



## TRANSCRIPT

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### **Presenter (Sean O'Rourke):**

The debate over whether to retain or scrap Seanad Eireann may be dominating coverage in the media in the run up to polling day but voters will be also asked on Friday if they favour the introduction of a new court of appeal. I am joined in studio now by the Director General of the Law Society of Ireland, Ken Murphy and also by Seth Barrett Tillman, Law Lecturer at NUI Maynooth to debate the arguments for and against this new proposed court. Good morning to you both, Ken Murphy you are in favour of this court of appeal being introduced. Tell us where this court would fit into our current courts structure.

### **Ken Murphy.**

Currently it would fit in between the High Court and Supreme Court. We currently have 36 High Court judges and any of the cases that come before any of those judges could be appealed to the Supreme Court. There is a massive backlog building up within the Supreme Court. In the 1960's there were 7 High Court judges. Now there are 36 High Court judges and really the system hasn't moved with the times. We think that there should be a Court of Appeal and certainly this proposal is supported by all parties in the Oireachtas. I was on a Working Group chaired by now Chief Justice, Justice Susan Denham. That proposed a number of years ago that the answer to this is to bring Ireland into line with other jurisdictions around the world. We're a bit of an outlier in not having a Court of Appeal which would deal with the more routine appeal cases from the High Court to the Supreme Court, leaving the Supreme Court free to

deal with matters of major public importance and constitutional issues. This is the norm around the world.

**Presenter:**

So what kind of cases would come before this new Court of Appeal, if the people vote yes?

**Ken Murphy.**

The Court of Appeal would deal with what I, not disparagingly I hope, would refer to as the more routine cases or what the Chief Justice in a speech last Friday referred to as cases that are clearly very important for the parties concerned but not necessarily of general importance to the public. Therefore routine cases to do with just about anything that can come before the courts. There's a huge range of technical matters, of legal matters. We've become a very litigious society. But that's pretty normal in modern societies. We've a much more complex world now and really we think that we must deal with the enormous backlog of cases, which is four and a half years, in delay for normal cases going between the High Court and Supreme Court at present. We must deal with that. It is impacting on society and on the economy.

**Presenter:**

Justice delayed as the famous phrase has it, Seth Barrett Tillman, is justice denied, we simply cannot tolerate these long delays and this court of appeal is designed to have that delay cut short.

**Seth Barrett Tillman.**

Well thanks very much for giving me an opportunity to speak here today Sean. I think the first thing we have to do is we have to call this by its proper name. This is a new bailout, we've bailed out the bonds, we've bailed out the bond holders and the banks and this is the judicial bailout. That's what this is and we're trying to reward a failing and failed set of institutions with more resources. And that already should lead us to ask some very deep questions. Of course justice delayed is justice denied but the real question is will this be a solution and I have very good reason to think it won't. In large part because the arguments that have been offered to date don't make very much sense.

One argument you just heard from Ken over here was back in the 1960's there were only 7 high court justices, but now there are 36, well the whole world has changed in the last fifty years. We now have electronic resources for judges to do their opinion drafting. That wasn't available fifty years ago. So much of their work should be simpler and more quick. This court won't work for the very simple reason that no one has explained why the backlog could be handled more quickly, more promptly and more expeditiously by a new group of nine people, than the nine people you already have.

And until we hear those arguments, what new procedures will be implemented in the new institution, there's no reason to think you're doing anything but shuffling paper around and spending a great deal of the tax payers money, who isn't at fault for creating this backlog.

**Presenter:**

Do you attach any importance to the intervention of the Chief Justice Mrs. Susan Denham at the weekend? Arguing for the merits of this case.

**Seth Barrett Tillman.**

I actually read her comments in the Irish Times and I have to tell you I found them extraordinary. I have to say I also found them very ill informed. The chief justice said in 2012 her court had 258 written depositions. Well I invite anyone in the listening audience to go to the website of the Supreme Court and click judgments and click decisions and you'll find there are only a hundred and twenty or so reported decisions.

What the Chief Justice is doing is claiming as part of the productivity of her court hundreds of depositions which aren't in the public domain. And also which are minor depositions when parties just settle cases. It's not part of the real productivity of her court.

**Presenter:**

Now you can hardly, in fairness to accuse the Chief Justice of not knowing what's going on in the Supreme Court.

**Seth Barrett Tillman.**

I didn't say she didn't know what's going on, I said she's claiming as part of the productivity depositions that aren't in the public domain, that no one can say...

**Presenter:**

She says for instance that in 2012 there were 258 written judgments in the Supreme Court.

**Seth Barrett Tillman.**

And only a hundred and twenty are published. The other depositions aren't published, they're minor, if they were important depositions they'd be on the website and they're not. And I'd like to follow up...

**Presenter:**

Can you clarify that perhaps Ken Murphy?

**Ken Murphy.**

Yes I'm looking at the Chief Justice's remarks here. She makes the point that the Supreme Court is finalising more cases than ever. She said it is one of the busiest Supreme Courts in the world. In 2012 it dealt with appeals, with orders and written judgments, 258. By comparison she points out that in the nine judge Supreme Court in Washington there were 64 cases in 2012. The Supreme Court in London had 77 cases, the Supreme Court in Ottawa had 83 cases. 258 is one of the most productive, most hard working, courts in the world.

**Presenter:**

Sorry yes but in fairness to Seth, he did say orders, sorry she says orders and written judgments, so the written judgments probably do just amount to the one hundred and twenty.

**Ken Murphy.**

That's right but these are cases disposed off. I don't think there's any error certainly in what the Chief Justice has said.

**Seth Barrett Tillman.**

This is completely comparing apples and oranges, if we're going to include non reported judgments which are not really part of the productivity of this court or any court. The US Supreme Court could claim another nine thousand depositions because it gets petitions to hear cases that are rejected. But they read the briefs. This is an apples and oranges comparison. If you want to know what the court has done go to its own website, you'll only find a hundred and twenty judgments.

But to make the point more boldly, in April of 2013, this very year, not last year, there was only one written judgment published by the Supreme Court. What are they doing there, one published judgment in all of April and three in January? That's less than one a week, there's a productivity problem. And a new court can't solve that.

**Ken Murphy.**

The Supreme Court is extremely hard working and works on a treadmill from which it needs to be released so that it can deal with cases of major public importance. Nobody is denying and I don't know if Seth is saying that there isn't a delay of four and a half years in dealing with cases, there is and this is accepted on all sides.

**Presenter:**

But the question he poses is whether a new layer of, another eight or ten judges is going to be any faster in dealing with those than the ten that are there already or the eight.

**Ken Murphy.**

This is a missing piece of infrastructure. Going from the Commercial Court, I've said this in the past and I'll say it again, going from the Commercial Court in Ireland into the Supreme Court is like driving from a modern twenty first century motorway into a small winding breen. Not because of the judges but because of the lack of resources. We simply don't have a court system, a supreme, appellate court system, appropriate for the twenty first century.

And this isn't just an issue about justice. It's also an issue about jobs because as far as business and mobile international investment coming to Ireland is concerned they will want to have the capacity to have their disputes resolved relatively quickly and this is not acceptable in the modern world.

**Seth Barrett Tillman:**

Of course they want their disputes handled quickly but no one has made any argument why the new court will be any more productive or quick than the judges you have now. All this court is doing is asking for more resources and shuffling paper from one court to another. The problem you have is you have bad rules that guide the conduct of litigation. Oral argument at the Supreme Court lasts days. That's a complete misuse of this court's time. And if it's duplicated at the Court of Appeal you will duplicate the problem.

**Presenter:**

What should they do instead?

**Seth Barrett Tillman.**

Well the Chief Justice actually addressed this in her comments. She said we have to have law and oral argument in order to protect, and I quote, the people's right to a fair trial. That's a remarkable statement. What the Chief Justice is saying is that her court, the Supreme Court is involved in protecting the fair trial right. But the fair trial right takes place in the trial court. It's almost as if what the Chief Justice is saying, every trial has to be duplicated in her court.

**Presenter:**

Are you saying everything should be done on paper or mostly done on paper when it gets to the Supreme Court?

**Seth Barrett Tillman.**

Exactly, almost everything should be done on paper and that's the way most fairly constructed appellate systems work.

**Ken Murphy.**

And that is the case. Most of the work that is done in appellate cases in the Supreme Court is done on paper. And the hearings are relatively short and there has been a great deal of case management work which is putting in modern systems there. Everything else has been tried. What is missing here is the system that will allow fair and speedy disposal of cases of which there is an extraordinary number waiting in delay at the moment.

**Seth Barrett Tillman.**

This simply is not true, cases are not presented on paper. There are only skeleton arguments that go to the Supreme Court on paper. The bulk of the judicial administration is done in oral argument that lasts hours if not days. And this is no way to run an appellate system and if it's done again at the Court of Appeal you will simply duplicate a terrible problem.

**Ken Murphy**

It is not the case that as many, Seth is I think mistaken in his understanding of what happens in the Supreme Court. I go to the Supreme Court regularly. The cases are dealt with pretty efficiently. And most of the work is done in pre reading by the judges of transcripts of the earlier cases.

**Presenter:**

What about the point made by the Master of the High Court Mr. Honohan, Edmund Honohan where he says that of the five hundred appeals waiting to be heard by the Supreme Court, half would be settled, quote, unquote, "on the spot" if they were called for review today because many litigants are filing appeals as a way of holding on to or freezing the status quo.

**Ken Murphy**

It is a case that some people do appeal cases in order to delay and to create an opportunity for settlement at levels of justice below what has been applied by the courts. But I do think the Master of the High Court, the Master of the High Court of course has a view but I think it's very much a minority view. I don't think anybody in the judiciary...

**Presenter:**

But he has a bird's eye view.

**Ken Murphy.**

I don't think anybody in the judiciary, and the master isn't a judge as you know, really believes that that's the case. Anybody who is dealing with the Supreme Court now sees that it is on a treadmill which has to be relieved. Particularly, one of the things that could happen is that if the Supreme Court is allowed to develop principled jurisprudence and deeper cases and deeper judgments, the principles of law will become clearer and therefore there'll be fewer appeals. One of the reasons for so many appeals at the moment is because of uncertainty because the Supreme Court can't develop principles.

**Presenter:**

Seth what do you say to Mr. Honohan's observation that if for the next two years they were allocated one Supreme Court judge and one High Court judge to hear on a daily basis a review of each appeal filed within the previous six months to see what the reality of it is. And how it can be expedited. It would be possible to progress appeals much more quickly in the current framework.

**Seth Barrett Tillman.**

To be perfectly frank, when I read those comments I thought that Mr. Honohan was probably the most courageous person on this island. That took tremendous courage for him to say. And of course the judges are going to line up or at least be quiet. The Chief Justice has come out for this proposal. The Chief Justice of the country, are they really going to say they disagree with her. Every barrister and solicitor who might have to practice before the new court is frankly in terror of coming out against the new court.

**Ken Murphy.**

I have to say this is nonsense really because I was on the working group that we worked for three years and made a report to government in relation to this. There was wide consultation in relation to this. Nobody is scared.



Everybody recognises that there is a need for us to bring our court system into line with best practice across the world. And really you know, both for the benefit of society and the economy, this has to happen.

**Seth Barrett Tillman.**

And to follow up with Mr. Honohan's comments, the master of the High Court, if the Supreme Court broke itself into two divisions of five or three and literally...

**Ken Murphy.**

It does sit in two divisions.

**Seth Barrett Tillman.**

And adjudicated one case a day for every business day, one case a day you'd have five hundred depositions if not six hundred in a year and you've resolved your backlog. And if this court can't resolve one case every business day then no increase in the number of judges could possibly solve your problem.

**Ken Murphy.**

International best practice is that the Supreme Court should be charged with deciding legal issues of public or constitutional importance, a Court of Appeal below it should deal with appeals below, this is not an additional layer...

**Seth Barrett Tillman**

One case a day.

**Ken Murphy.**

This is a division of labour in accordance with best practice across the world. Ireland needs it and actually the voters who are listening can actually do something to resolve this problem. They can vote 'yes' on Friday.

**Presenter:**

Ken Murphy Director General of the Law Society of Ireland, Seth Barrett Tillman department of law at NUI Maynooth, thank you both for being with us.

**Ends**