VIEWPOINT

THE ROLE OF THE JUDGE

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It is for me a very great pleasure indeed to be here and that is so notwithstanding the fact that I am conscious that, in accepting the kind invitation of Esmonde Smyth to speak here about the role of the judge, I am breaking what I like to describe as a long held principle of mine, and what most other people would describe as an obsession of "bee in my bonnet;" namely that free advice is by far the most over produced commodity in Ireland at present and should have been put into intervention long before beef or butter.

However, the combination of the blandishments of Esmonde Smyth and the pleasure which I anticipated of meeting so many colleagues previously known to me in either of the legal profession or in the judiciary overcame these so-called principles.

What is the role of the judge? I think this question leads to a series of what could accurately be described as blinding glimpses of the obvious and maybe it is as well, in order to discipline our discussion, that we should state them.

There appears to me to be three basic and fundamental functions of a judge and they are as follows:

1. To do justice between the parties in deciding the issues brought before the court, be they civil or criminal.
2. To try and ensure that not only is justice done between the parties, but that also to reasonable and unbiased observers it appears to be done.
3. In deciding what is the just order to be made, to have regard to both the immediate and long term consequences of it on the parties. In the context of criminal cases, I include as a party the public. To have regard in the limited instances in which it arises to any

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> consequences, on the development of case made law, but to disregard other consequential effects of a judgment of political, religious or social issues. This third basic function I would describe and label as the *justitia ruat coelam* rule.

The priority in which I have stated their functions is vital. For example, the obligation to try and ensure that justice appears to be done is always subservient and secondary to the actual doing of justice and, where there is a clash between these two, the doing of justice is always predominant. It is not impossible for there to be a clash. In a criminal case, for example, where a lighter sentence than might appear appropriate is in fact the just one, a major reason might be some aspect of the conduct of the victim, but to publicise or emphasis that in the judgment for the purpose of ensuring that justice appeared to be done might constitute a further hurt and injustice to the victim.

If these principles so briefly set out can really to any extent represent a very broad description of the role of a judge, then the next logical step may be to consider what the boundaries of that role are; thereby defining what is judicial function by the simple method of saying what is not.

The most obvious and important element here is the separation of powers between the judicial, executive and legislative. Judges, in my experience, most frequently look at this doctrine from the point of view of resisting the invasion of their exclusive right to administer justice – such invasion coming from the legislature of the executive. This is right and proper and such invasions appear to me to be rapidly and significantly on the increase.

But there is another aspect to the separation of powers very relevant to the question of what are and what are not judicial functions.

That is the very obvious proposition that the constitutional prohibition of invasion by the executive or legislature is no more certain or complete than the corresponding prohibition of the entry by the judiciary into the exclusive domain of either the executive or the legislature.

The doctrine then is an invaluable safeguard for the independence of the courts, but is acquired and maintained at the significant price of a rigid self discipline and, to some extent, a rigid abstention.

This seems to me to be true not only as a matter of principle, but to have a very strong pragmatic support as well. It seems inevitable that the only consequence of an invasion by the judiciary into what is properly under the constitutional provisions the domain of the executive or the legislature will be a retaliatory expedition by either the executive or the legislature into the undoubted domain of the judiciary and a weakening of the capacity of the judiciary properly and plausibly to complain of that invasion.

It is easy to identify examples of the most obvious invasions of judicial power, such as acts or omissions on the part of the servants of the executive which tend to frustrate or prevents its exercise. An example applicable to the legislature is a statutory provision purporting to oblige a judge to decide in a particular way an issue coming before him. But it is not quite so easy to identify the most typical examples of wrongful invasions by the judiciary into the domains of the executive or legislature.

One infrequently met with, but of considerable importance when it is, would be the interpretation of a statute based not on what the court should be doing; namely trying to ascertain what had been the intention of the legislature in apssing the statute, but rather on the basis of what the court considers to be the most desirable provision which should have been enacted by the legislature.

It is almost inevitable to spend a long time as a lawyer and, I suppose, especially as a judge, without reaching strongly held opinions as to what is and is not desirable legislation in any particular context or for any particular purpose. I feel it is of considerable importance that we should always remember that we must leave these strongly held opinions aside when we are carrying out the task of interpreting a statute.

What seems to me, however, to be a more relevant and realistic example of an invasion by the judiciary into the domain of the executive or legislature is wrongful criticism by a judge of either of these two institutions.

I should here issue the equivalent of a manufacturer's warning: I have for a very long time been strongly convinced that, except as a manifestly essential ingredient in a judgment or ruling, it is both wrong and unwise for a judge to indulge in such criticism. Wrong because it represents on any reasonable interpretation of the doctrine of the separation of powers a breach of it and unwise because it inevitable leads, or will lead, in my belief, to a retaliatory improper criticism by the executive or by the legislature.

I am, however, aware that this view was not shared by some of my former colleagues, for whom I genuinely have great respect, who believed that such criticism was useful and permissible and could sometimes yield valuable results. It certainly usually was warmly applauded by the media, but whether that is proof of its propriety or merely an example of the ever increasing passion of the media for the reporting of confrontation is a nice question.

In talking about impermissible criticism of the executive or of the legislature, I am, of course, at all times dealing only with criticism which is not a necessary ingredient in the giving of a judgment and it cannot be said, for example, that there could be any conceivable impropriety in a judge having been obliged to condemn executive action or legislative provisions indicating what course of conduct would be lawful and effective or what form of legislation would be lawful and effective if it were adopted.

Another relevant non-function of a judge (one less likely to be disputed) is the indulgence in general pronouncements on the customs, manners and morals of society which, though often triggered by the evidence before a court, are not and, I return to the test already suggested, manifestly necessary for the completeness of the ruling or judgment in which they are given.

This is, I suppose, more a matter of style than of legal obligation, but the major objection to it is a practical one; namely that it is presenting unnecessary hostages to fortune. Extraordinarily few general statements on such topics cannot find a vociferous opponent and if a judge accepts the necessity with which I will later be dealing, not to defend himself or herself by entering into public controversy, then the making of such statements merely leads to unanswered criticism or possibly, to be more precise, to an increase

in unanswered criticism as far as a judge is concerned.

These considerations of what are and are not the functions of a judge could be said to lead to a consideration of the relationship between the media and the judiciary. Whether or not it does, I intend to go there because it seems to me that in that relationship there is, at present, found to be one of the major difficulties to be encountered in discharging the functions of the judicial role.

The impact of the media on the courts can be identified under a number of different, though not entirely separate, headings. Firstly, it has a vital function in factually reporting what goes on in court. That function has recently been specifically identified, as I understand it, by the Supreme Court as a contribution to the discharge of the constitutional obligation to administer justice in public.

Secondly, it may either intentionally of unintentionally interfere with the trial of an action by publishing sensational, incomplete, speculative or misleading accounts of a set of facts yet to be proved and determined.

Thirdly, it can be weighted or loaded comment on the issues of a case not yet determined, intended to interfere with that determination.

The difficulty most commonly arising in the factual reporting of cases is that it is not factual. It is either highly selective so as to support a critical or biased attitude held by the journalist or media concerned, or it is so abbreviated as to be quite incomprehensible. It is difficult to know what the solution for this sort of problems is. It can, in the event of a clear misstatement of a fact or the omission of a dominantly material fact, be met by a corrective statement issued on behalf of the court. That would, I think, be the political or commercial attitude to a misleading or a selective account of the affairs of a politician or of a corporate body.

I very much doubt that it fits easily into the judicial situation. I have strong conviction that judges, by and large, should confine their public utterances to what they say directly in judicial proceedings from the bench. Furthermore, observation of the effect, generally speaking, of attempting to correct the media by subsequent issuing of statements would lead to a conclusion that, for one reason

or another, it has a limited success.

The only real cure for, or a safeguard against, factual misreporting seems to me to be to try and ensure that, in every ruling or judgment, you set out in a very clear, even if necessarily brief, statement the material facts and arguments presented which have led to the decision. I fully recognise that this is much easier done in courts which frequently have the opportunity to reserve judgments than in those whose pressure of work does not permit this.

There is, however, even in a pressurised situation with a big list of cases or motions, much to be said in any matter which shows even a remote possibility of being of public interest, for adjourning even for a few moments at the conclusion of a case to jot down the headings of a judgment or ruling so as to ensure that no major factor or piece of evidence leading to it is omitted. Provided that the journalist attending the court on behalf of any particular section of the media is satisfied to take that properly down in transcription, it should cure certainly an inadvertent misstatement. I do not know to what extent, if any, there is now available to the Circuit Court in cases other than criminal jury trials transcription by tape or otherwise of the proceedings. I do know that it was introduced into the Supreme Court for the first time whilst I was in that court and had not been used there before.

I found the availability of this transcription to have a particular venue relevant to this question. That was, even in a court of three or five, it frequently was the situation that in such matters as appeals from orders from the High Court on motions or even in new trial motions, it was possible after a short recess for the court to agree on a judgment. Such judgment was then prepared in terms of headings and delivered by one of the members of the court and it was possible that, within a very short time that the matter was of public interest, a transcribed version of it would be available to the media.

I very tentatively suggest that if some similar system was made possible for the Circuit Court and if it was made known to the representatives of the media attending it, particularly in cases which are exciting public interest, that a transcription of the actual ruling would be rapidly available after the conclusion of a case, it might

avoid some of the problem I am trying to outline.

Another and more serious impact of the media on the administration of justice to which I have already referred is the sensational or misleading reporting of facts which become an issue in a trial, something which very largely, though not exclusively, arises in criminal charges. As a problem, it has undoubtedly greatly increased in recent times. This appears to be due to a number of causes. The spread to every type of media outlet of a fascination with the lurid and sensational which, they assert, is to answer a public demand, but which seems to me, if not to create such a demand, at least to inflame it. Another cause is the departure from previously held standards of reticence and discretion which are usually labelled as the products of a stuffy and hypocritical Victorian morality.

Whatever may be the causes of this tendency, which undoubtedly has increased and is increasing, it presents a major difficulty with particular relevance to the trial of criminal cases.

The basic legal position with regard to comment or statements published by the media relating to matters which are the subject matter of pending cases is, of course, that such publication may constitute an offence requiring to be punished as contempt of court so as to vindicate the authority of the court and deter the repetition of the offence.

The second basic legal position with regard to such matters is the effect they have on the proceedings and that is that, if the publication concerned has created a real risk of injustice not capable of being remedied or avoided in the proceedings themselves, irrespective of the inconvenience and expense involved, such proceedings must either be abandoned, or if the mere passage of time may obviate the risk of injustice, postponed.

Recent decisions appear to emphasise two aspects of this problem; one being that judges, as distinct from juries, are most unlikely to be affected by such publications and the other that, even in cases where facts are to be decided by juries, they are likely to accept and implement the direction of the presiding judge to ignore such material in reaching their decision. Such decisions in the U.K. at least appear sometimes by implication to accept the contention

that press freedom may be more important than a fair trial.

Without appearing to recommend to you disobedience of binding judicial precedents, I would urge caution in the application of these principles to individual cases.

Of course, it must be correct that judges, by virtue of their training and experience firstly as lawyers and afterwards as judges, would ordinarily be much better able to perform the particular intellectual exercise of completely ignoring facts or comments on facts which they have been wrongfully informed of and which may be quite relevant to an issue of fact to be decided by them than a member of a jury, who is unlikely to have had either that training or experience. However, that very definite fact is a far remove from a confident assertion that judges may never be impressed, even subconsciously, by such matter though they seek to put it out of their minds. In addition, there remains always the danger that such extraneous matter, having been brought to the notice of a judge, such judge would lean over backwards in making a decision of the case. With regard to the concept of members of a jury being well able to ignore such extraneous matter in accordance with the direction of the judge, I think this must manifestly be even less certain.

Where an important matter, such as the guilt or innocence of an accused person, is concerned, it may well be that the courts should still err on the side of caution in continuing a trial after a manifestly prejudicial piece of evidence has come to the notice of either the judge or the jury.

Weighted or loaded comment urging a particular decision in a particular case or in particular types of cases would appear at present to be a very significant problem which derives not only through the activities of the media, but also of other institutions and individuals as well. The earliest example of this in our recent legal history was, I think, the lobbying by the insurance companies in the 1970's for the reduction in the level of damages for personal injuries in negligence cases in which a link was asserted between those damages and the costs of motor insurance premiums. This was thought to affect favourably to the interest of the insurance companies the minds of members of the juries. This may have had some effect, though I am not entirely satisfied that it had, but

certainly it had an ironic sequel. It seems that, emboldened by the apparent success of that campaign, a further campaign was initiated for the removal of juries from the trial of such cases and that was successfully achieved as a political decision. The consequence of that, I have no doubt, was to restore upwards the level of damages to what I, for one, would have considered appropriate.

In more recent times, the level of damages awarded against the state in certain negligence cases seems, by comment both from the media and, indeed, from the executive as well, to be linked to the future level of personal taxation. This constitutes another form of undesirable invasion of the independence of the judiciary.

In criminal cases, there has been, for a sustained period, a major media lobbying campaign for more severe sentencing in a wide range of different types of offences. This appears to be based on an absolutely unquestioning acceptance of the idea that, in the sentencing of a convicted person, the major, if not the only real consideration, should be the extent to which the sentence constitutes sufficient revenge for the victim of the wrong committed. This is emphasised by the now almost universal approach of asking the victim whether the sentence is enough and expressing a point of view through the media as to its adequacy or inadequacy dependent on that opinion.

Revenge is not a *bona fide* or just factor to any degree in the area of sentencing. Of course, the effect of a crime on a victim is a factor and an important factor in the seriousness of the crime and must be given due weight in the determination of the appropriate sentence for the crime.

Victim impact reports as a separate and thus identified document are of recent origin and of considerable value. My experience, both as a practitioner and as a trial judge, would have been that information of the extent of the impact on a victim was, in most cases, already properly brought forward by prosecuting authorities and, if not, would ordinarily have been required by a judge.

A major contribution has been made and is being made by the victim support group to the justice involved in the administration of the criminal law as it affects the victim and it is something which

is extremely welcome. But a move to give to the victim in any sort of criminal offence a direct say or determination in the level of sentencing to be applied is surely a move in an entirely wrong and backward direction. It is a return to the unsupportable basis of what was sometimes described as an ancient rule of the Brehan Law, with what accuracy I don't know, of "an eye for an eye" and "tooth for a tooth."

Whilst there are many of the characteristics of the role of a judge which are clearly common to every type of case which he or she may be asked to try, there are special considerations in regard to the role of the judge in family law cases which may require and reward a short consideration. Firstly, I feel we all must have had the experience that, in many ways, the most burdensome and stressful of all the activities one undertook as a judge was the trial of family law cases. At times, it could seem to be an immensely unrewarding task and I have often thought, after a long day's hearing of such cases, that the very best one could expect to have achieved was the second worst result.

There are good reasons, therefore, why, if at all possible, the duties of judges should be so organised in any court so as to avoid any individual being permanently or consistently involved in family law cases without a change to alter types of work.

The paramount interest of the child as a fundamental principle underlying our family law is, of course, completely correct and must not be watered down. There are, however, good reasons to reemphasise the importance to a child in the determination of any family law case, as far as it can be made compatible with its interests, of the welfare and, in particular, the psychological welfare of its parents. The excessive burdening of the non-custodial parent either with financial obligations or with restrictions and inhibitions on access to the child may, in many cases, though not obviously in all, be not only a manifest hardship on such parent, but also unwittingly an injury to the long term interests of the child as well.

It is well to remember that, although family law cases are cases in which a very great number of disciplines other than law and, in particular, the disciplines of child psychology, child caring and parenting are relevant and may be of assistance, ultimately there is,

in many of them, a definite necessity for a firm decision between two conflicting accounts of the dispute which has arisen that only somebody using the tools of a judge and with the experience of training in office of a judge is likely to achieve. Whilst the court should, therefore, be able to make the maximum possible use of the other relevant disciplines and obtain assistance from persons who are skilled in them and should probably be provided with independent psychiatric or psychological evidence not presented by either party, the ultimate function of deciding should and must remain with the courts and moves to transfer them to a form of psychological tribunal or conciliation body are probably misguided. The question of the accountability of judges has, I think, clearly become of particular relevance in modern times. I do not see any justification for a belief that this represents any perceived fall off in the integrity of the standards of the judiciary in this country, but rather I would see it as being an inevitable consequence of movements toward accountability and transparency in all aspects of society.

Whatever its cause, it is a problem which is going to face the judiciary in the future to a different extent and in a different way, I believe, when it faced it in the time in which I was involved in it.
I would not dream of proposing any particular scheme of accountability or the setting of rules of ethics and good conduct for the judiciary in Ireland and I believe that even the period of four years in which I have ceased to be a member of that judiciary would entirely disqualify me from so doing.

I would like, however, to discuss certain very obvious factors which must be taken into account in the development of any such schemes or any such listing of ethics and good conduct. And the first is that the independence of the judiciary at every level seems to me necessarily to involve that, for judicial acts and for the discharge by members of the judiciary of the functions of the judiciary, they should be accountable only to the judiciary, save for the special exception provided in the Constitution with regards to Supreme and High Court Judges concerning their removal from office for stated behaviour or incapacity or by resolutions passed by Dail Eireann and Seanad Eireann which is uniformly accepted as being a necessary

part of the independence also of the other branches of the judiciary. Any schemes that could or should be introduced, therefore, would be schemes for making the judiciary accountable to the judiciary. There is nothing strange or exclusive about such a provision and it should always be remembered that a very striking example of the same scheme applies to legislators. Any member of Dail Eireann or Seanad Eireann is, as I understand the position under the Constitution, accountable only to Dail Eireann or Seanad Eireann for his conduct as such member and is not accountable to anybody else for that. The fact that he may be removed by the people from his position at election is not in any way the same thing as direct accountability.

It should also be remembered, of course, in times when we have so many judicial inquiries into the conduct of members of these houses that such judicial enquiries have been exclusively initiated by powers granted to the Dail or Seanad or themselves and are used in aid of the function which the houses of the Oireachtas have to discipline their own members.

Quite apart from this fundamental characteristic which must apply to any accountability, it is absolutely essential to precede any proceedings by way of the trial of a judge, even by other judges, with every known form of effective persuasion and peer pressure which up to the present has, I think, been remarkably successful in maintaining standards of conduct and ethics on the part of the members of the Irish Judiciary.

A further general question, which appears to me to be of importance and is apparently ignored with growing frequency by those outside the law discussing this issue, is the vast difference in degree and otherwise which exists between what are properly to be described as ethics and what is properly to be described as good conduct. It is unwise and unjust to treat the two separate ends of a very wide spectrum with equal procedures or anything approaching equal penalties.

A further issue which may possibly arise and which, I think, does arise is that significant difference of approach and significant provisions for setting standards should be applied to the conduct of a judge in court and as a judge and of the conduct of a judge outside

court and as an ordinary solicitor.

There can be no doubt that one of the burdens which the office of judge imposes upon those who occupy it is the maintenance of a particularly high standard of public conduct and it is right that that should be so. The long term consequences, however, of misconduct which is a breach of that general standard and misconduct in the carrying out of the duties and functions of a judge in court should be recognised and must be maintained. If there is to be, or has to be, a definition or setting out of ethical and good conduct standards for the judiciary, I can only say that I believe its efficacy and the good it will do will very largely depend not upon its charms, but upon the spirit of the judiciary as colleagues one with the other. On its terms at least, a contribution to a workable procedure which does more good than harm is likely to be achieved by the most general provisions, rather than seeking to particularise in a manner which will be ineffective and may indeed produce the opposite of the result which is desired.

Another matter which, of recent times, has grown in importance at every level of the judiciary in Ireland is a question of the management of courts and the management of the business of the courts. To this again, there are certain very obvious provisions, but sometimes they appear by those outside the courts themselves to have been lost sight of. The first is that the major manager of the business of any court must necessarily be the judge who presides over it. Any move away from that situation is not only an infringement of the independence of the courts, but is likely to frustrate their efficiency to a large extent as well.

In relation to the management of the court and the judge presiding over it, I mean in particular the question of the cases to which he or she will give preference in time and the manner in which he will dispose of the business before him. That can and should not be ruled or regulated by anybody outside the judicial system.

With regard to the overall management of any particular group of courts, let's take an obvious relevant example, such as the functions which are performed by the President of the Circuit Court. It seems to me that there is a different problem presented which requires to be recognised and to be protected. That is that no

president of any court should become a mere manager of that court. It is absolutely essential that he or she not only is a judge of that court itself, but that he or she spends a significant part of his or her time during any legal year exercising the role and function of a judge so as constantly to be reminded of the problems which alter and vary from day to day in the carrying out of that job of being a judge in that court. Whatever arrangements are made and I understand that new arrangements are being made and have been made and one can foresee a development of various kinds in this area with regard to the administration of the courts involving the presidents of various courts in a considerable amount of activity, it remains necessary for such presidents to sit as judges during a substantial part of each term and all the assistance and resources necessary to make the double activity of the president of any court possible must be provided.

I can only conclude these remarks, which I know have been very rambling and extremely personal in their approach, by expressing to you a wish and a recommendation. My wish is that each and every one of you judges of the Circuit Court – whether having recently or a very considerable time ago joined that court – will have found and will continue to find the tasks allotted to you as fascinating and rewarding as I consistently found the judicial tasks which were allotted to me. My recommendation to you is that even in the darkest and most troublesome times – and they do exist in carrying out your duties as judges – you will always remember that you are taking part in what surely constitutes one of the single greatest undertakings of humanity: the attempt to bring justice to ordinary people.