experiences of the impact of technology on the practice of law and the administration of justice in the 21st century.

I am delighted to visit Paris and the Cour de Cassation in particular. However, I feel that I am here under some element of false pretences. I have been invited to discuss the common law response to new technology, but I should say immediately that Ireland is not and cannot claim to be at the cutting edge of new technology in the legal sphere. There are a number of reasons for this. First, while Ireland has experienced success in attracting enterprises in the field of technology in the last 20 or 30 years, we are a still small jurisdiction on the edge of Europe. Second, the financial crisis that all of Europe experienced but in which Ireland suffered one of the biggest shocks came at a particularly bad time for the modernisation of the court system. The justice sector suffered substantial cutbacks, and the greatest savings were made by simply failing to continue to invest in technology. Since the recovery of the economy, there has been a process of catch-up. The approach was recently described to me (correctly) as attempting to learn from other, more advanced systems, to choose the best and most effective developments and solutions, and to then seek to adopt those solutions and perhaps adapt and improve them.

This is a logical position to take, at least in the field of the administration of justice. Law and legal systems are, by definition, local rather than international, and outside of the narrow specialised, albeit lucrative, field of international dispute resolution, legal systems are not in competition with each other, so there is no, or only very limited, first mover advantage to be gained by making the greatest advances in technology. Instead, adopting and adapting a technological solution after it has been tried, tested, and proven in another and comparable jurisdiction is arguably a more sensible and cost-efficient approach. However, it means that I cannot present myself as experienced in cutting-edge legal technology. Yet, the perspective of being an interested and engaged observer may be of some benefit, and the

fact that Ireland is the European site of a number of the largest tech companies and satellite businesses gives a particular perspective. As has been said, in this respect, we are influenced by both Boston and Berlin or, perhaps I should say, by both Palo Alto and Paris.

It is worth pausing to reflect on why this conference is topical. Part of the modern impetus for the study of comparative law, and in particular the engagement between the major civil law systems and the common law systems, has been the interaction between courts in jurisdictions with each system with both the Court of Justice of the European Union and the European Court of Human Rights. I think civil lawyers tend to see the jurisprudence of both the CJEU and ECtHR as reflecting a drift towards a common law system because of the emphasis both courts now place on their prior case law. However, it may be some comfort to the civil lawyer, that from a common law perspective, there is a commonly expressed view that the impact of European law with its civil law emphasis, has tended to give a more civil law flavour to the common law. It is not simply that there is now a very substantial amount of European law in the national systems. Moreover, European law brings with it a distinctive form of legislation and, as importantly, a distinctive approach to interpretation of the law. In my view, for example, this European approach heavily influenced by civil law has affected the approach to statutory interpretation within the common law system more generally.

It is perhaps understandable that when viewed from the outside the most distinctive feature of the common law system is often identified as the theory of binding precedent – *stare decisis*. However, that emphasis can be misleading. The question of what the *ratio decidendi* of a decision on an area purely regulated by the common law and thus by decisions of the courts, is not in fact one which is often encountered by courts in the common law system. Much of the business of courts involves the *application* of law, and most of that law is not judge made common law, but statutory, itself often implementing European law. It is relatively rare, even at the level of a Supreme Court to encounter the classic question of whether a given situation of fact is covered by a <u>binding</u> precedent. Instead, many

cases involve either the application of the law or questions of statutory interpretation, and in most cases when reference is made to the case law, it is to attempt to reason by analogy or deduce a principle which is applicable to the case being considered.

It is arguable therefore that it is the *case method* which is the most significant feature of the common law system since it encourages the distinctive incremental approach of the common law. This method, which encourages reasoning by analogy, laterally as it were by case to case rather than vertically from principle to application, is now clearly discernible in the approach of the CJEU and the ECtHR and, through that medium, is perhaps making its way, at least in an embryonic form, into civil law systems.

Common law systems are becoming more closely aligned with the supranational systems and the civil law systems because of a different development. The classical image of the development of common law, was the development of common law principles by decisions of judges in fields such as tort delict, contract, property and criminal law, which probably reached its zenith in the Victorian era decisions of the courts of the United Kingdom. However, the centre of gravity of that system was essentially private law and, of course, crime. Those areas of law (with the exception of criminal law) form a much smaller part of the work of courts in the common law system today: and even within the area of private law, the number of cases which are decided by reference to pure common law principles is smaller still.

Today, a very significant proportion of the work of courts in the common law systems is public law, either judicial review of administrative action, challenges to provisions by reference to the European Convention on Human Rights or, in the case of Ireland, by reference to the Constitution. Not only does the European Convention on Human Rights bring civil law systems, and therefore civil law influences, into view in common law courts, but the method of interpretation in this regard, is much more familiar to civil lawyers (even if a purist civil lawyer might consider it to be contaminated by common law influences. The question of whether any legislation or decision offends against the terms of the Convention or a

national Constitution setting out guarantees of rights or other provisions in broad and general terms, involves reasoning from principle by way of deduction. The decisions of common law courts in this area are therefore increasingly likely to find useful comparator decisions in courts in civil law systems, because they deal with essentially similar issues, such as the question of whether specific provisions of national law are inconsistent with broadly expressed rights such as liberty, a fair trial, equality and protection of property.

This is illustrated by one example in the recent case law of the Cour de Cassation. In its ruling of 10 July 2024[2], the Social Chamber addressed the question of whether the fact that evidence had been obtained illegally or in breach of rights, should necessarily lead to its exclusion from civil law proceedings. The issue of the admissibility of evidence obtained in breach of the law of the Convention or the Constitution, has arisen in both criminal and civil law contexts in Ireland and has been controversial. In the case of *The People (Director of Public Prosecutions) v JC* [3] the Supreme Court of Ireland divided 4 to 3 on the question of the admission of evidence which had been obtained in breach of the constitutional right to protection of the dwelling home by reason of the invalidity of the search warrant which had been issued to search a premises. The case involved a consideration of an extensive range of case law, but arguably could have benefitted from a consideration of the decisions of the major civil law jurisdictions, since the essential question is one of principle: how are the competing demands of the obligation to do justice in any case to be reconciled with the obligation to uphold legal rights? The fact that in its ruling of 10th July the Cour de Cassation referred with approval to the ECtHR's proportionality test is a further signpost towards the general comparability, if not convergence, of the case law.

It seems to me, therefore, that it is increasingly likely that courts of both civil law and common law jurisdictions will be able to consult the jurisprudence of their respective jurisdictions, not merely because the

[2] Ruling n°23-14.900.
[3] [2015] IESC 50; [2017] 3 I.R. 417.

subject matter may be comparable, but also because the method of analysis will be more familiar. If this is so, the likely impact of new technology in facilitating this is, in my view, more likely to be found however in developments within civil law jurisdictions, making the decisions of those jurisdictions available more widely within the common law jurisdictions rather than vice versa. This is so for a number of reasons.

The first general point that I think can be made from at least the high-level bird's eye view that Professor Markesinis would have espoused, is that the most obvious potential impact of the new technologies and, in particular, AI is likely to be in a knowledge-based profession, and in respect of repetitive tasks. It is, therefore, no coincidence that among the courts that are at the forefront of adapting new technology, particularly AI, are the CJEU and the ECtHR. The ECtHR has a very limited budget but an enormous volume of cases, many of which are, if not identical, very similar. Furthermore, because there are no significant barriers to commencing proceedings before the ECtHR, a large number of the cases filed at the Court are straightforward and many hopelessly misguided. The difficulty in all these cases is not so much in resolving a difficult dispute as in getting to the point of identifying it, of getting to the point of simply "opening the file", as it were. At the same time, since the Court deals with 46 contracting States, there is a significant demand for translation. The CJEU for its part has perhaps greater resources, but, as the architecture of the Court almost demonstrates in physical terms, it has an enormous demand for translation services. Because the Court sits at the apex of the European court structure and has an essential part to play in the European Union, there is a large incentive to try and make the Court's business accessible to EU citizens. On the other hand, in large civil law jurisdictions, such as France and Spain, there is a large archive of cases, mostly individual decisions of no broader significance, and where there is a current demand for anonymisation and pseudonymisation.

All these aspects of the supranational systems and the continental civil law systems are obvious areas in which new technology, particularly AI, can provide effective and beneficial solutions. It is no surprise, therefore, that

these cumulatively are the areas in which the greatest advances are now being made in the use of technology in legal systems.

However, none of these features is present to the same degree in common law systems based on a system of binding precedent. There is not the same demand for translation as in supranational courts. Anonymisation to pseudonymisation is not something valued in a common law system based on binding precedent; on the contrary, the tradition of open justice and of leading cases creating binding precedent has tended in the opposite direction. It also follows that there are not a large number of individual cases raising essentially similar issues. In theory, at least, the establishment of a leading decision in an apex court, creating a binding precedent, permits lawyers to advise their clients in a way that is intended to minimise the necessity of going to court for a decision. The focus of the system, therefore, tends to be on a relatively small number of decided cases, certainly in comparison to the number of disputes, and crucially the system already makes them widely available and well known. They are already easily retrievable, and new technologies will not have the transformative effect in this respect that they may have in the large civil law systems.

However, there are other ways in which new technologies may have an influence on the common law. One distinctive feature of the common law system is that it is driven by the parties and not by the court and is, perhaps consequently, expensive. In some common law jurisdictions, the State has retreated from the theory that it ought to subsidise the provision of legal services as part of a fully developed welfare State; in some it was never economically possible to do so, and in others it was inconsistent with the public ideology of the State. In most jurisdictions a combination of these factors apply. But the end result is that the State saw its function as merely providing a forum in which parties could bring their disputes for resolution at their own expense, which could be considerable. One consequence of this is that a large number of disputes, which may be of real importance and significance to the individuals concerned, do not get to court in common law systems, and do not get the benefit of the well-engineered machine the

common law has devised for resolving disputes, because the cost of doing so is disproportionate, is simply prohibitive, or requires parties to take risks which they find unacceptable.

A different problem which arises in every legal system but is particularly visible in a common law system is the term that has become popular more recently: it is "*noisy*", that is, there is inconsistency of outcome. This is not the same as bias: bias is the tendency of all cases, or a significant number of cases, to exhibit the same prejudice or, more neutrally, the same beliefs or assumptions. In a biased system, all tend in one direction. That bias is more easily cured than noise. In a noisy system, results are all over the place. *Noise*[4] is a particular problem in a common law system because of the significant emphasis placed on the principle of institutional and individual independence of the judiciary. This poses a particular threat to legal systems because it identifies not simply a defect that may be cured, but rather exposes a weakness and a vulnerability in what is a key feature of the system and one which, in other circumstances, would be celebrated.

It is not surprising, therefore, that in the areas of both cost and consistency of outcomes, there have been important developments in common law systems and there are likely to be more.

Sir Geoffrey Vos, the Master of the Rolls in England and Wales, has been a particular proponent of technology in the common law system, including the development and use of AI-led models. In particular, he has promoted the development of a Digital Justice System in England and Wales, which would provide a common portal to link the formal court system with various dispute resolution systems, whether general like arbitration and mediation or sectoral, with other systems such as the ombudsman. The system would also be linked to the bodies providing legal advice and legal aid and charities offering advice and assistance. The idea is that the user would input information once, and then it would be passed through the various systems without the risk of falling between the cracks. This would be a significant achievement in its own right. However, one ambitious further aspect of this

[4] Kahneman, D., Sibony, O. and Sunstein, C.R. (2021) *Noise: A Flaw in Human Judgment*. London: William Collins.

is to offer a small claims dispute resolution system with AI decision-making subject to a right of appeal or recourse to a human decision-maker, which it is anticipated would occur in only a fraction of cases. This is obviously ambitious, but it offers the prospect of a very large number of disputes of real importance to individuals being resolved when they might otherwise never have been addressed.[5] This is an innovative project and one which we in Ireland are watching quite closely, and certainly one which we would hope to adopt and take the benefit of, should it prove to be successful.

I will only touch upon different initiatives, like the US COMPAS system, which predicts the likelihood of reoffending and, therefore, is used in sentencing decisions where there are otherwise very disparate results.[6] In British Columbia, the Civil Resolution Tribunal is an AI supported platform enhancing accessibility and expedition in the resolution of disputes. These developments raise a host of questions which I cannot address here, but it is in my view not coincidental that they occur in the area of small claims that are disproportionately costly to resolve in the traditional court system, and in the field of ensuring greater consistency in the application of the law.

This leads me to broader theoretical issues, which I would like to raise and consider during our discussions. First, Europe's approach to technological advances, and in particular, issues as fundamental as AI, has been towards comprehensive regulation, as exemplified by the AI Act (that is Regulation EU 2024/1689).[7] That is a really impressive piece of legislation, and its approach is something which, in principle, I would applaud. The Regulation itself is based on respect for fundamental rights and the fact of such regulation is, in truth, a significant justification for the whole idea of a European Union. It is certainly obvious from the perspective of a small jurisdiction like Ireland, but it is true of every jurisdiction in Europe that no state in Europe can hope to impose its system of regulation upon the market. However, as a single trading bloc, creating a very large and

[5] Vos, G. (2024) 'The Future of Courts'. Speech delivered on 15 May 2024.
[6] Larson, J., Mattu, S., Kirchner, L., and Angwin, J. (2016) 'How We Analyzed the COMPAS Recidivism Algorithm', *ProPublica*, 23 May. Available at: https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm [Accessed 5 November 2024].
[7] Regulation EU 2024/1689.

lucrative market, Europe has the capacity to adopt and impose regulations and secure compliance with them, which a country like Ireland, and indeed any individual Member State, could not itself seek to impose. That is in itself quite a telling insight since it tells us something about the size, scale and power of the large tech companies and the impact of technology. But insomuch as Europe can devise and impose regulation that is consistent with liberal democratic values, that is a huge benefit to member states and would have a ripple effect well beyond the borders of Europe.

The most optimistic version of this is the so-called "Brussels Effect". That is, as I understand it, the idea that because Europe is itself such a significant player, the regulations which it adopts can, by default, become more general standards accepted by industry. If it is necessary to adapt products and processes to secure access to a European market, then it is easier to adopt those product changes and processes more generally. Indeed, that is the express basis upon which the AI Act has been promoted by the European Parliament in its publication *The Global Reach of the EU's Approach to Digital Transformation*.[8]

However, I think we should be careful about any complacency in this regard. There are a number of reasons why the Brussels Effect may not work in this area, and if so, where the entire European approach may be challenged. It is possible to doubt that the approach of comprehensive regulation of a rapidly changing area will be sufficiently flexible to be successful.[9] It is possible to have concerns at a more philosophical level,[10] but it is also possible to have concerns at a more pragmatic level.

[8] European Parliament. (2024) *The global reach of the EU's approach to digital transformation*. Briefing, 29 January 2024.
[9] Gikay, A.A. (2024) 'The EU's Approach to AI Regulation Versus the UK's Approach: A Comparative Analysis of Adaptability to Developing Technologies', *International Journal of Law and Information Technology*, 32(1). Available at: https://academic.oup.com/ijlit/article/32/1/eaae013/7701544 [Accessed 5 November 2024].
[10] Tasioulas, J. and Green, C. (2023) 'The EU's AI Act at a Crossroad for Rights', *AI Ethics at Oxford Blog*, 4 December. Available at: https://www.oxford-aiethics.ox.ac.uk/eus-ai-act-crossroads-rights [Accessed 5 November 2024].

Sir Geoffrey Vos, who I have already mentioned and who is certainly not a sceptic about the need to adopt the technology, has observed that developments in AI will pose a serious challenge to put the EU model of regulation.[11]

> *"In my view, however, likely developments in AI will, in reality, put that kind of regulation to the test.*
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> *The power of AI is growing rapidly. The LLMs of today are only the start. Much more powerful tools will soon be available. When they are, they will be able to advise on and even resolve, at least some, legal questions as well as humans, far more quickly and far more cheaply. Whilst lawyers and judges will* ***want*** *to retain complete human oversight of the use of these technologies, they will, I suspect, not actually be able, without spending masses of time and money, to check the work of the AI.*
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> *Citizens will surely use these AI tools in practice to get legal advice and will surely want justice delivered more speedily and efficiently by the use of them. If lawyers and judges refuse to adopt them, they will be left behind. Once the human lawyer or judge is faced with something that may take days to check – or simply be uncheckable – what choice do they have but to accept the advice or verdict of the machine?*
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> *This is a serious problem for the future. It will not arise due to malign use of AI, but from an inevitable commercial and perhaps human imperative to allow citizens and businesses to achieve what they want and need – namely effective legal solutions – more quickly and efficiently than humans can achieve. And this problem affects every other consumer, financial and industrial sector in much the same way that it affects law, lawyers and judges."*

[11] Vos, G. (2024) 'The Digital Trading Revolution – Underpinned by Law". Speech delivered on 16 October 2024.

There was a worldwide AI Safety Summit conference held at Bletchley Park near London in November 2023, and an expert report was produced in advance of that. Among the points it highlighted were the following:[12]

- Law, as a knowledge-based profession, is one of the most likely areas to be affected by developments in AI.
- Europe is not at or close to the cutting edge in the development of AI. Most, if not all, developments occur in the United States, China and, to a lesser extent, Russia.
- To a noticeable degree, most of the developments in AI now occur within private industry, rather than in universities. This has a knock-on effect, making it more difficult for entrants to the market to establish themselves and for consumers to benefit from competition.

Consequently, there is a lack of information, and to some extent, a risk of disinformation about developments. One headline-catching event was the announcement by industry leaders in the US that developments should be paused and regulated.[13] This, however, has been criticised, as an attempt by market insiders, to protect the area and their position within it.

The impact of AI is, however, likely to be transformative in our lives in general and, consequently, in our work. This was vividly illustrated recently by the author Yuval Noah Hariri, who observed that social media is based upon algorithms, which are, in relative terms, an extremely rudimentary form of AI.[14] Yet, who can now discount the impact of social media on the lives of everyone in the world today or deny its influence on our politics, our relationships, and indeed our world?

One other feature of social media, and consequently technology, is a form of information globalisation. Even as young people in Europe (or indeed elsewhere in the world) become more and more disillusioned with, or even

[12] Department for Science, Innovation & Technology, 'AI Safety Summit, Capabilities and risks from frontier AI: A discussion paper on the need for further research into AI risk', AI Safety Summit (October 2023).
[13] Bradshaw T. and Johnston I. (2024). Elon Musk and other tech experts call for 'pause' on advanced AI systems. *Financial Times*, 29 March 2023.
[14] Harari N. (2024) 'Beware the AI bureaucrats', Financial Times, 26th October 2024.

hostile to, the United States, it is a feature of their lives that they have more detailed knowledge of events in the US and are accordingly much more affected by them than any previous generation.

Finally, the fact that much of the development in this field is occurring not just in the US but in Silicon Valley, where the underlying philosophy is individualistic, sceptical of the state and, above all, positively hostile to regulation, brings the industry into almost direct conflict with the European model. But that raises the question of whether in a modern and globalised world with ease of access to information, Europe can successfully insist upon regulation if the products of an unregulated, aggressively competitive, and quite possibly a cheaper and more efficient system, are plainly visible and perhaps accessible. To take one simple, albeit extreme, example: could any country or even a major trading bloc like the EU continue to insist upon the exclusive use of the postal system for sending messages, if email was in use everywhere else in the world and obviously visible, available, and effective in Europe?

This leads to a second reflection upon which I have touched which is the privatisation of a field which it should be said has enormous impact on our daily lives. Meta's creation of a 22-member Oversight Board in December 2020 is instructive. At many levels, this is an admirable venture. The board comprising a globally diverse range of human rights lawyers, academics, journalists, NGO workers and activists, focuses on appeals in relation to complaints about Meta's content moderation practice and whether they are unduly restrictive of freedom of speech. The original board was appointed by Meta but the committee of the board now appoints new members and Meta has no influence in that regard. It has usefully been described, as not so much a national supreme court as akin to an international human rights body.[15]

However, fundamentally, this is the privatisation of what previously would have been a core state function and a core function of the administration of justice. The Meta Oversight Board is a single example, but it is possible to

[15] Helfer, L.R. and Land, M.K. (2023) 'The Meta Oversight Board's Human Rights Future', *Cardozo Law Review*, 44, pp. 2233–2300.

imagine a future in which all sorts of media companies have similar schemes (perhaps not as well developed or as considered) or where indeed all companies subcontracted their review process to a single oversight body agreed on by them all, and then the development would be very significant indeed. In theory the existence of such an oversight board does not affect or in any way subtract from the jurisdiction of courts or indeed supranational courts. In practice, however, it does so, and it is only necessary to consider how this regime might be adopted more generally, and/or expanded, and/or developed in a way less congruent with the approach we take for granted in western liberal democracies based on the Rule of Law perhaps to appreciate the transformative potential impact of technology at a fundamental and structural level in the organisation of the State.

Much of the development in technology is driven by people who are heavily influenced by science fiction writers. One such writer, Vernor Vinge, famously posited the point of singularity, that being the assumed point at which machine intelligence would outstrip human intelligence in terms of knowledge and creativity.[16] That point of singularity may or may not be close, may be distant, or may not exist at all, but it is surely the case that we are in a period of fundamental changes, some of which, if permitted, may become irreversible.

This year, the Nobel Prizes for Physics and Chemistry were awarded for developments in the field of AI, which is a marker of its pervasiveness and importance. One of the awardees for Chemistry, Demis Hassabis, now with Google DeepMind, said that artificial general intelligence ("AGI") is anything between 5 and 20 years away and said, "w*e need a broad discussion on [what goals and values AGI should be set to track], with governments, with civil society, and academia, all parts of society —and social science and philosophy, even".*[17] There is a real and disturbing mismatch between the

[16] Vinge, V. 'The Coming Technological Singularity: How to Survive in the Post-Human Era' Vision-21 Symposium, NASA Lewis Research Center and the Ohio Aerospace Institute, 30 to 31 March 1993.
[17] Murgia, M. (2024). Google DeepMind's Demis Hassabis on his Nobel Prize: 'It feels like a watershed moment for AI'. *Financial Times*, 21 October 2024.

pace of development in the technology and the stage we are at in terms of regulatory and societal response. As he said, there is not a lot of time. It is essential that we - particularly those who are not part of a technological revolution but have been charged with maintaining and protecting fundamental values in our systems – engage with and give thought to the impact of these changes, while society, and in particularly European society has the power to influence the outcome. That is why a conference like this is valuable, and I commend the Cour de Cassation for encouraging this discussion.