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SEPARATION OF POWERS; CAN JUDGES OVERREACH – A COMPARISON OF EXPERIENCES

Judges in Northern Ireland, in common with other jurisdictions where there is an independent Bar, are bound by a Statement of Ethics which sets out a series of principles essential to the proper discharge of judicial office. These derive from the Bangalore principles of judicial conduct and are developed in a series of propositions set out under six headings namely:

- Judicial Independence
- Impartiality
- Integrity
- Propriety
- Equality of treatment to all before the courts
- Competence and diligence.

I highlight a section from the proposition in relation to judicial independence to the effect that:

> "Judicial independence … is in fact a cornerstone of our system of Government in a democratic society and a safeguard of the

> freedom and rights of the citizen under the rule of law. The judiciary, whether viewed as an entity or by its individual membership, is and must be seen to be independent of the legislative and executive arms of Government. The relationship between the judiciary and the other arms should be one of mutual respect, each recognising the proper role of the others."

Of course the reference to the "proper role of the others" relates to the doctrine of the separation of powers considered to be a pillar of the rule of law under which the three branches of Government (executive, legislative and judicial) are kept separate to prevent abuse of power. This division of responsibilities into distinct branches seeks to limit any one branch from exercising the core functions of another.

The theory is straightforward enough but the practice can be sorely tested in societies where there is conflict, particularly in relation to constitutional arrangements.

Northern Ireland was, of course, at the sharp end of civic unrest and paramilitary activity during the period in our history commonly referred to as the "Troubles". During this time, particularly between 1969 and 1998, when the Belfast Agreement was concluded, the judiciary was firmly in the eye of the storm. The conflict presented significant

challenges to the judiciary and judicial independence. This tended to focus on the criminal courts.

The UK Government's response to the deteriorating security situation was the introduction of *The Northern Ireland (Emergency Provisions) Act 1973* and the *Prevention of Terrorism (Temporary Provisions) Act 1974*. Their effect was to create "Diplock Courts" for terrorist cases. The right to trial by jury was suspended for "scheduled offences" and the court consisted of a single judge. The system was introduced primarily to combat jury intimidation by paramilitaries. The legislation also made fundamental changes to some longstanding common law principles in relation to criminal trials. The legislation relaxed standards for admission of coerced confessions, permitted reliance on the uncorroborated evidence of so-called "supergrasses", anonymous witnesses were allowed to testify from behind screens and the burden of proof in relation to the possession of firearms was changed.

The system, and the judges who presided over it, were subject to criticism at home and abroad. It was argued that the effect of these provisions weakened public confidence in the criminal justice system and undermined the rule of law. Some suggested that the background of the judiciary was such that its members could not be regarded as impartial and independent. Reflecting the polarisation caused by the conflict, others looked to the judiciary to apply the Emergency and Temporary Provisions rigorously with a view to defeating those determined to overthrow the State.

All of this has to be considered against a backdrop where judges were considered "legitimate targets" by paramilitary organisations and were the subject of numerous murderous attacks.

How did the judiciary respond to this formidable challenge?

In my view it can be fairly said that the judiciary did act independently and impartiality but at the same time successfully avoided the temptation to "overreach" its constitutional competence.

A number of examples demonstrate the truth of this:

- Prior to the 1973 Act coming into force, the then Lord Chief Justice, Lord Lowry excluded confessions made by IRA suspects detained by the British Army on the grounds that they were not made voluntarily.

- In interpreting Section 6 of the 1973 Act which sought to moderate the test for the introduction of confession evidence the courts interpreted this so that the words of the section did not take away the trial judge's inherent discretion to exclude evidence "in the interests of justice".

- The courts interpreted Section 7 of the 1973 Act, which sought to shift the burden of proof in possession of firearm cases, to ensure that the section should not be used unless,

having done so, the court was left satisfied beyond reasonable doubt of the guilt of the accused.

- The courts in effect put an end to the so-called "supergrass" trials in the early 1980s when the Court of Appeal refused to uphold convictions not secured with corroborating evidence.

By doing so, the courts ensured that the in-roads of emergency legislation into the historic edifice of the common law were kept to a minimum so that the traditional standards of justice were preserved from distortion or dilution. The courts interpreted the potentially draconian powers entrusted to them in a way which kept as close as possible to the long established principles of the criminal law.

This approach was not confined to the criminal courts but extended into civil matters. By way of example:

- The courts awarded damages including exemplary damages for individuals who were arrested without reasonable grounds.

- The courts declared as unlawful attempts by Unionist politicians to exclude Sinn Fein from participation in local government by an attempt to delegate powers to specially constituted sub-committees.

- The courts declared as unlawful an attempt by Belfast City Council to delegate its business to the Town Clerk as a protest against the Anglo Irish Agreement in 1986.

Happily, post the 1998 Agreement, the political landscape in Northern Ireland has been transformed and much of what I have described has been confined to the past.

A power sharing Executive and Assembly has been established in Northern Ireland to which legislative powers have been devolved. Because of a number of political disagreements that Assembly and Executive is currently suspended but there are on-going efforts to re-establish the relevant institutions.

Although other areas of government had been devolved to the local Assembly in December 1999, the devolution of responsibility for policing and justice did not take place until April 2010. As a result, for the first time in over 30 years, justice matters were again in the hands of the Local Executive and legislature. A Minister of Justice was appointed and an Assembly Scrutiny Committee, the Justice Committee, was established to scrutinise the work of the Department of Justice and the frontline justice agencies.

These political developments have increased the extent to which the courts have become involved in matters which are potentially the preserve of the Executive and legislature. There are, in my view, a number of reasons for this.

Firstly, the advent of devolution has inevitably created a new dynamic between the courts and the executive arm of government in this jurisdiction. There is now a much greater local level of political scrutiny of the justice system. As a result for the first time the Lord Chief Justice and other judges engaged on a regular basis with both the Justice Minister and the Justice Committee prior to the collapse of the devolved institutions.

A further catalyst for change in the relationship between the judiciary, the Executive and the Legislature – not just in Northern Ireland but across the UK – has of course been the incorporation into domestic law of the European Convention on Human Rights, in the form of the Human Rights Act 1998.

Finally, there remain a significant number of unresolved issues between the political parties which now find themselves before the courts. These issues can be broadly divided into two general areas namely "legacy" issues and "social policy" issues.

Legacy issues

The Troubles in Northern Ireland left many families bereaved. Many murders remain unsolved and serious issues have arisen in relation to whether or not murders were properly investigated, including whether or not agents of the State colluded in the murder of its citizens. In the absence of an agreement as to how these issues should be dealt with, to a large extent it has been left to the judiciary to wrestle with the

problem. There are four arenas in which legacy issues confront the judiciary.

- Approximately 50 inquests involving controversial killings have been referred back to the Coroners' Service for further enquiry, in the light of new information and the State's Article 2 obligations to investigate deaths in which it is alleged that State agents have been involved.

- There are currently 41 judicial review applications outstanding in relation to investigations into controversial killings.

- There are hundreds of civil actions seeking damages by the next of kin of those either killed or injured as a result of alleged involvement of State agents.

- A number of criminal cases are currently being considered in relation to prosecutions arising from killings in the early 70s, caused by State agencies and paramilitaries.

How can the judiciary meet the challenges presented by all of this litigation? It must be recognised that the cases are extremely controversial and are hugely labour intensive. Many of the investigations require examination of a vast amount of material, much of

which is highly classified and in respect of which the State is claiming Public Interest Immunity.

An attempt to deal with this vast litigation has inevitably involved the judiciary in political controversy. The Lord Chief Justice has been involved in public initiatives to case manage this volume of work to ensure consistency of approach and map forward a practical way of dealing with the cases that will do justice to all parties involved.

He has engaged with victims' groups, representatives of the British Government, the party political leaders and with the Justice Committee.

In relation to inquests he has presented a plan to deal with the outstanding cases and has sought the necessary financial resources to deal with this caseload. These proposals included the establishment of a legacy inquest unit which would have its own dedicated staffing and resourcing, with a view to progressing the outstanding legacy caseload in a manner which is not possible under the coronial system as currently funded.

In an address to the Victims and Survivors Forum on 27 January 2017, the Lord Chief Justice observed:

> "If we continue in this vein, hampered by a lack of resources and reliant on inadequate systems and processes, there is little prospect of dealing with the cases which involved

> substantial amounts of national security material in the short to medium term. In the absence of the additional resources we have requested for the creation of a bespoke legal inquest unit, it would be decades before all of the outstanding cases were completed. That is clearly not acceptable."

This public engagement marks a significant change of approach. However it is not without its difficulties. The fact remains that there is not agreement between the political parties and within the community as a whole as to how these issues should be resolved. Attempts by the judiciary to deal with the issues, in accordance with the law, creates a risk that judges will not be perceived as being impartial or independent. The balance between fulfilling our role and overreaching ourselves is a fine one.

Social policy

In Northern Ireland there is much disagreement on many social policy issues, particularly on issues concerned with religious beliefs. This raises particular sensitivities in Northern Ireland, where there is both a significant faith community and an array of non-governmental organisations which exist to promote human rights and civil liberties.

The determination of social policy is, of course, the province of the legislature and the Executive. The difficulty is that the system of

government in Northern Ireland is such that one of the main political blocks can veto legislation on a particular issue so that it is not possible for the legislature and Executive to agree on some contentious issues. This is particularly true in social policy issues such as abortion or the rights of same sex couples. Increasingly during the period of devolution the judiciary has been drawn into this realm. A series of cases have come before the High Court in Northern Ireland whereby individuals seek to enforce claimed rights under the European Convention on Human Rights. The effect is that judges now find themselves in the position of having to strike the balance between public and private interests in areas of the utmost social controversy. This is by no means a straightforward task, and most of the judgments on these issues are appealed to the Court of Appeal in Northern Ireland and ultimately the Supreme Court.

A number of recent cases which had been heard in this jurisdiction highlight the difficulties faced by the courts and how they have sought to deal with the issues that have arisen.

- In *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38 the House of Lords overturned a Court of Appeal decision in Northern Ireland. An unmarried couple sought to jointly adopt a child. The Northern Ireland legislation provided that an adoption order could only be made on the application of more than one person if the applicants were a married couple. The Court of Appeal held that being unmarried was not a "status" within Article 14 of the ECHR

and the applicants failed to establish that there was a breach of their Article 8 and Article 14 rights.

The House of Lords held that:

(i) Being unmarried was a "status" within the meaning of Article 14 and restrictions on who could apply to adopt a child fell within the ambit of Article 8 – thus the applicant's Convention rights were engaged.

(ii) The State was entitled to take the view that in general it was better for children to be brought up by parents who were married but a fallacy to raise such a generalisation into an assumption that no unmarried couple could make suitable adoptive parents.

(iii) Allowing the appeal, the court held that a fixed rule which excluded unmarried couples at the outset from the process of being assessed as potential adoptive parents was irrational and would contradict one of the principles of adoption law that the best interests of each child was the most important consideration. Further, given the developing state of its jurisprudence, it was likely that the European Court of Human Rights would find a violation of Article 14 of the Convention and that in any event the House should not be inhibited from going further than the

European Court since the margin of appreciation available in Members States in delicate areas of social policy was not automatically appropriated by the legislature. "Convention rights" within the meaning of the 1998 Act were domestic rights, not international rights. The duty of the United Kingdom courts was to give effect to them according to what they considered to be the proper meaning as they would any other statutory rights and that accordingly the House was free to give what it considered to be a principled and rational interpretation to the concept of discrimination on grounds of marital status and that consequentially the House declared, notwithstanding the 1987 Order, the applicants were entitled to apply to adopt the child.

Self-evidently this was a hugely significant decision.

- Notwithstanding the decision in *Re G*, in October 2012 Mr Justice Treacy granted the Northern Ireland Human Rights Commission's ("NIHRC") challenge to the same Northern Ireland adoption legislation on the grounds that it is unjustifiably discriminatory in acting as a bar to unmarried couples and those in a civil partnership from being considered as potential adopters.

  The Department appealed the judge's decision to the Divisional Court. The Divisional Court dismissed the appeal

and was highly critical of the failure of the Department to take any action on this issue since the House of Lords decision in the *G* case. In the leading judgment Lord Justice Girvan said that what emerged from the *G* case was that the House of Lords rejected as "irrational, disproportionate and unjustified" the blanket ban on adoption by an unmarried couple. He added that unless and until the UK Supreme Court decided to overrule its decision in *Re G*, the prevailing domestic law of Northern Ireland means that an unmarried heterosexual couple are eligible to be considered for adoption. On that basis a heavy onus lies on the State to justify a differential treatment of unmarried homosexual couples. He said:

> "Thus, in the context of the case such as that of C and her partner, before they enter into a civil partnership, they would be eligible to be considered for adoption as a couple. It would be unjustifiable discrimination, as compared to unmarried couples in the light of *Re G*, to treat them differently. Whilst this does not mean that they have a 'right' to adoption they have in effect an entitlement as a matter of law to be asked to be considered for adoption."

He went on to consider the consequences of C entering into a civil partnership with her partner and held that the prohibition under the Northern Ireland legislation preventing a person in a civil partnership from being eligible for adoption in any capacity whether as an individual or as a couple produced "absurd and irrational results". He came to the conclusion that the discriminatory prohibition on adoption imposed on civil partners could not withstand the challenge.

- The decision in *Re G* was an important factor in a case heard before me brought by an applicant who challenged the decision by the General Registrar's Office to refuse to permit a humanist celebrant to officiate at her marriage and to have that marriage recognised as a valid marriage. She based her claim on an allegation that this failure constituted a breach of her Article 9 and Article 14 rights. The issues before the court were firstly whether humanism was a "belief" within the meaning of Article 9, secondly whether the applicant's desire to have a humanist officiate at the wedding was a "manifestation" of her humanist beliefs, thirdly if her Article 9 rights were engaged whether there was an interference with those rights and finally whether or not the interference was justified.

  I answered yes to the first three questions and the central issue in the case therefore became whether or not the

interference was justified. As in the case of the adoption cases the issue ultimately turned on the question of discrimination. I took the view that the starting point must be that if the law is to protect freedom of religion or belief under Article 9 it must recognise that all religions and beliefs should be treated equally.

In the judgment I say:

> "The State must be neutral and impartial in the arrangements it makes for the exercise of manifestations of various religions and beliefs.
>
> In relation to the solemnisation of marriage the State has chosen to authorise the solemnisation of religious marriage ceremonies in recognition of those bodies' beliefs. Having done so, in my view it should provide equal recognition to individuals who hold humanists beliefs on the basis of my findings that humanism does meet the test of a belief body and that a wedding ceremony conducted by a humanist celebrant constitutes a manifestation of that belief.

> I consider there has been a breach of the applicant's rights under Articles 9 and 14 of the ECHR."

I came to the conclusion that the Department did not put forward sufficient objective justification to justify this discrimination.

It is important to understand that the applicant did not have a "right" to a humanist marriage. Nor did she have a "right" to have that conducted by a humanist celebrant. The issue was that, having granted rights to those with religious beliefs, there was an obligation not to discrimination against other "beliefs".

This decision has been appealed to the Court of Appeal who may take the view that this is a matter that should have been left to the legislature and not something in respect of which the court should have intervened.

- In the case of *X* heard by Mr Justice O'Hara in the Family Division on 17 August 2017 a more restrictive approach was adopted. In that case the applicant was a gay man who lives and works in Northern Ireland. He married his husband in London in September 2014, a same sex marriage recognised in law by the Marriage (Same Sex Couples) Act 2013.

In the proceedings *X* sought a declaration that his marriage in London is a valid and subsisting marriage under the law of Northern Ireland. His contention was that the failure to recognition his marriage as a valid and subsisting marriage when domiciled in Northern Ireland contravened his rights under the ECHR.

The question of the status of marriage is a transferred matter under the Northern Ireland Act 1998 and lies solely within the competence of the Northern Ireland Executive and the Northern Ireland Assembly. To the frustration of supporters of same sex marriage the Assembly has not yet passed into law any measure to recognise and introduce same sex marriage. This frustration is increased by the fact that the Assembly has voted by a majority in favour of same sex marriage, but by reason of special voting arrangements to which I have referred earlier the majority has not been sufficient to give the vote effect in law.

Whilst the judge recognised the strong social policy arguments in favour of same sex marriage he came to the conclusion that he could not, as a matter of law, conclude that *X's* Convention rights had been violated.

In coming to his conclusion he was very aware of the fact that courts should be careful about how and when they intervene in social policy matters, having regard to the

separation of powers. He considered this issue to be a matter of discretionary judgment. He pointed out that whilst it is open to Government and Parliament to provide for same sex marriage there is no obligation to do so and that same sex marriage is not a Convention right. He concluded by saying:

> "I finish only with the suggestion that when this issue is raised again in the Northern Ireland Assembly, as it inevitably will be, those who carry the responsibility of voting will pause to read the papers from the consultation process."

Thus it was clear that Mr Justice O'Hara felt restrained from entering into policy areas. Clearly he was influenced by the clear line of authorities since the *Re G* case in Strasbourg that there was no Convention right to same sex marriage.

- In its first ever sitting in Belfast the Supreme Court will hear the case of *An Application by Siobhan McLaughlin for Judicial Review* on 30 April 2018.

  In that case in the High Court of Northern Ireland Treacy J found that the decision of the Department for Social Development, in refusing the applicant a Widowed Parents Allowance on the ground that she was not married or a civil

partner at the date of her partner's death, involved discrimination on the ground of marital status, contrary to Article 8 when read with Article 14 of the European Convention on Human Rights.

The Department appealed this decision to the Court of Appeal which allowed the appeal and held that the issue was within the discretionary area of judgment afforded to Parliament. Whether a court would adopt a different policy based on a different balance of considerations is irrelevant. It was not for the court to determine the policy in this area. In the context of this case it is for the court to determine if the Government's assessment is manifestly without reasonable foundation. They were unable to reach that conclusion.

It will be interesting to see what view the Supreme Court takes.

- Finally and inevitably the issue of abortion has been given judicial consideration in Northern Ireland.

  An initial application was brought before Mr Justice Horner in the High Court by the Northern Ireland Human Rights Commission seeking a declaration that the relevant abortion legislation in Northern Ireland is incompatible with Article 8

of the European Convention on Human Rights insofar as it is an offence:

- To procure a miscarriage at any stage during a pregnancy where the foetus has been diagnosed with a fatal foetal abnormality.

- To procure a miscarriage up to the date when the foetus is capable of being born alive where a pregnancy arises as a result of rape or incest.

On 30 November 2015 Mr Justice Horner held that the abortion legislation in Northern Ireland breached Article 8 of the ECHR by failing to provide an exception to the prohibition on abortion in these cases and made an order declaring the legislation to be incompatible with the UK's obligations under the Human Rights Act 1998.

This matter was appealed to the Court of Appeal. The three Court of Appeal judges each reached a separate determination on the question of whether the Northern Ireland abortion legislation breached Article 8.

The Lord Chief Justice recognised the need for judicial restraint in dealing with issues of moral and political judgment:

> "In light of the wide margin of appreciation recognised by the European jurisprudence and the decisive vote within the Assembly I do not consider that it is open to the courts to derive a right to abortion from the Convention. I would not therefore make a declaration of incompatibility and would allow the appeal on that issue."

However, he went on to interpret the leading case on the legislation in a way that was more reflective of values in today's society. As a consequence he interpreted the legislation so that the option of abortion was open to those in this jurisdiction in circumstances where the continuation of the pregnancy would affect the mother's physical or mental health so that her life was significantly adversely affected. She did not have to be a "physical and mental wreck" in the language of the 1930s cases.

Lord Justice Gillen did not agree with the Lord Chief Justice's approach in interpreting the legislation. He took the view that it is "institutionally inappropriate and a reach too far for this court to change the effect of the relevant legislation and its interpretation of the case law which has stood the test of time in this jurisdiction without legislative intervention. Such a change is not a task which should be undertaken by this court."

He agreed with the Lord Chief Justice's interpretation in relation to Article 8 and came to the conclusion that:

> "A fair balance has been struck by the law as it presently stands, until the legislature decides otherwise."

Lord Justice Weatherup also disagreed with the Lord Chief Justice's view that the legislation may be interpreted in a manner which would permit the additional grounds for the termination of a pregnancy by redefining the meaning of "unlawful" in the 1861 Offences Against the Person Act and held that it was for the Assembly to determine whether to amend the legislation.

He agreed that the prohibition on termination of pregnancies may amount to "interference" with the right to respect for the private life of a woman contrary to Article 8(1) and the essential question was therefore whether the interference was justified under Article 8(2).

He went on to consider how this affects the proposed grounds for termination as expressed by the Commission (fatal foetal abnormality, pregnancy resulting from rape or incest, and serious malformation of the foetus). He was inclined to the view that the restriction on the termination of

pregnancy in cases of fatal foetal abnormality and as a result of rape and incest would amount to a breach of the right to respect for private life. He noted, however, that the evidence presented in the case did not establish that the restrictions were justified, either on the ground of establishing a rational connection or a fair balance and that there had been a failure to establish a fair balance of individual rights and interests and public rights and interests.

In respect of the termination of pregnancy in the case of serious malformation of the foetus, Lord Justice Weatherup said he would be inclined to the provisional view that this may not amount to a breach of the right to respect for private life as the restriction may be capable of justification where it advances the public interest in preventing discrimination against disability. Again he felt that there remained an absence of evidence based justification for the treatment of cases of serious foetal abnormality. When he asked himself the question "*Is it institutionally appropriate for the court to intervene?*", he said:

> "In relation to the Article 8 claim for the right to respect for private life I have expressed the provisional view that, on the evidence before the court, the exclusion of fatal foetal abnormality and pregnancy by reason of

> incest or rape from permitted grounds for termination of pregnancy have not been justified. This is of course a controversial issue and is primarily a matter for legislation and remains under consideration in the Assembly. This is a policy area where the Department of Justice has been active and continues to be active, subject to the current restraints on the operation of the devolved institutions. This court has to consider whether in all the circumstances it is institutionally appropriate to intervene in respect of the legislation. This judgment may inform further consideration of the issues. As the matter will receive further consideration in the Assembly I would conclude that it is not appropriate to intervene at this stage."

So ultimately the Court of Appeal decided that abortion legislation was a matter for the Assembly and the appeal was allowed. This decision has been appealed to the Supreme Court and judgment is awaited.

Conclusion

Someone once said that the best thing about being a judge is you get the chance to do some good.

The difficulty is how does one assess what is good?

In the areas I have discussed, what is good may depend very much on one's personal views. In determining issues in respect of which there is political controversy, be it on legacy issues or social policies, there must be a high risk of conscious or unconscious bias.

When I first considered this topic I had assumed I would be debating cases where the courts sought to act as a check or balance against populist actions of politicians – fulfilling our role as "enemies of the people"! On reflection, based on the recent experience in this jurisdiction, the risk of over-reaching arises not because of executive action, but in fact inaction.

My concern is that by failing to fulfil their constitutional functions, the legislator and executive is looking to the judiciary to act beyond its institutional competence, and thereby undermining the rule of law, in a way which may not have been anticipated.