

State likely to be torn away from common law – judge

Legal implications

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Brexit is likely to “tear” Ireland away from the influence of the common law system and “perhaps even rupture” centuries-long ties between the Irish and English legal systems, a leading Irish judge has said.

Gerard Hogan, who was appointed advocate general of the Court of Justice of the EU last year, warned that there would be “very significant pressure” on the State to become part of a homogenous system of civil law over the next 10-15 years that would be “very difficult, if not impossible, for us to stay out of”.

The former High Court judge said the Irish and English legal systems were joined “almost as an umbilical cord together” but that this would “change fundamentally” after the UK leaves the EU.

“It is like one of these Apollo missions: the mother ship is finally untethered and the big mother ship is moving away and we are almost in the lunar lander somewhere between the Earth and the moon,” he told the EU Bar Association’s annual conference near the Four Courts in Dublin.

This “may not be a terribly comfortable place to be,” he said, and the English courts had yet to come to terms with that or what they would do with their heritage of EU law over four decades.

While the Irish legal system is intellectually prepared for Brexit, if and in whatever form it may occur, its impact over the long term is likely to be considerable, he said.



■ Attorney General, Séamus Woulfe SC with advocate general Gerard Hogan yesterday. PHOTOGRAPH: CONOR MCCABE

“Over time we are going to be pulled further and further away and prised away from the English legal system and from that common law heritage,” he said.

System of precedent

Under common law, judges apply legal precedent based on court rulings, and this is followed in Ireland, the UK, the US and Australia.

Civil law, which is followed in most countries – including in member states across the European Union – requires judges to apply legislative decisions to cases under consideration.

Attorney General Séamus Woulfe SC disagreed, arguing that after 45 years in the EU it was going to be “very difficult” for the English legal system to disengage from EU law.

The current “generation of judges” in Britain would, he said be “very slow” to isolate the UK.

“The fear of isolation will lead them to being inclined to EU law indirectly continuing for quite a

while.”

Mr Woulfe questioned whether the UK might actually exit, given the political division at Westminster.

“It didn’t happen last Friday, it is probably not going to happen next Friday, it is probably not going to happen on June 30th,” he said, referring to the latest date that the UK is looking to delay Brexit to.

The prospect of a second referendum on leaving the EU was “going up and up,” said Mr Woulfe.

While the Conservatives and Labour might find it difficult to agree on a referendum in their talks, there was “a grey comfort” in a unity government where they might let the people decide, he said.

Mr Hogan said he saw “a real possibility of attracting a great deal of legal business to these shores” given that Ireland would be the only English-speaking country and the only “pure” common law system in the EU after the UK leaves.

