

CRITICISING JUDGES IN IRELAND

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But these judges in Ireland have other aspects... Orders suppressing national, political and even literary organisations will be found over the signatures of members of this judiciary. So they have departed from the status of independence of the executive government by themselves taking a hand in its work. This has undoubtedly been a poison in the well of justice in this country.¹

I. INTRODUCTION

Following the Treaty signed in London on 6 December 1921, Hugh Kennedy KC, Law Adviser to the Irish Provisional Government, in the letter quoted above, told the Minister for Home Affairs that the incumbent judges could not be trusted and should be warned against interfering

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¹ UCD Archives, Kennedy Papers, P/4 272, Kennedy to Duggan, 18 January 1922.

in matters of state. As events turned out, the men thus impugned were to remain in office for another two and half years and to be succeeded by a judiciary constitutionally established and headed by the letter writer, the aforesaid Hugh Kennedy, the first Chief Justice of Saorstát Éireann - the Irish Free State. Not only were His Majesty's Judges to continue on sufferance and without the support of the British establishment, but they were to do so in competition with a rival and popular judiciary for a further seven months, as they had already been for more than a year and on through a civil war followed by a long parliamentary debate on the Bill which was writing them out of history. The Courts of Justice Act, under which the present Irish courts were established did not become law until June 1924.

There was, however, nothing revolutionary about the law, procedure, dress or titles in the new Irish system governed as it was, and still is, by common law and statute, with one important difference - it is subject to a constitution. We inherited the common law by conquest. The old Gaelic system of Brehon Law remained in force up to the 17th century outside of the Pale where English administration and custom had taken root. What is known of it survives in law texts originating in the seventh and eighth centuries A.D.² A judge was required to give a pledge of five ounces of silver in support of his judgment. If that was wrongfully challenged, he was entitled to a hefty payment from the complainant in addition to his normal fee. It was believed that a judgment secured by bribery brought the wrath of God on a kingdom, and, perhaps even more persuasively for the office holder, that a biased judgment visited unsightly blotches to the cheeks of the judge which would not disappear until he reversed it! However, it was not considered an offence to criticise a judge provided you were prepared to pay him if you were proved wrong.

As might be expected, the administration of law, being biased in favour of the victorious settlers under British rule, was distrusted by the generally dissident majority.

² Kelly, *A Guide to Early Irish Law*; see also Breathnach, "Lawyers in Early Ireland" in Hogan and Osborough (eds.), *Brehons, Serjeants & Attorneys: Studies in the Irish Legal Profession*.

Justices of the peace were originally appointed in Ireland specifically to enforce the King's peace by putting down rebellion. Resident Magistrates, mostly retired military and police officers who served as a combination of judge and commander of the local militia, were particularly hated because they were seen as the symbol of colonial power and the enforcers of repressive laws. When the secessionist party of Sinn Féin, which had won the majority of seats in the General Election of 1918 set up their own parliament - Dáil Éireann - in Dublin on 21 January 1919 it was only to be expected that the animus against the existing judicial regime would find expression in the creation of an overtly rival system of courts.³ Its immediate and widespread success in winning litigants away from Crown courts deprived the latter of their importance and solicitors soon followed their clients into these intriguingly 'illegal' courts. There was a court in every parish with its justices elected by a convention representative of local groups. The records in the National Archives show that the Parish Justices may well have been the most fiercely criticised judicial figures in history!⁴ Moreover, because the Dáil Minister for Home Affairs was anxious to ensure that he kept his consumer base, all complaints were attended to and investigated.

The two court systems remained in operation to the detriment of the official courts until the outbreak of the Civil War, when the Provisional Government abruptly abolished the Dáil Courts by an overnight decree because a conditional order of habeas corpus was granted in respect of a military prisoner in its custody. The result was that over five thousand cases were plunged into limbo - and the offending Dáil judge into prison without trial! It may well be that this crude manifestation of executive power left a residual trauma; when the Courts of Justice Bill creating the present judicial system, was introduced in August 1923, the members of both the Dáil and the Senate kept it in debate for over eight months in their determination to copperfasten the total independence of judges of the executive, most particularly those of the lower

³ Kotsonouris, *Retreat from Revolution: The Dáil Courts, 1920-24*.

⁴ National Archives, DEEC 10/11.

courts.⁵ Also it was successfully argued that to allow the salaries of the district justices to be paid by a yearly vote in the Dáil, instead of from the Central Fund, would permit deputies to use the occasion to criticise decisions of individual justices.

In 1923 a judicial commission was created with extraordinary powers to hear cases and appeals pending in the Dáil Courts at the time of closure and to register all final judgments. Thus, in the period between 1920 and 1924, Ireland had four distinct judicial regimes whose functions overlapped and clashed and criss-crossed - British (or imperial), Dáil Éireann, the Winding up Commission and constitutional.

II. CONTEMPT OF COURT

The Constitution of the Irish Free State, which passed into law on 6 December 1922,⁶ provided that judicial power would be exercised in the public courts to be prescribed by law and that all judges would be independent in the exercise of their functions and be subject only to the Constitution and to the law. Under Section 72 no person could be tried without a jury on any criminal charge save for minor offences or offences against military law triable by court martial or military tribunal. The Constitution also guaranteed freedom of speech, of assembly and of association 'for purposes not opposed to public morality'. The question of what constituted contempt of court, specifically in the criticism of a judge, came up for decision early in the life of the new state and was rooted, as were other leading cases which followed, in its unhappy beginnings.

Three men had refused to plead when prosecuted for arms offences and the jury persistently claimed it could not agree on the question whether they were 'mute of malice'. An article in the *Nation* in February 1928 savagely criticised the trial judge for his reasonable conclusion that some jury members had acted in disregard of their oath and the law. The paper, which was the organ of the losing Republican side in

⁵ The Courts of Justice Act 1924.

⁶ Saorstát Éireann Public Statutes 1922.

the recent civil war, denounced “the judge’s insolence to jurors ... who were sick of being called upon to assist the murderers of 8 December 1922 ... men whose only crime was their faithful adherence to their Irish Republican convictions”. The editor, Sean T. O’Kelly, was prosecuted for contempt of court and a preliminary point was raised that under Article 72 of the Constitution the defendant was entitled to a jury trial.

All three judges of the High Court affirmed the inherent jurisdiction of the courts “to punish on summary process the editor of a newspaper for contempt of Court in publishing scandalous matter of a Judge with reference to his conduct in judicial proceedings.”⁷ His colleague, Hanna J., said,

It is necessary that every Court, no matter how established, should have the power to commit for contempt. The Courts of Dáil Éireann established under the decree of the first Dáil (June 29th, 1920) claimed this power. In my view, whether we are the grantees of the powers of the former Courts in this country through the operation of the statutory provisions referred to, or are the descendants of the Dáil Courts, or were wholly created from the deliberations of our own Legislature, we are fully armed with this most essential power.⁸

In other words, notwithstanding the constitutional provision that trials for criminal offences were to be held with a jury, the power to attach for scandalising the court was inherent and survived intact. The later Constitution of 1937 also enacted that no person was to be tried on any criminal charge save in due course of law, but it also provided for the establishment of special courts for the trial of offences where “...the ordinary courts are inadequate to secure the effective

⁷ Sullivan P., quoting in support the decisions in *R. v. Gray* [1900] All E.R. 59 and *R. v. The Editor of the New Statesman* [1928] 44 Times L.R. 301, in *Attorney General v. O’Kelly* [1928] I.R. 308 at 315.

⁸ [1928] I.R. 308 at 331.

administration of justice, and the preservation of public peace and order”.⁹

We have seen that the *O’Kelly*¹⁰ case was based on opposition to laws relative to the security of the State and in two more recent cases the criticism of judges arose in the same arena, in fact, from the same trial in the Special Criminal Court. It is our misfortune that emergency legislation has been in place, in one form or another, almost contemporaneously with independence.¹¹ The Special Criminal Court comprises three judges who sit without a jury to decide cases brought under the Offences Against the State Act 1939 and subsequent legislation. While the majority of these would obviously be subversive-type offences, such as membership of an illegal organisation or possession of arms and explosives, there have also been trials relating to kidnapping, bank robbery, and recently, drugs offences.

The legislation itself was the subject of the first case to be brought by an individual to the European Court of Human Rights, *Lawless v. Ireland*.¹² In 1957 Gerard Lawless, a member of the Irish Republican Army, had been detained under the Offences Against the State (Amendment) Act 1940 and held in a military detention camp for five months without trial. The Court found that because of the “public emergency ... threatening the life of the nation” the Irish Government was entitled to take measures derogating from its obligations under the Convention. It is important to stress that the *Lawless* case centres on detention without trial and not trial without a jury.

However, in 1947, it was a question of a trial without professional judges in that the Special Criminal Court, at the time, was staffed by Army officers. In *Attorney-General v. Connolly*,¹³ the editorial by Ross Connolly in a Sinn Féin publication had anticipated the outcome of the trial of one

⁹ Article 38 of the Irish Constitution.

¹⁰ [1928] I.R. 308.

¹¹ Campbell, *Emergency Law in Ireland 1918-1925*.

¹² *Lawless v. Ireland (No.1)* (1960) 1 E.H.R.R. 1.

¹³ *Attorney General v. Connolly* [1947] I.R. 213.

Henry White for the murder of a police officer: "... he awaits his death, which sentence will inevitably be passed on him, after his mockery of a trial before the Special Criminal Court is over." In his affidavit, the defendant fueled the fires further by making allegations about the appointment, lack of justice and qualifications of the members of that court. The defence, in the appeal against the conditional order, argued that the charge was one of a criminal nature not punishable by attachment and, moreover, that the judges of the Special Criminal Court were appointed and removable by the will of the government and hence were subject to criticism like any department of state. The President of the High Court, George Gavan Duffy, was adamant that given "the old, traditional distrust of the criminal administration that long pervaded the mind of the people during the British regime, it is essential to the rule of law in the new Ireland that the public should be convinced that justice is being truly administered, in accordance with the law of the Irish people, by the High Court of Justice, established under our own Constitution".¹⁴

It was a theme understandably stressed by judges following the establishment of the State; that the administration of justice was now in native hands and that it was all the more important that it be accorded the people's obedience and respect. History was to show that the difficulties encountered in this area are common in post-colonial societies, where it may have been one's patriotic duty to disobey the law right up to the moment when it is time to obey it. It is not surprising, then, that contempt of court issues were particularly sensitive in Ireland, allied as they so often were to questions of territorial claims and the near irresistible temptation to ripe and righteous rhetoric. The President of the High Court said that the defendant's right of free speech was not a licence to undermine public order and quoted from Lord Atkin's famous 'cloistered virtue' judgment¹⁵ that the right of criticism must not be exercised in malice or in an attempt to impair the administration of justice.

¹⁴ [1947] I.R. 213 at 218.

¹⁵ *Ambard v. Attorney General for Trinidad and Tobago* [1936] A.C. 322 at 335.

Interestingly, his remark that the charge of ‘scandalising the Court, whether the actual trial was prejudiced or not’ would appear to preclude a defence of justification. However in subsequent judgments, inevitably there is a review of the allegedly impugned trial and decision with observations to the effect that the comments were a gross misrepresentation of the facts or evidence given in court, which makes it difficult to isolate the issue of criticism of the judge. Even where the contempt consisted of rabble-rousing, bigoted abuse of a Protestant judge who had also served under the British administration, and the abuse directed at those personal elements only, as in *Attorney General v. O’Ryan and Boyd*,¹⁶ the High Court in its review of the case said that the sentence imposed by the Circuit Court in the impugned trial was, if anything, too lenient. Although by then the Irish Free State had been in existence for twenty-five years, Gavan Duffy P. spoke of the background against which the defamatory material should be judged and of the residual bitterness so easily stirred again. It was not possible to ignore the abuse as “the irresponsible rantings of an *exalté* ... this particular contempt of Court is graver and even more reprehensible in Ireland than it might be in many other countries ... There is no excuse for a man of influence who works upon the zeal and piety of a Catholic community, like the people of Waterford, by stirring up public feeling against the Judge of the area, who is not a Catholic, on the pretext that he had degraded his office by behaving in Court as a sectary and partisan.”

He did go on to say that when the circumstance allowed, attacks upon judges should be left to the discrimination of the public, that it was essential to preserve the right of fair criticism of the courts and that consequently the “delicate jurisdiction over contempt of Court upon a summary application” should be leniently exercised to the benefit of a man who has no defence. It would appear that, *mutatis mutandis*, judgments of the Irish courts which followed *O’Kelly* and *O’Ryan and Boyd* in time have done so also in essentials. There has been a refusal of defence applications for a trial by jury under the Constitution, a strong

¹⁶ *Attorney General v. O’Ryan and Boyd* [1946] I.R. 70.

commitment to preserve the existing jurisdiction, lengthy, closely-argued judgments separately delivered and a light punishment for the defendants, most of whom, it must be said, apologised profusely in the end. Moreover, every judgment has defended the right to criticise judges and courts and the establishment of the Special Criminal Court itself. It is appropriate to comment that the principle has been so consistently restated that it would be difficult to argue that it constitutes nothing more than a conventional nod to a well-meaning sentiment. What follows is only a fraction of extracts from a variety of judgments beginning with one from the last century:

I now come to the question of contempt of court. What is it? Is it insolence used to a particular judge in his personal capacity? Is it the words that would be likely or calculated to induce a breach of the peace between the Judge and the person who speaks them? No such thing; it is not upon that ground that the Court acts. The Court acts, as stated in *R. v Davison and ex parte Pater*, not out of regard for the particular judge. What it looks at is the dignity of the administration of justice and the acts, as for contempt against that which is aimed against the administration of justice and against what amounts to a defamation of the Court in the administration of justice.

Palles C.B. in *Tanner's Case*.¹⁷

In upholding the current position, to the extent of saying that it is for a judge and not for a jury to say if the established facts constitute a major criminal contempt, I would stress that, in both the factual and legal aspects of the hearing of the charge, the elementary requirements of justice in the circumstances would have to be observed. There is a

¹⁷ *Ex parte Tanner M.P.* [1889] Judgments of the Superior Courts in Ireland 343.

presumption that our law in this respect is in conformity with the European Convention on Human Rights, particularly articles 5 and 10(2) thereof.

Henchy J. in *The State (DPP) v Walsh*.¹⁸

In *In re Kennedy and McCann*¹⁹ Chief Justice O'Higgins distinguished between contempt of court and reasonable criticism. Freedom of expression which goes beyond acceptable limits is criticism which brings the administration of justice into disrepute and undermines the confidence which people should have in judges appointed under the Constitution to administer justice in the courts.

The person producing the programme did not agree with the judgment but there is no suggestion that [the Circuit Judge] acted from improper motives or anything of that nature. ... I do not see why a judgment cannot be criticised, provided it is not done in a manner calculated to bring the court or the judge into contempt. If that element is not present there is no reason why judgments should not be criticised. Nor does the criticism have to be confined to scholarly articles in legal journals. The mass media are entitled to have their say as well. The public take a great interest in court cases and it is only natural that discussion should concentrate on the result of cases. So criticism which does not subvert justice should be allowed.

Carroll J. in *Weeland v RTE*²⁰

Among certain groups the trial of persons supporting a political cause has been the subject of strong emotion and

¹⁸ [1981] I.R. 412, at 440.

¹⁹ [1976] I.R. 382

²⁰ [1987] IR 662, at 666.

condemnation of the process in the Special Criminal Court in a manner which has led to the Director of Public Prosecutions taking action. As already mentioned, one trial sparked off two separate prosecutions. In 1976 Noel and Marie Murray were convicted of the capital murder of Garda Reynolds, a police officer. Two letters were published in *Hibernia* which, in effect, accused the judges of bias in not entertaining evidence other than confessions and of a presumption of guilt. Kenny J., in delivering the judgment of the Supreme Court, pointed out that the three judges were of the High Court, the Circuit Court and the District Court respectively and that the charges made against them were very grave.

The Court wishes to emphasise that criticism of the retention of the death penalty, of the Offences Against the State Acts or of any of their provisions, and of the establishment of the Special Criminal Court are not a contempt of court. These are matters which may validly be debated in public even if the comments made are expressed in strong language or are uninformed or foolish.²¹

He also pointed out that the Murray trial had been extensively reported and therefore the editor should have known that statements in the letters were completely false and that their publication was capable of being contempt of court, which "...also includes serious misrepresentation of the proceedings in a court."²² Kenny J. quoted Lord Hardwicke L.C. in *Read and Huggonson*,²³ 'nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented'.

Another contempt of court hearing arising from the same *cause célèbre* did not reach the Supreme Court until 1981 and concerned a press release from an organisation called the Association for Legal Justice, the burden of which was that the Special Criminal Court judges 'abused the rules

²¹ *In re Hibernia National Review* [1976] I.R. 388, at 391.

²² [1976] I.R. 388, at 391.

²³ (1742) 2 Atk 469.

of evidence as to make the court akin to a sentencing tribunal'. The D.P.P. issued proceedings for contempt against the editor and the journalist of the *Irish Times* who had reported the statement which had been read over the telephone to the newspaper. They at once apologised in court but the chairman and secretary of the Association, Walsh and Conneely, defended their action and had appealed against the order of the High Court dismissing their application for a jury trial. Both the Chief Justice and Mr. Justice Henchy of the Supreme Court delivered lengthy judgments which contribute much to the frequency with which *The State (DPP) v. Walsh*²⁴ is referred. ("In short, the facts adduced in this application to commit for contempt (to which facts no rebuttal has been offered) constitute a classical example of the crime of contempt by scandalising a court." - Henchy J.²⁵) All the issues, which had also been raised in previous cases, were examined extensively - jurisdictional and constitutional as well as freedom of speech. Irish, English and American decisions - forty-seven in all - were referred to; it even put to final rest the common law presumption that a wife acts under the coercion of her husband - too late to be of any comfort to the unfortunate Mr. Bumble in *Oliver Twist*!

While cases such as the above are sometimes perceived as judges insisting on their dignity and high office, it should be remembered that there are often issues which involve individuals or the community, whose interest must deserve at least the same protection. We have seen in *Attorney General v. O'Ryan and Boyd* that the court was particularly mindful of the local and historical background against which the inflammatory abuse of the Circuit Court judge should be measured. Indeed the judge himself had taken no action when the abusive letter was sent to him: it was this turning of the other cheek which enraged the writer into reading the missive aloud to the meeting of the county council two weeks later. There is also the protection of family privacy and of children which is central to the judgement in

²⁴ [1981] I.R. 412.

²⁵ [1981] I.R. 412 at 442.

In re Kennedy and McCann.²⁶ In 1976 a custody case was heard *in camera* and an appeal by the mother to the Supreme Court was pending. A Sunday newspaper published her - understandably - one sided view of the proceedings to date, included photographs of the children, and attacked the court and society as being hypocritical about morality and motherhood. The father brought an application to attach for contempt. It transpired that the journalist, Mr. McCann, had not been at any of the court hearings and that Mr. Kennedy, editor of the *Sunday World*, was unaware of the *in camera* ruling; both apologised. In his judgment, O'Higgins C.J. referred to the account of the sorry state of a wrecked marriage, offensive references to the father, names, ages and photographs of the boys and their mother. He said that the article

tore away the shield of privacy which the Courts had erected and exposed the children to a glare of publicity which can affect seriously their ordinary lives, companionship at school and their relationship with their parents ... The article further carried the direct implication, offensive to all judges and all courts in this country, that justice could not be obtained in Irish courts and that in this respect, ours was "a sick society" which was "hypocritical about motherhood, morality and the family." ... The right of free speech and the full expression of opinion are valued rights. Their preservation, however, depends on the observance of the acceptable limit that they must not be used to undermine public order or morality or the authority of the State.²⁷

III. REFORM PROPOSALS

²⁶ *In re Kennedy and McCann* [1976] I.R. 382.

²⁷ [1976] I.R. 382 at 385-386.

In 1991 the Law Reform Commission published its Consultation Paper on Contempt of Court,²⁸ in which the question of the criticism of a judge and the offence of scandalising the court was examined at length. Irish leading cases as well as those of other jurisdictions and commission reports on the subject in several countries were extensively analysed. The members made several provisional recommendations and invited submissions to their proposals. A seminar was held some months later so that lawyers, academics, judges and media representatives could make their views known: the latter did so robustly. The Commission published its report in 1994²⁹ having first submitted it to the Attorney-General who in 1989 had requested this examination of the law of contempt. It is difficult to summarise the recommendations even in the specific area of scandalising the court and, moreover, there was not unanimity between the five members including the President, a former Supreme Court Judge. Very briefly indeed, they were that the offence of ‘scandalising the court’ should be defined by statute for prosecution purposes, and should consist of imputing corrupt conduct to a judge or publishing a false account of court proceedings, the person must know there was a substantial risk - or be recklessly indifferent to the risk - that publication would bring the administration of justice into disrepute, or that there was an intention to publish a false account. The truth of the communication would render it lawful, there should be no legislative interference with the court’s power of summary attachment and that abuse of the judiciary, even if scurrilous, should not constitute an offence. There has been no move as yet to introduce laws giving form to these or any other of the proposals.

The potential conflict in the ideas of contempt of court and freedom of expression was explored in the MacDermott Lecture delivered at Queen’s University in Belfast by Mr. Justice Seamus Henchy of the Supreme Court in May 1981 which was subsequently published in the

²⁸ Law Reform Commission, *Consultation Paper on Contempt of Court*, (1991).

²⁹ Law Reform Commission, *Contempt of Court* (L.R.C. 47 - 1994).

Northern Ireland Legal Quarterly.³⁰ Judge Henchy stressed that the circulation of information was as necessary to the body politic as fresh air is to an individual's well-being and that equally, the right of the public at large to have the process of law preserved from debasement or frustration was vital to civil rights. He saw contempt of court as the common law remedy whose aim was to ensure that the administration of justice operated without undue interference; there was wide acceptance that the sanction of criminal law should attach to such conduct. However, it is his observations on the *Sunday Times* judgment of the European Court of Human Rights,³¹ two years previously, that are of most interest in the present context. He saw it as having a profound and far-reaching importance.

The case further established that the European Court of Human Rights considers itself free to set and apply its own norms and criteria for determining when a valid domestic law must not be applied, even when the highest domestic court considers it to be necessary for the maintenance of the authority and impartiality of the judicial system of the state in question. It may be that in the future the frontiers between freedom of expression and contempt of court will, at least in certain cases, be drawn in Strasbourg, to the exclusion of domestic courts or the edicts of national parliaments.³²

Reading one of the recent decisions from Strasbourg under Article 10 of the Convention, *De Haes and Gijssels v. Belgium*,³³ one can see that the judge's forecast of sixteen years before was uncannily accurate. However, it would also be difficult not to agree with his conclusion that because of

³⁰ Henchy, "Contempt of Court and Freedom of Expression", (1982) 33(4) N.I.L.Q. 326.

³¹ *Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245.

³² Henchy, (1982) 33(4) N.I.L.Q. 326 at pp. 339-340.

³³ (1997) 25 E.H.R.R. 1.

the basic incompatibility which arises between a lawyer's view of the essential attributes of the administration of justice and those of freedom of expression which the communicators believe to be necessary in an open democratic society, problems must continue to be solved empirically on a case by case basis.

IV. CONCLUSIONS

All the foregoing has to do with the official or formal exposition of the law as governed by long established practice, judicial precedents and by the Constitution but it is not at that level that the every day legal affairs of the public are conducted. It is surely at least as important that people see their courts as the guardians of their civic rights and as tribunals where grievances are heard in a fair-minded manner and that the conduct of proceedings is such as not to demean them. Given an adversarial system and the unequal terms in which they are confronted and surrounded by experienced lawyers speaking an archaic and mysterious language, it is incumbent on any judge to remain as reasonable and courteous as possible. It is here where scrutiny and critical comment could most benefit the community. Often it does not need comment: a factual account of a case which highlights bad behaviour on the judge's part should allow a reader to form his or her own opinion. Persistent rudeness, sarcasm, personal prejudice, impatience or downright laziness are failings which work to disillusion a person whose only experience of the living administration of justice may be one day in court when one or several of these characteristics were on prominent display. It will bring the process into disrepute as surely for that person as any libellous or malicious account of one decision which he or she may never read. A judge may be irritable or unfair or even bullying on occasion - a bad judge day - but persistence in unjudicial behaviour should not be tolerated in a free society.

Journalists and editors frequently remark that judges cannot be criticised and that they are accountable to nobody but if one explores it with them, it appears that they are confusing criticism with the *sub judice* rule, which regularly gets them into hot water. Judgments are constantly discussed,

criticised, even denounced by columnists, commentators and the proverbial man-in-the-street in letters to newspapers or radio phone-ins. There have been furores about so many court cases in the past twelve months alone that it is impossible to single out one, yet nobody has been prosecuted for criticism or scandalising, although several editors have been summoned to explain breaches of the *sub judice* rule. It was not always thus. While court proceedings provided the bulk of reporting in most provincial newspapers for years, atmospheric description rarely went beyond the sycophantic 'laughter in court', usually in response to a witticism from the Bench. The end of deference was signalled in a series of 'colour pieces' by a young journalist which the *Irish Times* ran in the Seventies. Nell McCafferty reported the happenings in the Dublin District Court by way of a deceptively mild narrative which was not intended to conceal anger or wry amusement or pity.³⁴ The reality of grimy, dilapidated courthouses, judicial power and rudeness underlined by official indifference was brought home to the reader in a style for which the word 'inimitable' was invented. There were no legal repercussions nor pressure on Donal Foley, the news editor whose idea it was. The judges did not like it, neither did officialdom but the public did. Ms. McCafferty threw windows open on a whole world that respectable society had heretofore ignored; thankfully, those windows have not been closed again. For several years past, a columnist³⁵ in an evening newspaper regularly scrutinised judges, judgements and procedures with a critical faculty honed by his early experience as a court reporter for a provincial paper and a keen knowledge of the law. Provided a judge is not accused of corruption or bias in his or her professional conduct, none of the several journalists who write about court matters today could conceivably be the subject of a prosecution given the guidelines laid down by successive Supreme Court decisions.

Judges in Ireland appear to have escaped the generalised prejudice against lawyers. By and large, they are

³⁴ Some of the articles were later published as McCafferty, *In the Eyes of the Law*.

³⁵ The late Michael O'Toole in the *Evening Herald*.

seen as the upholders of constitutional rights, as a welcome, if occasional thorn in the side of the executive and by successive judgments on constitutional issues as effecting widespread social changes where timid governments have failed to lead. Privacy, contraception, health, religious equality are some issues among the many to have come before the Supreme Court and the law changed as a consequence. It is not the role that the judges particularly seek and they frequently rebuke the legislators for the lack of statutory remedies for issues which give rise to difficulties: at the time of writing, it is the quandary of the respective rights of adopted children and their birth mothers. When a particular judgment attracts publicity and partisanship, then criticism will centre on the remoteness of judges from life's hurly burly, the social background from which they come, and that they cannot be criticised - even while they are! Within days some other judgment is welcomed as a triumph of common sense - arguably, it is the way things should be in a democracy. Irish people are remarkably well informed in the law, they do not consider that judges are superior beings but take judicial independence as a given. Neither do they question for a second their democratic right to criticise the whole process relentlessly.

In the final analysis, the most effective criticism of a judge lies in the power of a superior court to review his or her decisions. One might be found to have been wrong in the interpretation of the law but it must be far more of a rebuke - and justifiably so - to have one's decision set aside because a party did not get a full opportunity to put his case, or a summing up was unfair, or some fundamental duty was overlooked. Apart from the judicious and public slap on the wrist, it has the inestimable advantage of the power to right the wrong - the modern equivalent, perhaps, of removing the blotches from the face of the unjust judge in the more immediately perceived cause and effect according to Gaelic Law! However, the increasing use of judicial review does not detract one whit from the need and desirability to subject the judiciary and the administration of the law to examination and comment from a free press. That there will always be tension in the exercise must be accepted as a given and not be

allowed to crash into bullying by one side or the other. For a small country which achieved its independence only in the last century, where previously the nature of the legal process was overwhelmingly biased towards maintaining the status quo, the lively interest and the quizzical eye on all things under the law are not only inevitable but a sophistication to be rejoiced in. That the eye may be cast a little more warily on government rather than the judges is equally understandable in a people who saw their own amateur and painfully-constructed courts destroyed by their first government within six months of attaining power. All the more reason, therefore, to keep their judges up to scratch in the service of the people.