* * * * * under embargo until 5.00 am 23/4 EST

"THE THIRD BRANCH AND THE FOURTH ESTATE"

SECOND LECTURE IN THE SERIES

"BROADCASTING, SOCIETY AND THE LAW"

FACULTY OF LAW,
UNIVERSITY COLLEGE DUBLIN

RADIO TELEFÍS ÉIREANN

O'REILLY HALL, UNIVERSITY COLLEGE DUBLIN

The Hon Sir Gerard Brennan, AC KBE
Chief Justice of Australia
22 April 1997

THE THIRD BRANCH AND THE FOURTH ESTATE

When I was invited to deliver this second lecture in the series on "Broadcasting, Society and the Law", I had some misgiving about speaking from the viewpoint of an Australian judge. My visits to Ireland have been too few to grasp the dynamics of modern Irish life and my knowledge of Irish law is too fragmentary to appreciate the wellsprings of forensic thought in this country. In the anticipation of visiting again the home of my forebears, I put the misgiving aside. And, I rationalised, the similarity in the democratic ideals of our societies, in the institutions which safeguard our freedoms, in the legal traditions and judicial methodology which we value and, perhaps, in that insouciant lack of respect for pomp and authority (which we in Australia owe substantially to the influence of the Irish), gives sufficient warrant for an Australian judge to speak to an Irish audience on a subject of common concern: the role of the courts and the media in securing the rule of law.

The rule of law is like the air we breathe: so long as it is there - undiluted and freely flowing - we are not ordinarily conscious of its presence. But let the rule of law be polluted or impeded and we choke under the excesses of raw power. Fundamental to both our societies is freedom under the law, that is to say, our peoples are

ruled by laws which leave individuals free to think as they please, to act without restraints that are unnecessary to achieve the common good and to be secure in their person and their property. Both countries boast a government of laws and not of men, a government under which the legal rights of minorities, of the powerless, of the poor are protected equally with the legal rights of majorities, of the powerful and the affluent.

In a democracy, the rule of law is not achieved by raw power but by public acceptance of the law and by public confidence in the institutions which promulgate and administer it. This is not the occasion to speak of the content of the law except to say this: if the law works or tolerates injustice, the injustice will compound with every generation until, finally, disaffection with the law becomes so general and so deeply felt that the rule of law breaks down. But that is not my topic. I would focus not on the law itself but on the institutions - particularly the courts - that administer the law. Public confidence in those institutions has to be built on their due performance of function and the public perception of that performance. One is the reality; the other is the perception.

The political branches of Government make the news of the day. They affect great issues of policy that concern large sections of the community. The Legislature and Executive are under continual

scrutiny by the media. Politicians continually enliven political debate. The members of the political branches of government and the media necessarily live in a symbiotic relationship. The media need the political stories, the pictures, the background and the insights to weld together a presentation - whatever the medium may be - which informs, intrigues and perhaps entertains the public. Political figures need to publicise their policies and personalities and to ensure that both are presented in a favourable light. Public discussion of political issues is alive and well. And that is to be expected not only in the homeland of the Irish people, but in countries where the Irish diaspora has contributed to the national character.

The Courts, the apolitical branch of government, seem dull and pedestrian by comparison. They are focused on the individual, not on great questions of policy; they are slow, costly, deliberate to the point of tediousness, sometimes quite out of sympathy with popular sentiment, punctilious about publication of the grounds on which they exercise their power but reticent in the usual modes of public relations. Judges do not comment on their judgments or seek to vindicate their judicial pronouncements. There are no background briefings, no titillating leaks, few photo opportunities, no exposition of the implications of judgments. Yet it is the judicial branch that bears the primary responsibility for maintaining the rule of law, for

safeguarding the freedom of individuals, for regulating the very institutions of State power, for imposing condign punishment on those who contravene the law and for preventing the centres from overreaching the rights of those less powerful. It has no agenda of its own devising, no armoury other than that provided by the Executive; it can procure no favours and its own interests are unaffected by the exercise of any of its powers. 200 years ago, Alexander Hamilton called it "the least dangerous branch"[1]. He noted that -

> "The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

Having no power but the power of judgment, the Judiciary has no power base but public confidence in its integrity and competence in performing the functions assigned to it. There must be such a

---

1 Hamilton, *The Federalist Papers* (No 78) , (New American Library, New York, 1961) at 465, first published in 1787.

degree of public confidence in the courts' application of the law that neither power nor riches, nor political office nor numerical superiority can stand against the weight of the court's authority. If that confidence is eroded, there is nothing to redress injustice or to prevent abuses of raw power. If the law is to rule, there must be an arbiter whose authority is accepted by the powerful and the weak, rich and poor, government and governed, majority and minority. And there's the rub. The public knows little of the functions and methodology of the courts. Without adequate explanation or technical knowledge, the public may not know how it is that the judiciary maintains a free society under the law. Even the most familiar of curial functions, the sentencing of offenders, is often attended by misunderstanding of sentencing principles.

Of course, a sophisticated blend of legal and journalistic skills is needed to translate to the public the technical language of the law, the differing functions of judge and jury, the significance of precedent, the social significance of a judgment and its impact on future legal development. In earlier days there was a class of barrister-journalists, now sadly diminished in Australia. In this country, the tradition may still be maintained. There were some eminent practitioners of these fused professions. Charles Gavan Duffy, who established *The Nation* in 1842 was one of them. After serving both in prison and the House of Commons, he left for

Australia where he became Premier of Victoria. His second wife bore Frank who became Chief Justice of the High Court of Australia; his third wife bore George who became President of the High Court of Ireland. Serjeant Sullivan QC followed Gavan Duffy as editor and proprietor of *The Nation* when the latter left for Australia. Even in his advanced years, the Serjeant exhibited a capacity for evocative descriptions of Courts and judges. He remembered a Chief Justice of Common pleas before whom, he said[2], "no case was certain and no case was hopeless". But I digress, and I must return to my theme.

In the modern world, public understanding of any institution is conveyed largely by the media. The influence of those who work in the media led to their description, over 150 years ago, as the Fourth Estate. In 1840, Thomas Carlyle[3] attributed the term to Edmund Burke. "Burke" he wrote -

> "said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a *Fourth Estate* more important far than they all. It is not a figure of speech, or a witty saying; it is a literal fact, - very momentous to us in these times. ... Whoever can speak, speaking now to the whole nation, becomes a power, a branch of

---

2 (1927-1929) 3 *Cambridge Law Journal* 365 at 365.

3 "The Hero as Man of Letters" published in *On Heroes, Hero-Worship and the Heroic in History*, (1904, London, OUP) at 219, first published in 1840.

> government, with inalienable weight in law-making, in all acts of authority."

Carlyle himself had used the term on an earlier occasion[4], speaking of "A Fourth Estate of Able Editors". In both references Carlyle treats the Fourth Estate as "Men of Letters". Today he would have to expand his references to the men and women versed in the art and technology of radio, television and the Internet.

The popular media are more familiar to us than the street in which we live, more pervasive than the aromas of the kitchen, more influential with many than the Sunday sermon. They inform, they entertain, they prescribe fashion, they form tastes, they mould attitudes and values. They present the three branches of Government to the people. The Fourth Estate is not a fourth branch of Government but, in the life of a free and democratic society, it has great power and influence. Its power and influence will be expanded by new technology.

It is tempting to say that the third branch - the Judiciary - and the Fourth Estate - the media -share a responsibility to create or

---

4 *A History of the French Revolution*, (The Modern Library, New York) at 186, originally published in 1837.

maintain confidence in the work of the courts. But that would cast the media in the role of apologists for the courts and thus undermine the independence of the media and their proper relationship with the public. The media's function is quite different from the court's. The court's function, entrenched in public expectation, is to decide cases and, in doing so, to apply the law competently and impartially. The media's function is to report and critically to analyse the work of the courts. So we are speaking in the present context of disparate but interlocking functions which, if properly performed by both institutions, should produce public confidence in the maintenance of the rule of law by the courts.

There are several factors relating to the constitution of the courts and their procedure that affect public confidence in the rule of law. First, the courts must be constituted by competent judges: these are men and women who, by study and practice, have become learned in the law, resolute in character, beyond suspicion of partiality, possessed of a worldly wisdom and with a passion for justice. Where, you might ask, does one find such paragons of virtue? They may come from various avocations but they are identified most clearly by their peers in the legal profession who have seen them at work in weak cases and in strong, in complex issues and in run of the mill work, retained for the deserving and the undeserving. How are such judges to be identified? In neither of

our countries have we opted for either of the American systems: popular election or confirmation after public inquiry. Ireland's Constitution Review Group has given sound reasons for rejecting the public inquiry model, including their observation[5] that "the intense public scrutiny [of a candidate] is likely to deter the sort of people who would be suitable appointees". Judicial qualities are best vouched for by confidential report appraised by a few selectors, leaving the responsibility for the ultimate choice with a government that is accountable to the public. Governments that make patently inappropriate judicial appointments pay a political price. And, apart from more obvious considerations, they have to bear in mind that the recruitment of future judges of quality is linked to professional assessment of the quality of their predecessors. The Irish solution to the problem of judicial selection is *The Courts and Courts Officers Act 1995* which provides, as you know, for a Judicial Appointments Advisory Board to advise Government on the selection of judges.

Once appointed, the judge must avoid not only the reality but also the appearance of partiality. Lord Devlin commented that[6] -

---

5 *Report of the Constitution Review Group*, (1996) at 181.
6 "Judges and Lawmakers", (1976) 39 *Modern Law Review* 1 at 4.

> "The Judge who does not appear impartial is as useless to the process as an umpire who allows the trial by battle to be fouled or an augurer who tampers with the entrails."

Want of impartiality poisons the stream of justice at its source; an appearance of partiality dries it up. That is why the courts have adopted the rule[7] that a challenge to a decision on the ground of bias will succeed if "in all the circumstances the parties or the public might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the matter before him"[8]. That is the Australian test. The same test of reasonably apprehended bias has been expressed in the Supreme Court of Ireland. That is not surprising for, as Mr Justice O'Flaherty observed[9], Lord Hewart's maxim that "justice should not only be done, but should manifestly and undoubtedly be seen to be done"[10] is "probably a concept as old as the common law itself and it is in perfect harmony with our constitutional situation." In *Dublin Wellwoman Centre Ltd v Ireland*[11], Mrs Justice Denham, speaking for the Supreme Court, said:

---

7 The rule does not apply when, of necessity, a particular judge must sit on a case.
8 *Grassby v The Queen* (1989) 168 CLR 1 at 20 per Dawson J citing *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 and *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248.
9 *O'Reilly v Cassidy* [1995] 1 ILRM 306 at 310.
10 *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259.
11 [1995] 1 ILRM 408 at 421-422.

> "It has long been a practice of the judiciary in this State not to act as a judge in a case where they have an interest, or where there are grounds on which a reasonable person might fear that in respect of the issues involved he would not get an independent hearing."

It is not enough to have judges who are competent and impartial. To ensure public confidence, they must sit publicly and in open view. "Publicity", said Bentham, "is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying on trial." The judge receives and hears in public whatever is to affect the decision to be made. No representation is received by a judge in the privacy of his chambers. No telephone calls are accepted from parties or their protagonists. Secrecy does not cloak the exercise of judicial power unless privacy is necessary for reasons of physical or national security, or to protect the identity of children or some victims of crime or the protection of trade secrets. "The public administration of justice" said an Australian judge[12] "tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret ... distinguishes their activities from those of administrative officials, for 'publicity is the

---

12 *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J.

authentic hall-mark of judicial as distinct from administrative procedure'[13]." The Constitution of Ireland provides[14]:

> "Justice shall be administered in Courts established by law by Judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

However, I understand that the effect of this provision on the contemporary broadcasting of proceedings is in question in pending litigation. Therefore I shall refrain from further comment.

After trial comes the judgment and perhaps an appeal. The reasons for judgment, whether at first instance or on appeal must also be in the public domain. If the steps in the reasoning to judgment are exposed, they are amenable to correction on appeal except, of course, in the court of final appeal. And there, in particular, the steps in the reasoning must be available to the public and open to public criticism. As Sir Frank Kitto pointed out[15]:

---

13 *McPherson v McPherson* [1936] AC 177 at 200.

14 Article 34.1.

15 *"Why Write Judgments?"*, a paper presented in 1973 to a Convention of Judges of the High Court of Australia and the Supreme Courts of the States and Territories. and published in (1992) 66 *Australian Law Journal* 787 at 790.

> " The process of reasoning which has decided the case must itself be exposed to the light of day, so that all concerned may understand what principles and practice of law and logic are guiding the courts, and so that full publicity may be achieved which provides, on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other hand, an effective stimulant to judicial high performance."

By sitting in public and by publishing their reasons for judgment, the judges give an account of the exercise of their judicial powers.

Court critics sometimes complain that judges are unaccountable. To whom should they be accountable and for what? In charging a jury, judges expose their conception of the law to be applied. In reasons for judgment, they give a full and public account of the facts they find and the law as they hold it to be. How otherwise are they to give an account of the exercise of their powers? Should the judge be accountable to the government of the day? Certainly not. Should the judge be accountable in some way to an interest group or to the public? The rule of law would be hostage to public relations campaigns or majoritarian interests. Should a judgment be fashioned to satisfy popular sentiment? That would be the antithesis of the rule of law.

The rule of law does not ensure that the decision in a particular case will be pleasing to an interest group, to a government or to the public. Take, for example, the case of a garda officer who, following

established procedure, obtains a warrant from a peace commissioner to enter premises and search for controlled drugs. Drugs are found on the premises and a person is charged and convicted of being in possession of them. It turns out that the procedure for obtaining the warrant is defective and the warrant is invalid. Although the gardai acted in good faith, a majority of the Supreme Court held that the constitutionally-protected personal rights of the citizen[16] demand the exclusion of the evidence obtained under the warrant and the consequential acquittal of the suspected drug dealer[17]. Now a report of this case could be: "Suspect freed on a technicality". But the real significance of the case is that priority is given to the rule of law over the punishment of an alleged offender. Except in extraordinarily excusing circumstances, personal constitutional rights are held to prevail over law enforcement practices which are mistakenly believed to be valid. That betokens a cohesive society confident of its freedom but it does not mean that the rule of law is skewed in favour of defendants. And so, while the Supreme Court has acknowledged[18] a right to silence, the right is seen as correlative to the right to

---

16 Article 40.3.1°.

17 *The People (Director of Public Prosecutions) v Kenny* [1990] 2 IR 110; [1990] ILRM 569.

18 *Heaney v McGuinness v Ireland and the Attorney-General* (unreported (247/94), 23 July 1996).

freedom of expression and thus to be subject to legislative encroachment in the interests of public order and morality. Again the Constitution is upheld.

The rule of law is vindicated not in the result of a case but in the process of reaching the result. The law and the facts are the premisses in the judicial syllogism[19] qualified on occasions by a judicial discretion. If the law when applied to the facts leads to an unpalatable result, it is beside the point to criticize the result. Unless judges are to reach decisions that are socially acceptable, or popular, or beneficial to the majority whatever effect they may have on a minority, it is useless to look at the result and not the process. Indeed, the fact that a decision is unpalatable may be an indicium that the judge has applied the rule of law.

Hard cases, they say, make bad law. Conversely, good law may not work well in hard cases. The cases which test the law, which take it to the limit, which attract attention, are often the hard cases. These cases may evoke a development of the law within the

---

19 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374.

constraints of the judicial method and the result may then attract criticism. But, as Sir Frank Kitto warned[20]:

> "Every Judge worthy of the name recognises that he must take each man's censure; he knows full well that as a Judge he is born to censure as the sparks fly upwards; but neither in preparing a judgment nor in retrospect may it weigh with him that the harvest he gleans is praise or blame, approval or scorn. He will reply to neither; he will defend himself not at all."

If a judge is to be unaffected by praise or approval or unmoved by blame or scorn, the judge must be protected by a commitment to the rule of law. The law is the shield of the judiciary for it is the protection against allegations of the arbitrary exercise of power. Absent a commitment to the rule of law, a judge would be beset by the concerns to which a German judge recently pointed[21]:

> "There is only one major issue in this context not usually taken into account, the well established 'fourth power' - not separated, not controlled but endangering the system of checks and balances - the power of the mass media. The extreme importance of this fourth power for the judicial system begins with the question inherent covertly or overtly in the daily work of a judge. 'What will the newspapers say if I decide this case in that way?'"

---

20 "*Why Write Judgments?*" (1992) 66 *Australian Law Journal* 787 at 790.

21 Judge Schomburg, "Position and Role of the Judiciary within the Context of Separation of the Legislative, Executive and Judicial Powers", a paper presented to the 10th Annual Meeting of the Society for the Reform of Criminal Law, Whistler; British Columbia, Canada, (1996) August 20-24.

This is not a new problem. An American judge of a century ago is reported to have made the bitter comment that the press "have combined to bring the Courts and the administration of justice under their control, by their appeals to popular prejudice, accompanied by the usual amount of lying." Justice Ruth Bader Ginsburg, who reported the comment, doubted whether any of her colleagues would make that comment today[22]. No modern judge, committed to the rule of law, would contemplate yielding to populist pressure. And, for their part, even if the media make the most trenchant criticism of a case, they would not wish judges to bow to populist demand. The law is rightly expected to protect the critics of the court's work as well as those who support it.

It is one thing to point to the manner in which courts must be constituted and the procedures which must be followed in order to maintain public confidence in the rule of law. It is another to identify the perceptions which create that confidence. So I turn to the problems of communicating what happens in the courts to the public.

---

22 *"Communicating and Commenting on the Court's Work"* (1995) 83 *Georgetown Law Journal* 2119 at 2123.

It is in the reasons for judgment rather than in the formal judgment or order of the court that one must search to find what the court is doing. Sometimes, when the judgment has a political significance or the case or a litigant has a high public profile, the judgment itself attracts public attention rather than the reasons given. That may be justified in some cases, but in others the reasons for judgment should also be publicized.

Take, for example, *Crotty v An Taoiseach*[23]. In that case, the Supreme Court by majority held that the Constitution precluded ratification of Title III of the Single European Act. The decision, so it was reported, was welcomed by some interest groups and disappointed others[24]. The decision had significant political consequences, both domestic and European. And those consequences had to be addressed by the Irish people in the ensuing referendum which amended Art. 29.4.3° of the Constitution. No less significant than the judgment were the principles by which the Court reached its conclusion. First, it was held that the Court had

---

23 [1987] IR 713.
24 *Irish Times*, 10 April 1987.

jurisdiction, at the instance of an individual citizen[25] who, like every other citizen, would be affected by the Single European Act, to intervene to prevent the Government from acting without constitutional authority. That question, said Chief Justice Finlay, was "an issue of a fundamental nature, the importance of which ... transcends by far the significance of the provisions of the SEA". The issue was fundamental because it concerned the subjection of government to the Constitution and the authority of the Court to enforce the Constitution. Secondly, a majority of the Court, construing Title III of the SEA, found that it would impermissibly constrict the exercise of the Government's constitutionally vested power - and responsibility -to formulate foreign policy. Mr Justice Walsh said:

> "The foreign policy organ of the State cannot, within the terms of the Constitution, agree to impose upon itself, the State or upon the people the contemplated restrictions upon freedom of action."

Citing Article 6, he held that -

> "In the last analysis it is the people themselves who are the guardians of the Constitution. In my view, the assent

---

25 See also *Society for the Protection of Unborn Children (Ire) Ltd v Coogan* [1989] IR 734 and *McGimpsey v. Ireland* [1990] 1 IR 110 at 123-124 per McCarthy J.

> of the people is a necessary prerequisite to the ratification of so much of the Single European Act as consists of title III thereof."

The people gave their assent. The Supreme Court gave judgment on 9 April 1987; the referendum which carried the amendment approving Ireland's accession to the SEA was held on 25 May in the same year. But the enduring importance of the principles embraced in *Crotty* is that the Constitution governs all branches of government, even in matters of foreign affairs and that the Courts' jurisdiction can be invoked to ensure that no organ of government acts without the authority that the people, through the Constitution, have conferred. As the preamble to the Constitution states, it was adopted and enacted by the people of Eire and given to themselves. In Ireland, as now in Australia, sovereignty is vested in the people. And the people should know that the courts give practical effect to that doctrine.

Both Ireland and Australia are governed by written Constitutions, but the Irish Constitution contains many provisions which protect the rights and freedoms of individuals while the Australian Constitution contains few provisions of that kind. It was created chiefly to apportion powers between the Commonwealth which it created and the States which are reincarnations of the antecedent Colonies. It follows that, although similar problems can arise in both countries and similar conclusions be reached, the legal rules applied in reaching those conclusions may be different. Thus,

when the extent of confidentiality of Cabinet communications arose before the Supreme Court of Ireland in *Attorney-General v Hamilton (No 1)*[26] and before the High Court of Australia in *The Commonwealth v Northern Land Council*[27], both Courts concluded that Cabinet confidentiality could not ordinarily be breached. But the judgments in Ireland turned largely on the provisions of the Constitution and the judgments in Australia turned on what were seen as principles of the common law. Of course, the same values may inform the interpretation of a term in a Constitution and the definition of a rule of the common law. Some years ago, Peter Wright, an erstwhile member of the British Security Service wrote *"Spycatcher"*. The Attorney-General of the United Kingdom unsuccessfully sought an injunction against its publication in Australia[28]. Two years earlier, a similar application was heard in the High Court of Ireland[29] with respect to another book written by a deceased member of the same Service. That application was also unsuccessful. The reasons in the two cases were similar, but they proceeded from different starting points. In both cases, the plaintiff's

---

26 [1993] 2 IR 250; [1993] ILRM 81.
27 (1993) 176 CLR 604.
28 *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.
29 *The Attorney General for England and Wales v Brandon Book Publishers Ltd* [1987] ILRM 135.

interests were identified as those of a foreign government and, on that account, distinguished from the interests of a private litigant. The starting point of the Irish case was the Constitution. Mrs Justice Carroll said:

> "Any consideration of the question of preventing publication of material of public interest must be viewed in the light of the Constitution. Article 40.6.1° guarantees liberty for the exercise of the right of citizens to express freely their convictions and opinions subject to public order and morality."

By contrast, the Australian case proceeded on the general principles of equity and the common law. Conversely, different results may be reached when similar constitutional provisions are construed. The constitutional requirement[30] that "no person shall be tried on any criminal charge without a jury" permits majority verdicts in Ireland[31] but, in Australia, the requirement that trial on indictment for federal offences be "by jury"[32] has been held to prescribe an unanimous verdict[33].

---

30 Article 38.5.
31 *O'Callaghan v Attorney General and the Director of Public Prosecutions* [1993] 2 IR 17.
32 Constitution, s 80.
33 *Cheatle v The Queen* (1993) 177 CLR 541.

Constitutional cases lend themselves to reporting from the viewpoint of their political significance. This is inevitable and, indeed, desirable - especially when there is a readiness, as there is in Ireland, to submit the question decided to a referendum for constitutional change.

The Constitution of Ireland may be amended with the approval of a simple majority of those voting at a referendum to approve the amending Bill[34]. The Constitution of the Commonwealth of Australia, on the other hand, can be amended only if the amending Bill is passed by an absolute majority of both Houses of the Parliament and approved at a referendum by a majority of voters in a majority of States and by a majority of all voters throughout Australia[35]. In Australia, few referenda for constitutional amendment have been carried. While the reasons for judgment in a constitutional case may be the subject of public discussion in the conduct of a referendum in Ireland, the reasons for judgment in a constitutional case in Australia may not command so much public attention although the reasons become a relatively immutable addition to the constitutional text. There, the judgment itself often

---

34 Article 47.1.
35 Section 128.

seems more significant to the media than the reasons for judgment since the judgment sets the parameters within which political debate is conducted.

In both countries, the people are entitled to be informed not only of a judgment which affects their constitutional destiny but also of the faithful and impartial application of the rule of law by their delegates, the Courts, in coming to judgment. As Mrs Justice Denham said in the *Dublin Wellwoman case*[36]*:*

> "With the development of the modern communications media and an increasingly educated and enquiring society the public perception of the impartiality of the courts is a cornerstone of the administration of justice in our constitutional democracy."

The problem, as Justice Ruth Bader Ginsburg has noted[37] is that -

> "It is indeed hard, under the pressure of publication deadlines, to describe judicial opinions with entire accuracy[38]. And, to describe court actions accurately ... is, in many cases, to describe them boringly."

---

36 [1995] ILRM 408 at 422.

37 "Communicating and Commenting on the Court's Work" (1995) 83 *Georgetown Law Journal* 2119 at 2128.

38 *Virginia Pharmacy Bd v Virginia Citizens Consumer Council* 425 US 748 at 777 (1976) per Stewart J.

Of course, the rehearsing of facts, the recitation of constitutional or statutory texts, the invocation of precedent and the expression of concise legal reasoning, are hardly the stuff to be digested with breakfast or to entertain on the evening television screen. True it is that the reporting of some cases would be tedious and technical. Yet legal rules are laden with values. They contain the ethos of the society they serve and, to the eye of the trained observer, the curial acceptance or rejection of a legal proposition can sometimes be seen as a dramatic signpost to the way in which society is heading. The bio-ethical cases, which are the inevitable concomitant of advancing medical technology, provide some examples.

In the cases arising under Article 40.3 of the Constitution, difficult and controversial questions have fallen for determination. The constitutional right to life of the unborn[39] and the right to life of the terminally ill[40] have evoked instructive judgments on the nature and priority of those rights[41]. In one of these cases[42], the Supreme

---

39 Article 40.3.3°.

40 Article 40.3.2°.

41 *The Attorney-General (at the relation of SPUC) v Open Door Counselling Ltd* [1988] IR 593; *Attorney-General v X* [1992] IR 1; *In the Matter of a Ward of Court* [1995] 2 ILRM 401.

42 *Information (Termination of Pregnancies) Bill* 1995 [1995] 1 IR 1.

Court recognized the Constitution as the fundamental and supreme law of the State representing the will of the people and not inferior to the natural law. However, in interpreting the Constitution, the Court adopted a judgment of Mr Justice Walsh[43] espousing the interpretation of constitutional rights in the light of the preamble to the Constitution so that the judges must "as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity." Reasons for judgment can be expected to reveal contemporary judicial notions of these virtues. Although these virtues do not displace the text, judicial notions of them inform the provisions of Ireland's Constitution.

In cases of notoriety, the public and the media are immediately interested in the outcome. But what can be done to ensure that the public is aware of, and justifiably confident in, the integrity of the system? The answer depends on the role that the media choose for themselves in reporting and analysing the work of the Courts. In a recent article which sketched the obstacles in the way of adequate

---

43 *McGee v The Attorney-General* [1974] IR 284 at 319.

reporting of the work of the Supreme Court of the United States, the Court correspondent for the New York Times observed[44]:

> "Especially in an era when the political system has ceded to the courts many of society's most difficult questions, it is sobering to acknowledge the extent to which the courts and the country depend on the press for the public understanding that is necessary for the health and, ultimately, the legitimacy of any institution in a democratic society."

The author reports[45] the criticism by a Judge of the Constitutional Court of South Africa of press coverage of that Court's first and significant decision which struck down the death penalty[46]. His Lordship complained that the reporters "had not thought it necessary to tell the public what the court's reasons for the decision actually were." He wondered whether effective constitutional government could exist if the press did not enlighten the public about the reasoning behind the court's decisions. In 1990, the Canadian Judicial Council[47], acknowledging the need for "accurate, balanced and complete report of the hearing and disposition of specific cases"

---

44 Greenhouse, *"Telling the Court's Story: Justice and Journalism at the Supreme Court"* (1996) 105 *Yale Law Journal* 1537 at 1538.

45 (1996) 105 *Yale Law* Journal 1537 at 1552.

46 *State v Makwanyane* 1995 (3) SA 391 (Const Ct)

47 Canadian Judicial Council, *Principles Governing Relations between the Judiciary and the News Media", Canadian Judicial Council Annual Report* (1990-1991), 21-22.

accepted that the Judiciary, Court Officials and the Bar "have a responsibility appropriate to their roles to assist the media in the provision of such coverage". The Council urged enhanced media access to court proceedings and, more contentiously, suggested that the media representatives should be provided with legal information and assistance. I respectfully agree that the courts should facilitate media access to whatever is on public record or in the public domain. But it is another question whether the court should act as an interpreter of its own decisions or should seek to explain the reasons why a decision was reached.

Accurate reporting and critical analysis of the work of the courts require some legal skills and experience. Who should provide them? Public confidence in the rule of law is not to be won by the issuing of media statements nor by background briefings that might be suspect as putting a favourable spin on the work of the courts. The media would abandon their responsibility if they were to publish uncritically summaries of cases or other media releases issued with the authority of the courts. The media must themselves probe and analyse the reasons for judgments of public importance. The basic justification for freedom of the press is the employment of an informed and critical faculty and the employment of that faculty is a source of pride to the competent journalist. If the courts were to furnish digests of information for the media to publish, they would

abandon the independence which both must assert and defend in the public interest. Better by far that the media should sense that there are stories of vital public interest in the dramas of a trial, in the tensions between the organs of government, in the priorities of constitutional rights or immunities, in the interplay of legal rules and in the exposition of principles under which society lives.

I venture to suggest that the journalist who is familiar with the jargon, the procedure, the statutes and the precedents will find much to report and comment upon in the work of the courts and their fidelity to the rule of law, including the legitimacy of the techniques which the courts employ in interpreting and developing the law. The well-furnished legal journalist who perceives the principle underlying a rule appearing in reasons for judgment and who perceives the community value that underlies the principle is well placed to offer insightful criticism and, however indirectly, to play a part in the development of the law. The journalist who cannot or does not bring that critical faculty to bear upon what emerges from the courts is at risk of misleading the public about the work of the institution on which our freedom under the law largely depends. The priceless heritage of the rule of law depends not on a supine acceptance by the public of what the courts are doing nor on misinformation that leads to disaffection but on an informed and

critical insistence that the courts should apply the law competently and impartially and be seen to be doing so.

The courts and the media each have a distinct part to play. And so there is truth in the conclusion reached by Linda Greenhouse when she says[48]:

> "despite our divergent interests - the press corps' interest in accessibility and information, the Court's in protecting the integrity of its decisional process - I am naive enough ... to think of these two institutions as, to some degree, partners in a mutual democratic enterprise to which both must acknowledge responsibility."

The Authorities that broadcast and the Courts that administer the law both seek to serve Society and, in that sense, are partners in a democratic enterprise but the pride which each has in its professional standards and the independence which they boast offer the surest guarantee that the enterprise will succeed.

---

48 (1996) 105 *Yale Law Journal* 1537 at 1561.