

Ten-year anniversary lecture series

The impact of the Supreme Court on the law of Northern Ireland

Lord Kerr, Justice of The Supreme Court

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I have given this lecture the title, “The impact of the Supreme Court on the law of Northern Ireland” I will, I promise, say something of that eventually but I confess that I have allowed myself to become somewhat diverted from that central theme in the course of preparing the talk. There are a couple of reasons for that. First, I allowed myself to become absorbed again with the history of appointment of Irish and Northern Irish figures to the Appellate Committee of the House of Lords and I thought that you might be interested to hear something of that. Secondly, I found that I could not resist clambering on to a few old hobby horses of mine. The opportunity for a quiet – well, perhaps, not so quiet – rant to a more or less captive audience was a temptation too far. Besides, as I get older, I find that the chance to be provocative is not to be missed.

At the outset I should acknowledge the considerable help that I received from my estimable judicial assistant, Margherita Cornaglia. The few moderately expressed views in the talk owe much, I am sure, to her influence. Next, I have to thank my old friend, Brice Dickson, now emeritus professor in the Law School at Queen’s University, Belfast. With impeccable – indeed exquisite - timing, Brice sent me last week an article which he and a colleague in the Law School have just completed. It is entitled “Northern Ireland Dimensions to the First Decade of the United Kingdom Supreme Court” and its arrival could not have been more opportune or serendipitous – well serendipitous up to a point, for it set me off on a revision of some of the views that I had intended to express. So, muted thanks to Brice.

Right, first a little history. It is widely assumed that there has always been a Northern Irish representative on the Appellate Committee of the House of Lords. Not so.

In the first half of the twentieth century, a handful of Northern Irish or Irish lawyers were appointed to serve as Lords of Appeal. Lord Atkinson was appointed in 1921. He had practised in Ireland for 25 years before being called to the Bar in England. He sat on all six of the Northern Irish appeals that reached the Lords during his time there. Lord Carson, on the other hand, never played an active role as a Lord of Appeal in Ordinary and only sat on one appeal from Northern Ireland during his term of office between 1921 and 1929. Lord Atkinson was replaced in 1928 by Lord Atkin, and Lord Carson by Lord Russell of Killowen, who was a member of the Appellate Committee for 17 years, but only sat on one of the 9 appeals from Northern Ireland received during his time there. I don't believe that Lord Atkinson, Lord Carson or Lord Russell were appointed particularly because of their Irish backgrounds. The last of these, Lord Russell, was, after all, Lord Chief Justice of England in 1894.

The first Northern Irish man to be appointed to the House of Lords and who had practised exclusively in Northern Ireland as a lawyer and judge was John MacDermott. His appointment was made in 1947 when MacDermott was just 51 years old. He was appointed directly from the High Court in Northern Ireland. It is interesting to recall that he had been called to the Bar in Dublin in 1921, the year before Partition. As well as having served as a High Court judge, he had been a unionist MP, Minister of Public Security and Attorney General. Just four years after his appointment to the House of Lords, he was moved back to Northern Ireland as Lord Chief Justice, a position he held for the next 20 years. His short stint at the House of Lords puts paid to any suggestion that there was a policy or convention to have at least one Lord of Appeal with knowledge of the Northern Irish system.

That fallacy is also exposed by the circumstance that thirty-seven years passed after Lord MacDermott's return to NI before Robbie Lowry was appointed in 1988. During his time in the Lords, Lord Lowry did not hear an appeal from Northern Ireland. Following his retirement in 1994, there was a further gap of three years before the appointment of the next Northern Irish law Lord, Brian Hutton, who had succeeded Lord Lowry as Northern Irish Lord Chief Justice. He was the first Lord of Appeal with previous judicial experience in Northern Ireland to hear an

appeal from that jurisdiction. Lord Hutton was immediately succeeded by Lord Carswell in 2004, and I followed Lord Carswell when he retired in 2009.

Now, section 27 subsection (8) of the Constitutional Reform Act 2005 provides that in making recommendations for appointment to the Supreme Court, the selection commission must ensure “that between them the Judges will have knowledge of, and experience of practice in, the law of each of each part of the United Kingdom.” The UKSC website observes of this provision that in practice it is designed to ensure that there is continued representation from both Scotland and Northern Ireland. It is to be expected, therefore, that, when I shuffle off the stage, a judge or a practitioner from Northern Ireland will replace me.

This is important – but I would say that, wouldn’t I? But there are plenty of examples of cases from Northern Ireland where experience of that country, not merely the practice of law in the jurisdiction, has been useful, if not indeed indispensable. I shall have something to say presently about one case, *NIHRC*, where that was particularly important. It involved a challenge to the retention in the law of Northern Ireland of those provisions in the Offences against the Person Act 1861 which forbade the carrying out of abortion in all but the most narrowly defined circumstances. Whatever of any contribution that I might have been able to make to an insight into or an understanding of the reaction of the NI population to our decision and the resonances that our judgment would have in that country, it would surely have been regarded as anomalous and amiss by the people of Northern Ireland that a decision of such legal and social significance did not have a contribution from a judge who calls that country his home.

But, the obligation of justices of the Supreme Court to remain alive to contemporary standards and values is a theme to which I will warm later and, at this stage at least, a little self-restraint is in order.

In the meantime, a footnote to my brief excursion into the history of NI judicial contribution to the work of the Appellate Committee and the Supreme Court. As I have said, most of those who

might be described as Northern Irish Law Lords before Brian Hutton's appointment rarely sat on NI appeals. Even after his appointment, the presence of the NI Law Lord on a case coming from NI was by no means invariable. Between 2000 and 2008 there were 18 appeals from Northern Ireland, but a judge from Northern Ireland sat on only 12 of them.

By contrast, I have sat on virtually all of the cases coming from that jurisdiction since my appointment. I have managed to avoid a few: either because my niece was a QC in one of them or because the appeal was of such vintage, that I had given judgment in an associated case or, perish the thought, had advised in such a case.

Quite apart from hearing the actual appeals, I have been allocated to the three-person panel of Justices convened to consider applications for permission to appeal from Northern Ireland in 74% of cases determined between October 2009 and August 2019.

It seems to me, therefore, that it is now correctly accepted that, just as in Scottish appeals, there is something of a Northern Ireland "dimension" when decisions are made about the composition of permission panels and at the later stage of configuring the bench entrusted with hearing Northern Irish appeals. Just as at least one of the Scottish justices will sit on the panel hearing a Scottish appeal, so I will, in general sit on cases coming from NI and that, I believe, is as it should be.

It is interesting to trace the recent statistics of appeals to the Supreme Court from Northern Ireland. In 2009 there were none. In 2010 there was one – an appeal from a decision of mine given as LCJNI a few months before my appointment to the House of Lords. A case, I may say, in which I was roundly and rightly reversed. In 2011 there was one uniquely NI case and another associated with a case from England and Wales. In 2012, there were no cases from NI. In 2013, there were three uniquely NI cases and one that was associated with cases from E & W. In 2014 there were three NI appeals. Likewise, in 2015 and 2016. In 2017, three NI appeals and another in which there was an intervention from NI. In 2018, 5 appeals from NI and in 2019, so far, no

fewer than 8 appeals. Does this show a trend? I honestly don't know but I hazard that there will continue to be a healthy flow of cases from NI.

Northern Ireland has, of course, consistently punched above its weight in terms of applications for permission to appeal. The number of applications for permissions to appeal emanating from Northern Ireland has always been disproportionate to Northern Ireland's share of the UK population. Of the total of 2,235 applications received by the Court in 2018, 132 (6%) came from Northern Ireland, even though its percentage of the UK population is just 2.8%. The reasons for this are unclear, although many attribute the high numbers of appeals from Northern Ireland to the continuing stream of cases arising from what are euphemistically referred to as the Troubles. In any event, the Northern Irish cases reaching the House of Lords, and now the Supreme Court, are clear examples of the important contribution that jurisdiction plays in the development of the law and legal principles across the United Kingdom. But, then again, I would say that, wouldn't I?

I don't want to leave my historical excursus without saying something about the establishment of the Supreme Court and the reasons that I believe that its establishment was a fine thing for our constitutional order (and it is here that I dip my toe into faintly controversial waters).

As is well familiar to all of you I am sure, the driving purpose of the establishment of the court was to remove the constitutional anomaly that the highest court of the land was situated within one of the houses of parliament.

Of course, in practice the Appellate Committee was at least functionally separate from the broader House of Lords, but the curious amalgamation of the two led to confusion among the general public about how exactly the final court of appeal operated. In particular, as Lord Bingham commented, "It [was] not always understood that the decisions of the 'House of Lords' [were] in practice decisions of the Appellate Committee and that non-judicial members of the House never [took] part in the judgments. Nor [was] the extent to which the Law Lords

themselves ... refrain[ed] from getting involved in political issues in relation to legislation on which they might later have to adjudicate always appreciated.”

Clarity about those matters was important for underscoring our adherence to the separation of powers and to the values of independence, transparency and accountability that that principle pursues. As Walter Bagehot commented as long ago as 1867, the Supreme Court “ought to be a great conspicuous tribunal” not “hidden beneath the robes of a legislative assembly”.

So, the establishment of a Supreme Court was, unquestionably, an admirable aim from a political theory viewpoint, but there were two principal criticisms levelled at it. They were that it was an expensive waste of money for a change that was nothing more than symbolic and that it was a dangerous step to take since it would embolden judges to be more interventionist.

As it happens, and not just through an overdeveloped sense of loyalty to this institution, I think neither criticism has proved to be well-founded. The first criticism we might call “the pointless criticism” and it goes something like this. The time, effort and, most importantly, the expenditure of public money that went into establishing the Supreme Court was utterly pointless when, as has been observed, you end up with the same people doing the same job under the same constraints. The reform was merely “clarificatory of the existing legal position”, so why waste precious public money on something that is “little more than a change of label”?

True it may be that the physical move across the square, and the changed nomenclature of the same twelve justices, were largely symbolic. But, I have to agree with Albie Sachs, the South African Constitutional Court judge, who wrote on the establishment of the Supreme Court that “symbolism signifies”, particularly in the public realm where the population’s perception of public institutions and trust in their fair operation is critical. That concern becomes paramount when we’re talking about the operation of justice at the final level. To engender and maintain public confidence in the judicial system, it needs to be abundantly clear to the bystander that we operate independently of the legislature.

As the Appellate Committee, we were also hamstrung by the physical restrictions of the House of Lords. The confusion about how exactly the Appellate Committee conducted itself was compounded by the fact that there was no effective access to its proceedings for members of the public. We sat in a House of Lords committee room, down a warren of corridors and through Parliamentary security barriers. It was not an environment that conduced to open justice or to ensuring the visibility and transparency that is at the root of public confidence in the law. Now that we have, as Lord Neuberger has put it, emerged from the chrysalis of the House of Lords into the sunlight of our own building, we have attracted over 850,000 visitors to look around our courtrooms and sit in on our cases. We have also, since the inception of the Supreme Court, broadcast our hearings on our website so that anyone, anywhere, can access a live stream of our proceedings – and in perhaps surprising numbers, people do. The total number of website users since records of this information began to be kept in January 2010 is 6,076,242. Unique visitors to the website are, of course, different from ‘hits’. On the first day of the prorogation hearing the Supreme Court’s live streaming service received in the region of 12 million hits. This does not include those who watched the proceedings via BBC and Sky. Two million hits were recorded on the day of the hand-down of the prorogation judgment.

I think that it can now safely be claimed that the administration of justice in the final court is accessible to the general populace.

Moving then to the second criticism, which I will call “the interventionist criticism”. This suggests that, once we were properly distinct from the legislature, we would be so wild with newfound status that we would overreach the proper bounds of judicial decision-making and be more activist in the judgments we reached.

I am glad in general to report that that has not been the case.

One only has to look back to the Appellate Committee under Tom Bingham to know that, for every Supreme Court judgment that might be termed “interventionist”, the Appellate Committee produced one just as strong. That should not be surprising, given that our substantive remit is almost identical and the constraints operating on us are just as strict.

In truth, we have very limited opportunity for interventionist “law-making” and we have also, I hope, an understanding of our proper place in the constitutional order. That understanding has only been enhanced, I assert, by the rationalisation of our role in the Supreme Court. There has been no sudden surge in judicial activism. I make this claim supported by the number crunching that the indefatigable Alan Paterson has carried out in his work, “Final Judgment”. I don’t have time to outline the numbers to you but I commend Alan’s work; it makes for very interesting reading and gives the lie to suggestions sometimes made that we have become much more ready to second-guess government and legislative decisions than were our predecessors.

Now that I have saddled up this hobby-horse, I can’t resist taking it for a further little canter. What, I believe, those who criticise some judgments of the SC neglect to acknowledge is that by the HRA (an Act which had widespread cross-party support) Parliament *enjoined* the courts to review the legislation which it passes in order to tell it whether the provisions contained in that legislation comply with ECHR. By responding to that call in relation to primary legislation, and sending the message to Parliament that a particular provision is incompatible with the Convention, the courts do not usurp the role of Parliament, much less offend the separation of powers. A declaration of incompatibility is merely an expression of the court’s conclusion as to whether, as enacted, a particular item of legislation cannot be considered compatible with a Convention right. And under the scheme of the Human Rights Act it is open to Parliament to decide to do nothing.

What the courts do in making a declaration of incompatibility is to remit the issue to Parliament for a political decision, informed by the court’s view of the law. The remission of the issue to Parliament does not involve the court’s making a moral choice which is properly within the province of the democratically elected legislature.

A review of *executive* action as to its compliance with the rights enshrined in ECHR partakes of a different approach. Over the life of the Supreme Court, in a number of cases, there has been what has almost become a perennial debate as to whether, in certain fields, either by dint of deference to governmental expertise or because of the notion of institutional competence, courts should refrain from or be reticent about interfering with government decisions. I cannot begin to aspire to utter the final word on this vexed area and I suspect that the debate will continue to rage for years to come. But I make so bold as to claim that there is perhaps some muddled thinking in much that has been said on this subject.

A preponderance of this type of case involves consideration of whether interference with a qualified right such as article 8 of the Convention is justified. And that, of course, usually involves examining the proportionality of the measure against, among other things, the aim that is sought to be achieved, the importance of the right in question and whether it is “in accordance with law”. You will be relieved to learn that I am not going to embark on an exegesis on that subject this evening. What I do say, however, is whether executive action transgresses a qualified Convention right and, if it does, the importance to be attached to the right interfered with, are emphatically matters on which courts are constitutionally suited to make judgments. And, although it is trite to say it, one must always remember that they make those judgments on the command of Parliament.

The importance given by government to the impact that a particular outcome may have on, for instance, foreign relations, should give courts pause and, undoubtedly, they should be appropriately reticent about questioning the validity of a decision taken on grounds which a government minister considers to be in the national interest. But this should not operate as an inhibition on the discharge of the courts’ proper constitutional role. If there has been an interference with Convention rights, courts are there to examine whether that interference is justified. That examination must focus on the proffered reasons of the decision-maker, but the inquiry necessarily extends beyond that. The courts, charged by Parliament with the solemn duty of deciding whether the political reasons that have actuated the decision to interfere with a Convention right do indeed justify that interference, have a clear obligation to have proper

regard to the importance of the right which has been interfered with. That exercise requires the courts not only to examine the reasons given for the interference but also to decide for themselves whether that interference is justified.

Right, enough ranting. Let me turn at last to the avowed theme of this talk – the impact of the Supreme Court on the law of Northern Ireland. I have, of course, left myself far too little time to examine this subject thoroughly. I will confine myself to looking very quickly at four fairly recent cases. In their way, each has had an important and weighty effect not only on the law in Northern Ireland, but also on social conditions there.

As I alluded to earlier, it is important that the courts of this country remain alive to changes in social values, standards and the expectations of the society we serve. That is, of course, not to say that we should sacrifice legal principle on the altar of contemporary mores but where it is possible for us to do so, we should allow the changes in society's hopes and outlooks to infuse our thinking and to provide at least some guide to our possible outcomes.

The cases to which I refer go some way, I believe, to illustrating that approach. They also illustrate not only the court's defence of human rights but also its recognition of the limits that should be placed on those rights. The cases also, I believe, shine a light on what some might regard as the thin, but others as the sturdy, line between the constitutional role and powers of the judiciary and those of the legislature and government.

The first case that I want to talk about is *Dennis Hutchings*. Mr Hutchings was a member of the British Army when he discharged shots towards a young man who was running away from an army patrol near Strabane in Co Tyrone. The DPP (NI) decided that Mr Hutchings' trial for attempted murder should be held by a judge sitting without a jury. Among the arguments deployed on Mr Hutchings' behalf was that he would be denied a fair trial, contrary to article 6 of ECHR, if tried by a judge alone. That argument was rejected. We said:

“It should not be assumed, however, that [trial by jury] is the unique means of achieving fairness in the criminal process. Indeed... trial by jury can in certain circumstances be antithetical to a fair trial and the only assured means where those circumstances obtain of ensuring that the trial is fair is that it be conducted by a judge sitting without a jury.”

It was the risk of tribal loyalties influencing a jury’s deliberations which led to the DPP deciding that trial by a judge alone was more likely to ensure that Mr Hutchings’ trial was fair. We decided that he was entitled so to conclude. The case is important in delineating the limits of article 6 which guarantees the right to a fair trial. It is also important in refuting the notion that a fair trial of a serious case can only be achieved in this country by trial by jury.

The next case is also troubles-related. It concerned the notorious murder by loyalist paramilitaries in 1989 of a prominent NI solicitor, Patrick Finucane. Two principal issues arose in the case. The first was whether the government was entitled to resile from an undertaking that had been given by an earlier government to hold a public inquiry into the death of Mr Finucane if that was recommended by Judge Peter Cory. The second was whether an inquiry which complied with the state’s obligations under article 2 of ECHR had been held. (A review by Sir Desmond da Silva had been commissioned by the government in substitution for the originally promised public inquiry.)

We found that the government was indeed entitled to recant on the original undertaking, saying:

“Where political issues overtake a promise or undertaking given by government, and where contemporary considerations impel a different course, provided a bona fide decision is taken on genuine policy grounds not to adhere to the

original undertaking, it will be difficult for a person who holds a legitimate expectation to enforce compliance with it.”

But we also found that an article 2 compliant inquiry had not been held – largely because of reservations expressed by Sir Desmond da Silva in his report on the review. We said this about the limitations placed on his review:

“His was not an in-depth, probing investigation with all the tools that would normally be available to someone tasked with uncovering the truth of what had actually happened. Sir Desmond did not have power to compel the attendance of witnesses. Those who did meet him were not subject to testing by way of challenging probes as to the veracity and accuracy of their evidence. A potentially critical witness was excused attendance for questioning by Sir Desmond. All of these features attest to the shortcomings of Sir Desmond’s review as an effective article 2 compliant inquiry.”

The case is therefore, I like to believe, an important example of, on the one hand, the court respecting and declining to interfere with the government’s freedom of action in taking a quintessentially political decision as to whether to adhere to a previously given undertaking and, on the other, holding the government to account for the failure to fulfil its international obligation to conduct a proper inquiry into the murder of one of its citizens.

Hutchings and *Finucane* are cases that were spawned by the Troubles, but I think – and hope - that those decisions will have resonance well beyond that circumstance.

The final two cases that I want to talk about have nothing to do with the Troubles but are intimately connected with social conditions in NI. The first is the case of *Denise Brewster*. She challenged a requirement in NI law which required that unmarried co-habiting partners be nominated by their pension scheme member partner in order to be eligible for a survivor's

pension. William Leonard McMullan, known as “Lenny” McMullan, and Denise Brewster lived together for some ten years before December 2009. On Christmas Eve that year, they became engaged. Sadly, Lenny McMullan died two days later. His death was sudden and unexpected; he was only 43 years old. Ms Brewster was denied a survivor’s pension because a nomination which she believed Lenny had made could not be found. She argued that the nomination requirement breached her rights under the ECHR, in that it amounted to a discriminatory and disproportionate interference with her right to property.

It was accepted that the nomination requirement interfered with Ms Brewster’s rights, so the only issue in the case was whether the requirement was justified and proportionate. We decided that it was not. The government had failed to provide any evidence demonstrating that nomination was necessary to achieve the scheme’s claimed aim of eliminating unwarranted differences of treatment between married and cohabiting couples. It was clear that the nomination requirement was not necessary to test the genuineness of the relationship between cohabiting partners, for there was another requirement that it be shown that there was cohabitation for two years prior to death. The most significant argument raised was that the authorities responsible for introducing the nomination requirement should be afforded broad discretion because of the socioeconomic context of the decision making. We rejected that argument, saying:

“A suggestion that any matter which comes within the realm of social or economic policy should on that account alone be immune from review by the courts cannot be accepted. It must be shown that a real policy choice was at stake. While it is not essential that the policy options were clearly in play at the time the choice was made, obviously, when they were, the cause for reluctance by courts to intervene is enhanced. In the present case, however ... not only were socio-economic factors not at the forefront of the decision-making process at the time that the decision to include the nomination procedure was made, but the attempt to justify retention of the procedure on those grounds was characterised by general claims, unsupported by concrete evidence and disassociated from the particular circumstances of the appellant’s case.”

In Ms Brewster's case the department's decision was not dictated by a delicate choice as to how scarce public funds should be allocated. It was chosen so as to conform with the position in Great Britain. There was no reason, therefore, for reticence on the part of the court to intervene.

The final case is that of *NIHRC*. As I have said, this was a case where the Commission challenged the law in NI which makes it a criminal offence to have or to carry out an abortion in all but extremely narrow circumstances on the basis that it was incompatible with ECHR. The appeal was dismissed because, by a majority, the court found that NIHRC did not have standing to bring it. But, by an emphatic majority, we found that, in cases where a mother was carrying a foetus with a fatal abnormality, to make her and any physician criminally liable for the carrying out of an abortion was clearly incompatible with her rights under article 8 of ECHR which guarantees the right to respect for a private life. An entire lecture – indeed a series of lectures – could be devoted to this case. I will confine myself to two themes. The first is the change that the judgments have wrought on NI society. The second is the way in which we dealt with the thorny issue of intrusion on what might traditionally be regarded as the province of the legislature.

The first theme can be dispatched briefly. As I am sure you all know, the law on abortion in NI has been radically changed. I take leave to believe that our judgment was critically instrumental in bringing about that change.

On the second theme, the government had argued that the courts should defer to the decision of the elected representatives in Northern Ireland. We acknowledged the validity of that argument at a theoretical level but we roundly rejected the applicability of that principle to the *NIHRC* case. The sad truth was that the NI Assembly had not taken a final decision on the question of legalising abortion. We therefore said:

“On the question of the usurpation of the function of the decision-maker, in the circumstances of the present case, this simply does not arise. The Northern

Ireland Assembly has not made a decision. Its largest party, at the time of the debate in February 2016, declared that further consultation and consideration were required. Other parties, such as the SDLP, who voted against the measure, were not irreversibly opposed to reform ... the “evidential value of ... judgments of the executive” holds no sway here because none has been made. The courts should feel no sense of inhibition in relation to the question of whether the current law offends article 8 of the Convention, in the light of the absence of any firmly expressed view of the democratic institutions of Northern Ireland.”

There are, I am afraid, a number of instances where government has failed to act and, one suspects, they are content to leave it to courts to point the way forward. So be it. We, as judges, should be prepared to fulfil our role in those circumstances but I should perhaps refrain from unnecessarily controversial comment on that particular issue.

Let me finish by saying this. The cases that reach us from Northern Ireland have a singular slant. The country’s recent history, its conservative values and the stalemate in its legislature naturally trigger human rights challenges. These cases demand that we understand and respect Northern Ireland’s circumstances, and the consequent factual matrices in the appeals that reach us, in our decision-making, and that our conclusions are receptive and positively responsive to such circumstances. At the same time, the cases have a strong unifying impact by guaranteeing that despite the legal, social and political differences that continue to exist between our various regions, we are one country in our common understanding and commitment to human rights.

My great friend and colleague, Tony Clarke, Lord Clarke of Stone-cum-Ebony, would always intone, when he learned that I was giving yet another talk, “always remember, there is no such thing as too short a speech.” As always, I have failed to abide his injunction. So, I leave you with the marvellous sign-off of that wonderful broadcaster, John Ebdon, “if you have been, thanks for listening”.