

Speech at the University of Ulster (Belfast Campus)

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Lord Chief Justice of Northern Ireland

[1] I am delighted to have the honour of delivering the fifth Chancellors Lecture. This occasion has provided an opportunity for people from different walks of life to make their contribution on contemporary issues. Helena Kennedy in the first lecture talked about participatory democracy. Jon Snow spoke about the world of international politics. Jonathan Powell gave us the inside track on the development of the peace process and the President of Ireland, Mrs McAleese, disclosed her vision of the next 10 years on this island. I cannot hope to match the vigour of Helena Kennedy, the adventure of Jon Snow, the insight of Jonathon Powell or the infectious enthusiasm of the President. Indeed an invitation to a senior judge to deliver a lecture on a legal topic of his choice hardly seems like a pressing invitation to a good night out. I hope, however, that I can keep your attention over the next few minutes while I discuss some aspects of the work of the judiciary which in my view are important in the functioning of our democratic society.

University of Ulster

[2] Before I turn to my topic I want to acknowledge the important role that this university plays in our community. The University of Ulster, operating across four campuses in Belfast, Coleraine, Jordanstown and Londonderry, is the largest single university in the island of Ireland. Established in its present form in 1968, it nonetheless has roots stretching back to 1845 in Derry, when Magee College was founded, and to 1849 in Belfast, when the College for Art and Design was first established. I understand, Vice Chancellor, that you are regularly within the top ten universities in the UK in terms of applications for full-time undergraduate courses. You also have an international reputation for widening access to third level education, and are consistently in the top five UK universities which achieve such access. Your 27,500 students have had an enviable rate of graduates moving on to further study or into employment. That demonstrates clearly the strong links to business and community life in Northern Ireland which allow the University to produce the graduates that our economy and society need.

[3] Although a relatively young law school, students can obtain a qualifying law degree at either Jordanstown or Magee, and the opening of the Graduate School of Professional Legal Education in 2010 provides the first opportunity in this jurisdiction to qualify as a solicitor outside Belfast. It has proved an

important addition to the legal life of this jurisdiction, especially that of the North West. I wish that project every success in these very difficult conditions for students and practitioners alike.

The Rule of Law

[4] The lull between the end of the Executive's first full term and the rapid crossfire of the pending election campaign presents an opportunity to reflect on the role of the judiciary in our new and developing Northern Ireland structures. This has been a time of considerable change. We have now almost reached the end of the first year of devolution of justice. That has brought a new Minister of Justice, a new Attorney General and a new Justice Committee. My own appointment and that of the Chief Constable are relatively recent and we will soon have a newly appointed DPP. It might be tempting, therefore, to view this period as a time for change and I fully support the view that this is a time for us to take advantage of the opportunities available to us to develop our justice system. I consider, however, that if we are to do so successfully we must build upwards from a bedrock of principle and fundamental values that provides us with a secure base.

[5] The rule of law is one of the fundamentals upon which our democracy is based. It has a distinguished pedigree. 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 in this jurisdiction.

[6] The content of the rule of law shows its importance to every one of us as citizens. There are really three 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 fundamental to the exercise of the rights and freedoms of each of us. In his book entitled "The Rule of Law" published in 2009 shortly before his death, Lord Bingham, the foremost judge of his generation, described the alternative.

"The hallmarks of a regime which flouts the rule of law are, alas all too familiar: the midnight knock on the door, the sudden disappearance, the show trial, the subjection of prisoners to genetic experiment, the confession extracted by torture, the gulag and the

concentration camp, the gas chamber, the practice of genocide or ethnic cleansing, the waging of aggressive war. The list is endless.”

The sobering thought for all of us is that some of these things are entirely familiar in connection with the recent activities of some western democratic states. That alone should remind us of the importance of eternal vigilance in this field.

[7] The primary responsibility of the judiciary is to make their contribution towards upholding the rule of law. The primary function of the judiciary in exercising this responsibility 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. It is also important to note that the judiciary are required to make their decisions in accordance with law. The rule of law is not the rule of judges. Judges like everybody else are subject to the laws as enacted by the legislature. As I have indicated the rule of law is not there to create some sort of privileged position for judges but is necessary for each of us in a democratic society.

[8] There has been a tendency to characterise the role of the judiciary in the resolution of disputes between the individual and the State as being the protection of the individual against the abuse of power by the State. It is not a characterisation which I either approve or recognise. There will, of course, be occasions where the rights of the individual must prevail in accordance with law but in many cases the obligation which the law imposes upon the courts is to strike a balance between the rights and freedoms of the individual and the protection of the rights and freedoms of the community. Where they arise these are often difficult balances to strike but the duty of the judiciary is to ensure that the balance is struck in accordance with law without fear or favour, affection or ill-will. Every party before the court is entitled to a fair and impartial resolution of the dispute.

Judicial Independence

[9] Having established, therefore, that an independent judiciary is a necessary precondition for a democratic society that is governed by the rule of law I want to acknowledge the extent to which this 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 applying in particular to the Lord Chancellor. The importance of judicial independence was also expressly recognised in the Hillsborough Agreement which preceded the devolution of justice. One can see, therefore, that our

constitutional structures have expressly recognised the critical role which an independent judiciary has to play in securing our democracy.

[10] None of that tells us, of course, what the constituent elements of judicial independence are and it is to that that I now turn. Some of the sources for this are of long standing. The Act of Succession in 1701 provided for security of tenure and protection against reduction in remuneration. Similar provisions are found in Article 3 of the Constitution of the United States of America and are replicated in many written constitutions in the common law world and beyond. It is, however, 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 adopted in 2002 were developed under the 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 one of them. In January 2010 the Judicial Integrity Group at its meeting in Lusaka, Zambia adopted measures for the effective implementation of the Bangalore Principles. These include the measures to be taken by the state for securing judicial independence.

[11] I intend to refer briefly to those measures which need to be put in place but I want to emphasise at the start that 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.

[12] 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. Unhappily, however, there are recent examples of conduct by senior Cabinet ministers in the United Kingdom which might lead one to question their commitment to the upholding of judicial independence.

[13] 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. 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 secure the right adopted in Lusaka 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.

[14] 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 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.

[15] 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. This measure has been implemented in Scotland and the Republic of Ireland by establishing Non Ministerial Departments with a preponderance of judges on the oversight Board. I have already indicated to the Minister that some such model appears appropriate for Northern Ireland. Primary legislation would be required and it was not, therefore, possible to deliver this during the term of the last Executive. I wish to make it clear, however, that strategic control of the budget for the administration of judicial work is a fundamental aspect of judicial independence which I would expect to see delivered in the forthcoming Assembly.

[16] I have spent some time focusing on the obligations of the state to secure the highest international standards of judicial independence. As is clear from what I have said there has been considerable progress in this area and although we have a way to go I am confident that those with responsibility for these areas recognised the need to demonstrate that our justice system can meet these standards.

[17] It is right to say, however, that the need to secure judicial independence lies not just upon the state. Internally the judiciary also have to promote and secure independence. Every judge is an independent judge. No judge can be told how to deal with a case or what conclusion he or she should come to. The independence of the judiciary includes the personal independence of each and every judge to reach their own conclusion according to law.

Judicial Accountability

[18] I want to talk briefly about judicial accountability. I confess that I have considerable reservations about the notion of judicial accountability. Everyone agrees that judges ought not to be accountable for their decision-making to the legislature or the executive. I entirely accept that the judiciary have an obligation to take all reasonable steps to secure public confidence in the administration of justice but that does not make judges accountable to anyone. I prefer to characterise those matters which are often identified as aspects of judicial accountability as aspects of fulfilling that obligation of securing public confidence and, therefore, aspects of responsibility. Judges, like many others, have responsibilities. Sometimes, of course, it can be difficult to secure public confidence because the right decision is not necessarily the popular decision.

[19] In fulfilment of those responsibilities judges are, therefore, expected to give decisions which explain the reasoning for the outcome. If any party is dissatisfied with the outcome they frequently have a right of appeal. If there is any aspect of a judge's work that can properly be described as judicial accountability this is it. If the decision was given in writing it ought generally to be made available quickly, usually on the Internet. Where decisions are likely to give rise to public interest there is now 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. Senior judiciary also regularly give public lectures which explain the work that judges do and I made a lengthy statement at the beginning of the legal year setting out the judiciary's objectives for the coming year which I would intend to repeat annually.

[20] 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. The media are plainly entitled to criticise any judicial decision with which they do not agree and where appropriate to campaign for changes in the law if deemed necessary. In doing all of this the media have, of course, a responsibility to present an accurate and comprehensive account of the material facts. None of this, however, can ever render the judiciary accountable to the media.

[21] I have spent some time on issues connected to judicial independence because I have been aware from my many informal discussions with members of the public that there is often a lack of understanding of why judges need to be independent, what it means to say that a judge or the judiciary are independent and why judges are not and should not be accountable outside the system of appeals for their decisions. Although the responsibility for explaining this to the public lies with others as well as the

judiciary I accept that we must also use occasions such as this to explain our role in the constitutional firmament.

[22] It should also be apparent that the justice system has a host of participants all of whom have differing roles and responsibilities. Devolution of political control of justice has put great power into the hands of our elected representatives. In particular the legislature can now make law in virtually any sphere of the justice system. The Minister and Executive can focus on priorities and provide budgetary support to reinforce those priorities. There are, however, aspects of the justice system which lie outside the political control of the Assembly and Executive and one of those is judicial decision making. The omission is deliberate. It is intended to reflect the checks and balances which are appropriate in a democratic society. It ought not to be a source of concern. On the contrary it should be recognised as a necessary and desirable feature of a justice system aspiring to achieve the highest standards.

[23] Finally before I leave this aspect I want to acknowledge the enormous responsibility which the independence of the judiciary places on individual judges. The Lusaka Implementation Measures make it clear that 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.

The Opportunities

[24] At an earlier stage in this paper I indicated that I fully supported the involvement of the judiciary in initiatives which are likely to have a beneficial effect on the justice system as a whole. 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 should actively engage with other elements of the justice system and the public to achieve that purpose.

[25] We have been taking active steps to take advantage of the new opportunities. As is apparent from the earlier discussion because the justice system has a number of participants in order to establish appropriate checks

and balances it is 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.

[26] 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 2 operationally independent bodies, the PPS and PSNI, were engaged by 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 collaboration between the judiciary and others who have an interest in the justice system generally. I meet regularly with the representatives of the legal professions. On the civil side the judiciary are heavily involved in liaison groups in different areas and I am committed to developing further our internet resource in order to better inform the public about the nature and extent of what we do.

[27] One of the areas which causes greatest public concern is sentencing in criminal cases. Public confidence in the system of sentencing is improved immeasurably if there is transparency in the approach and consistency in the outcome. Last year I set up a Sentencing Working Group which engaged in a consultation exercise with public to establish those areas where the public felt that there was a need for guidance to promote transparency and consistency. That consultation exercise is now complete and the public will be in a position to see the benefits of this approach in the next few months. We intend to ensure that the output from this process is readily available on the internet and that it will, therefore, contribute substantially to transparency and consistency. I am aware, of course, that the Minister has consulted on a range of options for sentencing and nothing that we do is intended to replace whatever political decision may be made about the establishment of a Sentencing Guidelines Council. The consultation exercise indicates, however, that there is a cost to the establishment of such a Council and since we already take into account the output from the Sentencing Guidelines Council in England and Wales the question is whether an additional body here would be value for money. Whatever the outcome of that debate the work that we are carrying on will in any event be complimentary to whatever solution is arrived at.

Conclusion

[28] Ten years ago it may not have been appropriate for the Lord Chief Justice to have given this lecture on this topic. At that time the head of the judiciary was the Lord Chancellor and his principle obligations were to appoint new judges, discipline badly behaving judges, secure the independence of the judiciary and speak up for them where appropriate and reprimand any of his cabinet colleagues who failed to honour that independence. The removal of the Lord Chancellor as head of the judiciary undoubtedly increases transparency but also calls for a new dynamic between the chief justices of each jurisdiction and the relevant Executive. It is important for each of those involved in this dialogue to respect the proper field of interest of the other. It is also important that in carrying on the dialogue all parties are acutely aware of the need to ensure so far as possible that public confidence in all aspects of the administration of justice should be maintained.

[29] In tonight's lecture I hope that I have given you some insight into the role of the judiciary in our devolved structures. I also hope that I have succeeded in conveying the message that the judiciary should engage with the community at large in carrying on its work and is both willing and anxious to do so. The objective for all of us is 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.