JUDICIAL INDEPENDENCE IN THE TWENTY-FIRST CENTURY

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Attorney General's Conference on Judicial Independence

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Introduction

Ladies and Gentlemen, I am delighted to be here this afternoon, and would like to thank the Attorney General, the Law Centre and the University of Ulster for organising this conference on judicial independence. It is an issue which I think increasingly requires our attention. This is the third time that I have spoken publicly on this topic this year. I am becoming a little concerned that the Minister may think that I am developing a bit of a thing about this issue!!

Today's conference is set very much in an international context, but it may be appropriate to start by reflecting on one way in which the United Kingdom, and in particular Northern Ireland, differs from many other countries. Although the United Kingdom does not have a written constitution the position in Northern Ireland is slightly more complicated. The St Andrews Agreement of 2006 contained commitments to support policing and the rule of law and the Hillsborough Agreement in 2010 gave express commitment to respecting judicial independence.

The constitutional norms which we now take for granted have evolved from centuries of stand-off, argument and compromise between the Crown, Parliament, the nobles, the judges, the Church even, on occasion, the people and perhaps more recently the media. The way in which this has been done may be characterised as a debate; a constitutional conversation.

The multi-party negotiations which led to the Belfast Agreement of Good Friday 1998 were just that – a conversation about the institutions by which we should be governed, and a statement of the agreed principles on which they should be based. In that Agreement, the parties committed themselves to the exclusive use of democratic and peaceful means of participating in public life and that the institutions would not be able to act contrary to the rights in the European Convention on Human Rights. The Belfast Agreement dealt at length with the executive and legislative branches of government, but it did not touch on the judicial branch. The questions of justice and policing were dealt with at a later stage as we have seen.

Rule of Law

It is sometimes said that a democratically elected legislature is not enough to guarantee the freedom of citizens – that what is needed is both democracy and the rule of law. Perhaps both are part of each other. The rule of law is a phrase which can be overused to the point at which it appears to lose meaning. It sometimes seems to be used as a synonym for "law and order" or as an adjunct to support for policing. While those are indeed aspects of it, the idea of the rule of law is much richer and wider than that. In the common-law world it can be traced back to Magna Carta in 1215. It featured strongly in the Bill of Rights in 1689 and the Act of Settlement 1701. It is to be found in article 6 of the Constitution of the United States of America and in the French Declaration of the Rights of Man and the Citizen 1789. Aspects of the rule of law form part of the Universal Declaration of Human Rights 1948 and the Constitutional Reform Act 2005 recognises the rule of law as a constitutional principle throughout the United Kingdom.

That may sound like an excellent pedigree but what does the rule of law really mean? What would happen if we lost it? I would characterise it as having three essential features. First, the individual is protected from interference by the state other than in accordance with law, second the same law applies to everyone regardless of their position in society and third the content of laws must respect fundamental principles of transparency and fairness. The rule of law is not, therefore, empty rhetoric. It is not just an empty formalism that says "rules is rules". In its full sense, it is absolutely fundamental to the exercise of the rights and freedoms of each of us. Lord Lane is quoted as saying:

> "Loss of freedom seldom happens overnight . . . Oppression does not stand on the doorstep with a toothbrush moustache and a swastika armband. It creeps up insidiously. It creeps up step by step and all of a sudden the unfortunate citizen realises that it has gone."

That is why a constitution, written or unwritten, must contain mechanisms to protect us from this. In the UK, a complex system of checks and balances has developed over the centuries to protect the rule of law, by ensuring that too much power is not centralised in any one person or institution, that those who exercise power do so in the interests of the people, that they cannot take decisions outside their sphere of authority and that there are mechanisms in place to make sure they discharge their duties responsibly without unjustly favouring or oppressing any individuals or groups of citizens.

Lord Chancellor

For many years one of the unique features of the UK constitution was to be seen in the role of the Lord Chancellor. Up until the Constitutional Reform Act 2005 there was, in that one office, the executive function – as a senior member of the cabinet; the legislative function - as the Speaker of the House of Lords and the judicial function, as the Head of the Judiciary. The purists among you may think that such an arrangement would be unhelpful in protecting the rule of law, but I think many would now recognise that the reality was rather different. The former Lord Chancellor Lord Irvine of Lairg wrote that –

> "the combination of the functions of the office is an important stabilising force between the executive and the judiciary . . . The Lord Chancellor upholds judicial independence and mediates between the executive and the judiciary when need be".

Clearly – as history has proved- there was an alternative view that the tri-partite functions of the Lord Chancellor were not the best arrangement, and in the first half of the last decade his formal functions were separated out and some were distributed among other office-holders. The problem, as I see it, was that the redistribution did not take account of an unwritten, but very important part of his function. His office provided a real medium for communication and a vehicle for ensuring the views of the Judges were expressed and understood at the highest level. The Lord Chancellor was the voice of the judiciary at the table. As a member of the executive and legislature he also understood the other aspects of our democracy – he was not a special-interest lobbyist trying to make sure the Judiciary would have had it all their own way. The important point is that the LC was the vehicle for the conversation between the various arms of the state and ensured that this conversation could take place in an atmosphere of mutual respect and trust. It is not clear to me that we have found a vehicle for such a conversation on such a basis to continue.

The particular role of the Lord Chancellor may still have some force in Westminster. Albeit that he is no longer Head of the Judiciary he still has a unique statutory responsibility in relation to the rule of law and a seat at the Cabinet. In Northern Ireland though we need find another way for the NI Executive and the Judges to communicate; to ensure that there are ways for the Judiciary to have a meaningful voice in matters of relevance to their function, to ensure that we establish the mutual respect and trust which is the key to the successful working of our constitutional structures and to balance that with the need to maintain the independence necessary to the judicial function. I don't say this out of self-serving interest but in order to make sure we have the right checks and balances in our society; that the constitutional engine is properly calibrated.

The role of the judiciary

The primary function of the judiciary is the fair and impartial resolution of disputes between individuals and between individuals and the State in accordance with law. No other organ of the State carries out this function. It is evident, therefore, that in order to carry out the function the independence of each judge is of critical importance. It can properly be described as the precondition for the ability to carry out this responsibility. The public must be able to have absolute confidence that the judge hearing a case will do so objectively, according to law, and will not be subject to influence by the parties, the government, a group within civic society or even other judges. The phrase "according to law" is a very important one. The rule of law is not the rule of judges. Judges like everybody else are subject to the laws as enacted by the legislature. That is the only foundation on which public confidence in the justice system, and in the rule of law can be established.

The measures that protect the independence of the judiciary

In, if you like, testing the health of our constitution as it relates to the judicial branch of the State, I'd like to start by acknowledging the extent to which judicial independence is recognised within our broad constitutional structures. There are statutory obligations on Ministers in the Justice (Northern Ireland) Act 2002 to guarantee judicial independence and similar provisions in the Constitutional Reform Act 2005. As I indicated the importance of judicial independence was also expressly recognised in the Hillsborough Agreement which preceded the devolution of justice. It says:

> "We believe that the independence of the judiciary is essential in a democratic society which supports the rule of law. It is of paramount importance that the judicial function remains independent of Government and immune from any partisan or political interest. Public confidence requires that judicial decisions are taken in a fair, impartial, objective and consistent manner. This confidence can only be maintained if judges are able to act with independence."

All of this is further underpinned by a Concordat on Judicial Independence entered into by the NI Executive and the UK Government.

That is all very fine. But what does judicial independence really mean? What does it look like? How will we know we have truly secured it?

The Bangalore Principles

It is to the most recent international standard that we must turn in order to determine what judicial independence requires in modern democracies. The Bangalore Principles of Judicial Conduct[1] adopted in 2002 were developed under the

[1] http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

auspices of the UN by an international group of senior judges and have been used to develop protection for judicial independence throughout the world. They set out the core of values of the judiciary and identified independence as the first of them.

The Lusaka Measures

In January 2010 the Judicial Integrity Group at its meeting in Lusaka, Zambia adopted measures for the effective implementation of the Bangalore Principles[2]. These include the measures to be taken by the state for securing judicial independence.

I would like to consider the measures and to reflect on how our system meets the challenge in relation to each. Northern Ireland's legal system has gone through recent structural changes, and now is a good time to reflect on how we measure up against each one. Although each of these measures in itself is important this is not a catalogue from which one can pick and choose. All of these measures need to be addressed if as a justice system we are to achieve the appropriate international standard for judicial independence and thereby adequately protect the rule of law within our democracy. Do we do that?

The first measure is the responsibility of the state to provide constitutional guarantees for judicial independence. This has achieved statutory force in our jurisdiction through the Justice (Northern Ireland) Act 2002 and the Constitutional Reform Act 2005. The measure also requires that judges are able to act without pressure, threat or interference, direct or indirect, from any quarter but particularly from those exercising executive or legislative power. It would be churlish of me not to acknowledge the respect for this aspect of judicial independence which the Minister of Justice has shown in his year in office and the assistance which the Attorney General has provided in disseminating information on this issue. This event is itself evidence of that.

The measures also deal with the importance of judicial appointments, tenure of judges and judicial remuneration. We now have an independent Judicial Appointments Commission which accords with the required international standard. Allocation of judges is the responsibility of the Chief Justice. Tenure of full-time judges is secured to a fixed retirement age. Although there is some legislative protection for judicial remuneration it is not clear whether those provisions fully secure the Lusaka measure. It states that the salaries, conditions of service and pensions of judges should be guaranteed by law and should not be altered to their disadvantage after appointment. All of these features are designed to ensure that neither an individual judge nor an independent judiciary generally should be at risk of financial disadvantage from a disappointed legislature or executive.

Although the tenure of judges must be protected in order to secure independence there is now in place a disciplinary system to ensure that the high standards of

[2] http://www.summitofhighcourts.com/docs/standarts/UN2.pdf

probity and integrity expected of judges are maintained and that appropriate action is taken if such standards are breached. In respect of serious breaches, an independent authority is now in a position to recommend judicial removal which again corresponds to the highest international standards.

The last measure to which I wish to refer is that dealing with the budget of the judiciary. The Lusaka measures provided the budget of the judiciary should be established in collaboration with the executive and should be administered by the judiciary itself or by a body independent of the executive and legislature which acts in consultation with the judiciary. In this regard I believe our current arrangements fall short.

This measure has been addressed and secured in other parts of these Islands in different ways. In Scotland and the Republic of Ireland, the administration of the Courts is undertaken by an independent body, overseen by a Board with a judicial majority and chaired by the Lord President and the Chief Justice respectively. In England, the Courts and Tribunals Service remains an agency of the Ministry of Justice, but, uniquely, operates as a partnership between the Lord Chancellor and the Lord Chief Justice. Unlike the Senior Judiciary in these jurisdictions, I do not as Head of the Judiciary in Northern Ireland have the oversight which is needed in matters of strategic importance such as the budget and priorities for the courts and the administration of the structures underpinning judicial functions and support to the Judges. All of this is, at present, entirely within the domain of the Minister. Without the power to ensure adequate budget and supporting structures, however, judicial independence can be rendered meaningless.

This raises difficult questions. I recognise that the model now in place in Scotland and the Republic of Ireland leads to consideration of the requirement of accountability. Although judges are not accountable to the Executive of legislature for their judicial work the conduct of administration and expenditure of budget may be different.

I return, therefore, to the need to find a new way to have a conversation about matters in which the judiciary the executive and the legislature all have an interest. That conversation needs to recognise respective rights and responsibilities. I fully acknowledge the role of the democratically elected Assembly, the Office of the Minister and the scrutiny role of the Justice Committee. There is also a role for the media. The judiciary must, however, be afforded a meaningful voice in matters in which they have a crucial interest and which underpin judicial independence and therefore public confidence in the rule of law.

Judicial responsibility

The Executive and Assembly have a role in putting measures in place to guarantee judicial independence. But there is also a great deal of responsibility on judges

In addition to the enormous responsibility which the independence of the judiciary places on individual judges, the Lusaka Implementation Measures make it clear that there is a major role for the judiciary as a body. We must promote the principles of judicial conduct identified in Bangalore, which we have done through a code of ethics. We have established a complaints system for matters outside judicial decision making. We have actively pursued with the professions the introduction of pro bono schemes to promote access to justice and have refined our approaches to case management in order to ensure the just, orderly and expeditious conduct of court proceedings. Through the provision of summary judgments and promulgation of decisions on the internet we endeavour to keep the media and the public informed about the business of the courts. A very substantial part of our work involves the continuous training of judges to ensure that we have an up to date professional judiciary and to ensure consistency in areas such as sentencing. We recognise that we must continue to pursue the highest standards in order to secure the confidence of the public in our work.

I said earlier that the main task of the judiciary is decision-making in individual cases. Underlying that task is our responsibility to secure public confidence in the rule of law. That confidence is built by the principle of open justice. Society can be sure that we are acting impartially and independently; that we are carrying our duties with due responsibility, if justice is not only done, but is seen to be done. While there are a very limited number of cases where publicity will mean that justice cannot be done between the parties, their right to privacy must always be balanced against the public interest in open justice. The principle is especially important in hard cases, in which it can be difficult to secure public confidence because the right decision is not necessarily the popular decision.

Giving reasons

That explains, briefly, the importance of the responsibility on judges to give decisions which explain the reasoning for the outcome. This enables the parties to decide, if they are dissatisfied, whether and how to exercise their right of appeal. It has an even more important function though – and if there is any aspect of a judge's work that can properly be described as judicial accountability, it is this. The reasons will, in the vast majority of cases, be given in open court. If the decision is given in writing, it will generally be made available quickly. Where decisions are likely to be of public significance, my Office has developed a fairly widespread practice of ensuring that summaries of the decision are made available for the benefit of the parties and the press. Where there is media interest in a decision we have a judicial communications officer whose responsibility it is to liaise with the media and deal

with their queries. It is important that the public have an opportunity to hear and so to understand the reasoning in cases, especially those which are of significance.

Role of the media

In this context I also want to mention the relationship of the judiciary with the media. A free and independent media is an essential element of every democratic state and the existence of an independent judiciary to administer the rule of law is essential to secure the media's right to free speech. I entirely agree with Lord Judge's recent observation that the independence of the judiciary and the independence of the media are both fundamental to the continued exercise, and indeed the survival of the liberties which we sometimes take for granted[3].

The media has an important role in ensuring that the public know about judicial reasoning and about the outcome of cases. This means both the major cases in which there is a strong public interest, and the minor cases which affect people's day to day lives. Public confidence in the rule of law is built at every level. There is real importance in the role played by local newspaper reporters in telling local communities how the "speeders and pleaders" as lawyers sometimes call them, the anti-social, the petty thieves and the after-hours fighters are dealt with in their local town. In addition to reporting the facts, the media is plainly entitled to comment, to criticise any judicial decision with which they do not agree and where appropriate to campaign for changes in the law if deemed necessary. The responsibility which accompanies these rights is of course, the responsibility to present an accurate and comprehensive account of the material facts. The rule of law and public confidence in the administration of justice is only upheld if we all play our role to the best of our ability while at the same time recognising and being respectful of the equally important role of others and their field of interest.

I have no difficulty with the idea of judges engaging directly with the media in an appropriate fashion. Obviously we must avoid any comment on particular cases or matters of controversy likely to come before the court. But as Head of the Judiciary it is my responsibility to speak if there are matters of general importance to the administration of justice or affecting the rule of law on which we all depend for our freedom. As Lord Neuberger has recently said, the great strength of our society is that it is built on the competing voices of free speech. Justice to be truly open must join its voice to the chorus; and must ensure that inaccurate or misleading reporting cannot gain traction.

Respect and working together

Thinking about public debate almost inevitably leads one to think about the debate on public policy and what the government should do about various social problems. In recent years, the policy-making process has become characterised by increased involvement from people and groups from right across civic society, and this is to be

[3] Speech on "Judiciary and the Media", 16 March 2011

welcomed. Judges cannot join this policy-making debate, but we can provide information to policy-makers and advise them on the operational workability of proposals. It is important to emphasise that judicial independence does not mean judicial isolation. Judges have an important role to play in helping to improve our justice system and we must actively engage with other elements of the justice system and the public to achieve that purpose.

The justice system has a host of participants all of whom have differing roles and responsibilities. It needs to be carefully calibrated with appropriate checks and balances but it is also important for all of us to ensure that the checks and balances do not operate as barriers to worthwhile progress. One of the issues which has been a source of particular concern for the Minister is avoidable delay in the criminal justice system. We have recently established a series of meetings with the PSNI and the PPS in which we have exchanged ideas about how we might better secure the attendance of witnesses and manage cases to earlier trial dates. In doing so we all drew upon some of the work that had been conducted by the Criminal Justice Inspectorate in their report on avoidable delay.

The reason that I mention this example is to highlight the ways in which the different parts of the criminal justice system can work together. Here was a Ministerial initiative on avoidable delay supported by the work of the Criminal Justice Inspectorate. In parallel the two operationally independent bodies, the PPS and PSNI, worked in concert with an independent judiciary in order to find effective solutions. None of this in any way offends the principle of judicial independence. It does, however, represent an entirely appropriate operational collaboration between the judiciary and others who play a part in the justice system. I make a point of meeting regularly with the representatives of the legal professions, the Chief Constable, the Minister and other key players in criminal justice. On the civil and family sides the judiciary are heavily involved in working with the legal and other court-related professions in liaison groups and advisory committees on different subjects. I have the opportunity to meet different representative groups from across civic society in the course of my duties, and earlier this year, for the first time, the judiciary consulted the public at large about areas of concern in sentencing. In the near future, I am also committed to developing further our internet resource in order to better inform the public about the nature and extent of what we do. All of these are ways for the judiciary to listen to others and to join in the conversation without compromising the judicial independence which is necessary to secure public confidence in the justice system.

Conclusion

Throughout this talk, I have found myself reflecting on different ways in which the constitution is a conversation based on mutual trust and respect between institutions. Our constitutional mechanisms change and evolve over time, and they do so as elected politicians, responsible office-holders and others in civic society

discuss and reflect on how to ensure that the ship of State will neither run aground nor drift aimlessly.

I hope that I have set out the terrain of independence of the judiciary, located it within the constitutional principles it supports and in the context of the international principles by which its health in our State can be measured. I look forward to hearing our other speakers' reflections and experiences of it. This is not some arcane, academic topic. It is of the greatest significance to the everyday running of the courts, and to the view which the public takes of whether the justice system can be trusted, and therefore, whether the rule of law is strengthened or diminished.

Because we in Northern Ireland are undergoing a process of constitutional renewal at present, it is an excellent time to reflect on how our institutions measure up. I am glad to say that, in many ways, we measure up well, but there are still areas to which we must attend. Once the chairs have been put away and the conference papers filed, it will be time for us to get our sleeves rolled up and to talk, and work together, to build a justice system of which the people in this community can be proud and which secures widespread support and the confidence of the public. I am absolutely committed to ensuring that the judiciary plays its part in achieving that end.