First, I wish to thank the European Circuit for inviting me to deliver the keynote speech at its Annual Conference and the Bar Council of Ireland for hosting this event. Each of the topics under discussion this afternoon is worthy of attention, but given the necessary, even desirable constraints on time, I shall focus my attention on the first of them, namely "Court Reform in Europe and Beyond: Strengthening Democracy". By way of preliminary, the content of this contribution reflects my own views and not those of the General Court, save where stated otherwise.

Everywhere there are signs of a crisis of representative democracy. The process that led to the Brexit referendum and subsequent developments that seek to sidestep the British system of parliamentary democracy. The conduct of the United States presidential election against a backdrop of a constitutional order designed to operate checks and balances that often no longer function due to profound divergences of political opinion. Even the advent of primaries in the forthcoming presidential election in France indicates a loss of confidence in the ability of local representatives to find a winning candidate.

Two responses have emerged, neither of which appears to strengthen representative democracy. One, the technocratic, believes that the business of government is best left to the experts. The other, based upon what is often
described as populism, purports to return government to the people through the
election of often colourful, but self-appointed, tribunes. These approaches share
the characteristic of stripping elected representatives of power, leading to a loss
of accountability in respect of decision-making and a consequential cynicism on
the part of the electorate. There is a need to reassert the fundamental principles
of representative democracy, which remains a cornerstone of our respective
constitutional orders. This can be done through open and informed debate by
public representatives who are fully accountable for their decisions and who
respect the operation of the separation of powers.

The verb "to reform" connotes an improvement of the existing state of affairs.
Reform of the courts thus implies that the judicial system requires improvement.
Since human institutions tend to share, if not even magnify, their creators' imperfections, it may be said there is always room for improvement! However striving for improvement through change, particularly irreversible alterations of a constitutional character that may be difficult to reverse, demands considered reflection on the issues at hand and the application of considerable skill and care in implementing the changes proposed, absent which reform, no matter how well intended, can turn septic. One must also be on one's guard against the tendency to cloak change, which may be justified or may serve purely personal or other ends, in the guise of reform, in order to further its adoption.

Whilst the judiciary has a limited degree of autonomy in managing the legal system with one exception, the architecture of European legal systems is primarily a constitutional matter determined in the main by the legislature. The judiciary is an independent, unelected, arm of State power. Whilst not adopting

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1 Article 36.iii of the Constitution of Ireland provides that matters pertaining to the constitution and organisation of the courts, including the distribution of jurisdiction and business among them and all matters of procedure are regulated by law. Article 253 of the TFEU requires Council approval for the Rules of Procedure of the Court of Justice and of the General Court.
a passive role, perhaps well exemplified by the Chief Justice's successful promotion of the establishment of the Court of Appeal in Ireland, in a democratic system of government the main drivers of court reform are outside the courthouse walls. Thus the judiciary and the legal system over which it presides are peculiarly susceptible to the emerging weaknesses in the system of representative democracy.

It is against this background that I propose to examine two examples of recent or proposed court reform: changes to the system of judicial appointments and the process that lead to doubling the number of judges at the EU General Court.

Changing the system of judicial appointments
The essential features of the relationship between the legislative, executive and judicial arms of government in most European legal systems have remained constant since the emergence of the modern nation state. Save for some exceptions, in most European states the Courts consist of individuals appointed by the Executive in order, inter alia, to interpret and to apply legislation and to review the legality of Executive action. Increasingly the Courts are called upon to apply overriding legal norms recognised by the constitutional order of the State. These judicial functions are exercised independently of the other arms of government.

The observation that things are not always as they might appear to be is never truer when applied to mechanisms for judicial appointment. There is considerable variation between European States in the various ways by which they nominate and appoint judges. These differences often reflect distinct views on the role of the judiciary and the legal profession in society and can be fully appreciated only against the precise context in which they emerged. For
instance there is nothing to show that the direct election of judges by the people is any more likely to foster judicial independence than appointment by the executive arm of government.

The Constitution of Ireland confers the power to appoint judges on the President,\(^2\) which power must be exercised on the advice of the Government.\(^3\) In exercising that power, the President is neither answerable to the Parliament nor to the Courts.\(^4\) The People of Ireland have thus conferred an unfettered power to appoint judges on the Executive.

Section 13(1) of the Courts and Court Officers Act 1995 established the Judicial Appointments Advisory Board "[f] or the purposes of identifying persons and informing the Government of the suitability of those persons for appointment to judicial office". Save where the Government contemplates the appointment of someone who is already a judge,\(^5\) the JAAB, as it is known, "shall recommend ... at least seven persons for appointment to that judicial office".\(^6\) It thus performs a purely advisory function by assisting the Government in the exercise of its Constitutional powers. Presided over by the Chief Justice, it consists of the presidents of the other four courts, the Attorney General, two nominees of the legal profession and three persons appointed by the Minister for Justice.

Paragraph 6(A) of the Programme for Partnership Government declares an intention to introduce legislation to replace the JAAB with a Judicial Appointments Commission. It is envisaged that the JAC will consist of fewer persons and will have a majority of non-lawyers. It will be chaired by an

\(^2\) Constitution of Ireland, Article 35.1
\(^3\) Constitution of Ireland, Article 13.11
\(^4\) Constitution of Ireland, Article 13.8.
\(^5\) Courts and Court Officers Act 1995, s. 17.
\(^6\) Courts and Court Officers Act 1995, s. 16(2).
independent person selected by the Public Appointments Service and approved by a committee of parliament.

The Programme for Government further declares that "[w]e will reform the judicial appointments process to ensure it is transparent, fair and credible. ", thus implying that the current process is somewhat lacking in these attributes. The sole concrete change proposed to that end is to reduce the choice available to the Government " ...to the lowest number advised as constitutionally and legally permissible by the Attorney General," although her advice seems to have been discounted in advance as this is followed by the statement that " in any event not more than three candidates" may have their names sent forward for consideration by the Government.

Legislation to implement this aspect of the Programme for Government is as yet not in the public domain: however one might be forgiven for wondering whether the envisaged reduction in the choice available to Government is consonant with the spirit, or the letter, of the Constitution. One might have thought that requiring the JAAB to carry out a more thorough selection process and to submit the names of all those it deemed met those requirements would better serve the aim of introducing greater transparency, fairness and credibility to the process, whilst assisting the Government in the discharge of its constitutionally ordained duty. Once a person is deemed to meet an objective standard to meet the demands of a post, it must surely be open to Government to nominate him/her to that position, all the more so where the Constitution appears to envisage that approach.

Moreover, whilst it may be fashionable in certain quarters to promote the emasculation of executive power, it may be asked whether that strengthens
democracy. With or without a JAAB, a JAC or any similar structure, the Constitution empowers the Government (which, incidentally, consists mostly of non-lawyers) to decide who may be appointed to judicial office. The People may eject from office a Government that it believes has failed to perform its duties correctly. It is far from clear how the will of the People can be exercised over the "independent persons" who are to be selected by the Public Appointments Service with the approval of a parliamentary committee. At a time when the merits of representative democracy are questioned in part on the basis that power is exercised increasingly beyond the political process, the wisdom of placing further constrains on the exercise of such powers as the People have conferred on the Executive is questionable.

**Doubling the Size of the EU General Court**

Unlike almost all Supreme Courts, the Court of Justice has the right to initiate legislation. Apart from certain exceptional provisions, it can request the Parliament and the Council to amend its Statute. Since the Statute determines the number of judges at the General Court, the Court can propose to alter that figure. Article 257 of the TFEU provides that the Court of Justice may also propose the establishment of first instance courts attached to the General Court to hear and determine certain classes of action.

These provisions envisage the Court of Justice participating in the legislative process, thereby playing a direct, political role in shaping the EU's judicial architecture. By way of contrast, a modest proposal to amend the European Convention on Human Rights and Fundamental Freedoms so as to allow the Committee of Ministers to adopt changes by way of unanimous resolution rather

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7 TFEU, Article 281 excepts from the application of this provision Title I and Article 64 of the Statute.
8 TFEU Article 254
9 As in the case of the Civil Service Tribunal, dissolved on 31 August 2016.
than by way of an amendment to the Convention itself has yet to be implemented. 10 The differences in the capacity of two of the great jurisdictions of the European legal order to influence their fates could not be starker.

The decision to double the number of judges at the EU General Court is a radical change in the EU judicial architecture, not just in quantitative terms (assuming Brexit, the General Court will consist of 54 judges in September 2019, making it the largest international court of its kind in the world) but also in its constitutional import (as the doubling of the General Court amounts to a rejection in practice of three-tier system of jurisdiction envisaged by the Treaties of Nice and Lisbon which envisaged the establishment of specialised courts with a right of appeal to the General Court, which same structure the Court of Justice had formerly supported through its sponsorship of the Civil Service Tribunal).

The merits of the decision to double the membership of the General Court were very much disputed. My views and those of the General Court with regard to that proposal are well known. I do not propose to re-open that debate this afternoon. Indeed I believe I speak for the vast majority of my colleagues when I say that we will try to make the most effective use of the additional resources that have been made available to us, notwithstanding that other, even better alternatives were available. What is relevant here is whether the process that led to the adoption of the legislative proposal, and certain of the procedural elements pertaining to its future implementation, can be said to strengthen democracy.

The Process

Judge Dehousse's Egmont Paper of 21 March 2016 contains a detailed description of the procedure that led to doubling the membership of the General Court.¹ This chronology of events evidences the absence of any independent evaluation of the necessity for, or impact assessment of, the changes proposed by the Court of Justice. Moreover, there was a complete absence of consultation by Court of Justice with those directly affected by its proposal, including the body most directly affected thereby, the General Court. The actions of the other actors in the legislative process were scarcely better. The Council Legal Service touted demonstrably untenable arguments in support of its position,¹³ whilst the Commission, coincidentally the General Court's largest single client, attempted to use the proposal to fashion the General Court in its own image.¹⁴ The debate in the Parliament was staggeringly misinformed and, with some exceptions, of an astonishingly poor quality.¹⁵

Viewed from the perspective of strengthening democracy some of the statements by MEPs in the course of the parliamentary debate prior to the adoption of the decision to double of the size of the General Court are ominous. For instance on behalf of the ECR Group, Mr Sajjad Karim MEP observed that:

"Madam President, in over 20 years of elected public office service this must be amongst the most gerrymandered of political processes I have witnessed to date. I do not make these comments lightly. I have been involved in the Legal Affairs Committee in trying to work with colleagues, including the rapporteur, on trying to reach a proper solution to the problem that was presented to us. ... When our

¹³ Comments on the Council's Press Release by Judge A. Collins for the European Parliament reproduced as Annex V of Dehousse, "The reform of the EU courts (II). Abandoning the management approach by doubling the General Court".
¹⁴ For example see the Commission Opinion of 30 September 2011, COM (2011) 596.
citizens from right across the European Union are demanding genuine reforms that reflect actual service to them, we have chosen to come forward once again with a compromise solution that actually adds to the burdens of those citizens but does nothing about providing a solution to the problem that was presented to us. We are about to spend EUR 20 million a year extra where there was absolutely no need for us to add even one single euro cent to the burden for European taxpayers. ...."

And Prof. Giles Lebreton on behalf of the ENF Group added the following:

« ...cette réforme a occasionné de multiples violations de la procédure parlementaire: violation de notre règlement sur la règle de la double lecture, violation des règles les plus élémentaires du droit parlementaire lors du vote précipité qui a eu lieu contre la volonté du rapporteur, M. Pinto, le 8 octobre - ce jour-là a été un simulacre de démocratie, c'est à peine si nous avons eu le temps de débattre. Enfin, audition des juges qui s'est déroulée dans des conditions rocambolesques, puisqu'il a quasiment fallu que j'entre de force dans ma propre commission, qui pretendait m'interdire l'entrée. »

That Prof. Lebreton was left to defend the application of the Parliament's internal procedures demonstrates how a failure to respect the democratic process hands ammunition to those who might be regarded as somewhat ambivalent about the very process of representative democracy.

As already observed, the European Court of Human Rights enjoys no right of initiative as regards its rules or structure. All such changes are promoted and adopted by the Member States of the Council of Europe in the form of protocols to the European Convention on Human Rights. Perhaps as a consequence, since 2010 Contracting States have convened no less than four high-level conferences on the future of the European Court of Human Rights. These events have been meticulously prepared, affording all stakeholders a full opportunity to voice their positions and concerns. These conferences have led to the adoption of Protocols Nos. 15 and 16 to the Convention. The first places greater emphasis on the principle of subsidiarity and reduces the time limit for lodging
applications; the second, which is optional, allows the highest domestic courts and tribunals to request advisory opinions from the Court.\textsuperscript{16}

This process stands in contrast to the truncated and inadequate discussion of the proposal to double the size of the General Court. As Judge Dehousse explains in a separate paper comparing the two reforms:

"The reform of the ECtHR was far better prepared than that of the CJEU In the former, a lot of conferences were organized and a lot of propositions debated. Many experts were consulted. External contributions were even warmly encouraged. None of this happened at any stage in the EU The preparation process was much more open in the case of the ECtHR than the EU A lot of stakeholders were consulted in the ECtHR process. Nobody was consulted in the CJEU process. Not the lawyers (despite consequences for the appeal system), nor the national courts (despite potential consequences for the system of preliminary rulings), nor the social partners (particularly the trade unions directly concerned by the suppression of the Civil Service Tribunal), nor the academic world. Additionally, the General Court's opinion on its own reform was not only neglected, but it was deliberately hidden from the legislative authorities. Thus apart from the Court of Justice, the rest of the world was treated as if it could have no opinion on the issues raised: a thoughtless zone." \textsuperscript{17}

The legislative process that led to doubling the size of the General Court does not qualify as an exemplar of a healthy democratic process. At the very least lessons must be learnt from it so that, on the next occasion the Court of Justice proposes legislation, which could be by end 2017 as regards a possible transfer of jurisdiction in preliminary references from the Court of Justice to the General Court,\textsuperscript{18} it takes care to respect basic democratic principles such as transparency, consultation and reasoning which it rightly expects of other EU institutions when they make laws or adopt acts.

\textsuperscript{16} Details of these processes, including conference papers etc., may be found at http://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=#in13740528735758554841286


\textsuperscript{18} Regulation 2015/2422, Article 3.2.
Content of Regulation 2015/2422

Regulation 2015/2422 contains a number of elements that are questionable from the perspective of parliamentary control, on the one hand, and judicial independence, on the other.

Article 3.1 of Regulation 2015/2422 requires the Court of Justice, using an external consultant, to draw up a report for the Parliament, Council and Commission on the functioning of the General Court. The report is to focus on the efficiency of the General Court, the use and effectiveness of resources, the "further establishment of specialised chambers" and/or other structural changes. Where appropriate the Court of Justice shall make legislative requests to amend its Statute.

From the viewpoint of parliamentary control this report will be too late to allow Parliament to decide if there is any need for the additional 8 or 9 judges scheduled to arrive in September 2019 or too early to enable Parliament to assess the success or otherwise of the enlargement of the General Court's membership. Moreover since the first recital to Regulation 2015/2422 identifies the reason for doubling the number of its members as the constant increase in the number of cases before it, it is hard to understand why the 10th recital expressly envisages no increase in the number of referendaires upon the arrival of these additional judges as one might have anticipated that an assessment of the need for resources would depend upon the results of the enlargement. The real value of the report is thus difficult to comprehend, particularly since Parliament, approving the Court of Justice's 2014 Budget, now seems to want an
impact assessment to be carried out after the decision to double the size of the General Court commenced.19

From the judicial independence standpoint one may have concerns about independent consultants preparing a report on the operation of the General Court for the benefit of EU institutions whose acts are subject to judicial review by the General Court. There is no obligation on either the consultants or on the Court of Justice to consult the General Court. It may be assumed that such consultation will occur in any event: however recent history demonstrates that it cannot be assumed that it will. The report also serves as a basis upon which the Court of Justice may be required to prepare legislative proposals20 This issue is particularly sensitive given the question of imposing specialisation upon the General Court. Article 256 of the TFEU appears to envisage the General Court principally as a court of first instance in all of the matters assigned to it, with appellate jurisdiction from specialist courts on points of law only and the potential to hear references for preliminary ruling. Since by enacting Regulation 3015/2422 the Union legislature (including the Court of Justice) has for now at least abandoned the option of creating specialised courts, attempts to reverse that stance by requiring the General Court to create what would amount to specialised courts is, to say the least, somewhat inconsistent with the Treaties. In any event the General Court recently considered and rejected the introduction of a system of specialisation, in a context where it had the choice to do so in circumstances where it took on the case load of the former Civil Service Tribunal, itself abolished as a consequence of the changes introduced.21 It is thus difficult to understand the origin of the phrase "the further establishment of

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20 Regulation 2015/2422, Article 3.1.
specialised chambers" in Article 3.1 of Regulation 2015/2422, unless the intention is to undermine judicial independence by requiring the General Court to do something it has rejected to date.

Conclusion

The creation of a more efficient court system, through appropriate reforms designed to tackle identifiable weakness, has a clear potential to strengthen a legal order grounded upon representative democracy. Not all proposals for change are necessarily reforms, and the two concepts are sometimes deliberately confused. In order to have democratic legitimacy any process of court reform must respect the fundamental legal principles that the Courts are required to uphold in the exercise of their judicial review jurisdiction and adopted in accordance therewith. At this juncture perhaps the most appropriate way of addressing the issue is to insert a question mark at the end of the title of the first topic of this conference, so as to read: "Court Reform in Europe and Beyond: Strengthening Democracy?"