Should the media and the judiciary be on speaking terms?: Speech by Lord Woolf, Lord Chief Justice of England and Wales: 8th RTÉ / UCD Law Faculty Lecture

It is a pleasure and a privilege to be with you tonight. A pleasure because Dublin is indeed a fair city, and a privilege because of the prestigious nature of the lecture.

Among those who have previously given this lecture there are many that I admire and in whose footsteps I regard it as an honour to follow. One of my distinguished predecessors was Lord Irvine, whose great and ancient office of Lord High Chancellor of Great Britain and Northern Ireland is about to be executed by his successor. Lord Irvine drew attention to the distinction of University College Dublin (UCD). I am a graduate of University College London (UCL). The two colleges have Jeremy Bentham in common and I am able to assure the audience that his mummified body is still mummified and regularly meets lawyers at UCL.

I turn to the title of my talk and the question it poses. When I gave the title to the organisers, it was intended to be smart and snappy and designed to avoid the speech being delivered to an empty hall. At least I am not addressing an empty hall. I must admit that when I came to ask myself whether the media and the judiciary should be on speaking terms, the answer was painfully obvious. It was the single word 'yes'. However, as often happens, what appears an obvious answer proves, on further examination, to mask a complex and difficult issue of some importance. That I believe is the position here.

Parliamentary democracy depends upon the existence of a free and independent media and a free and independent judiciary. What is more, it is possible that a free media depends upon the existence of a free judiciary, and a free judiciary depends in turn upon a free and independent media.

While this may be true, the judiciary must be independent of the media and the media must be independent of the judiciary. What I am about to do is to try to explain how this paradox comes about.

Today, governments can exercise an immense amount of power. The extent of that power in a parliamentary democracy depends on the popularity of the party in power. Ironically, if the popularity of the party means that it has a substantial parliamentary majority then that majority can enable the Government, though freely elected, to become impatient of interference and criticism. If it does so, it can lose its sensitivity to the importance of a free and independent media and judiciary. In such a situation, checks on the power of government are particularly important. They are provided by the media and by the courts. Independently, they can together ensure that a government does not abuse its power. The roles of the media and the judiciary are different. The media exposes and the judiciary determines illegality. The part played by the media is the more subtle. By making known to the public the activities of the government, it acts as a cleansing agent. A Government that is engaged in abusing its powers cannot afford to have this exposed to the public gaze. In this way, the media can and does hold the government to account.

This explains why written constitutions invariably contain provisions that protect freedom of information. The Westminster constitution, which many former colonies inherited on obtaining their independence, provides such protection. The constitution of Ireland (Bunreácht na hEireann Article 40.6.1°) includes protection for the right of the citizens to "express freely their convictions and opinions". But interestingly, the Article recognises that the media can also abuse its power by adding words that will be familiar to my audience, but that came as somewhat of a surprise to me:

"The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State."

Although Article 40.6.1° refers to "opinion", that includes facts. Article 40 does not stand-alone. Our sponsors RTÉ are also, by statute, under an obligation of impartiality and objectivity in relation to matters of public controversy or political debate.

Although in the UK we have not the advantage of a written constitution, we now have as part of our domestic law the European Convention on Human Rights (ECHR). Article 10 of the Convention is also qualified and recognises that the media should be subject to control. Article 10 provides:

1. Everyone has the right to freedom of expression. The right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary within a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Neither of these provisions provide as extensive protection as the 1st and 14th amendments of the US Constitution. Still, the protection that they do provide for the media is sufficient to enable the media to play its critical role in protecting a free and democratic society.

The independence of the courts is equally important. The courts have the task of upholding, in your country, the Constitution and, in mine, the European Convention. More simply, it is the job of the courts to ensure that governments observe the law. As Michael Addo of the University of Exeter has said:

"The judiciary is a uniquely different organ of government whose effective functioning depends critically on its independence."

Mrs Justice Denham also expressed it well when she chose the title "The Diamond in a Democracy: An independent, accountable judiciary" for an admirable address she gave in Australia.

An independent and accountable judiciary is the diamond in a democracy. Yet this is not what the ECHR expressly says. Instead, Article 6 of the ECHR contains no more than an indirect requirement that there should be an independent judiciary. Article 6 of the ECHR provides;

" In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

It is to members of the public that Article 6 gives the entitlement to a hearing before an independent tribunal (that is, a judge). The creation of the right in this way makes the important point that independence of judiciary is not the privilege of the judiciary, but a requirement that exists for the benefit of the citizen.

In this respect your constitution does better than the ECHR. Article 35 of Bunreácht na hEireann makes the trenchant statement;

"All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law."

The right to freedom of expression is also not the property of any sectional interest. The right to inform and be informed by the press is, in the language of Article 10, "the right of everyone".

In neither of our countries is the right to freedom of expression an absolute right. However, our respective independent courts have, particularly in the last ten years, been extremely sensitive about interfering with this right. Any interference has to be necessary and so proportionate. As the constitutional provisions indicate, the courts have to draw a balance between the rights of the media to free expression and the rights of the individual, including an individual's right to privacy. The Hutton Inquiry, the outcome of which we await, has demonstrated most impressively the importance of both an open and patently fair judicial

investigation and the extensive reporting of the process so that the public can be involved and form their own conclusions.

I know the media will not agree that the judiciary has always come to the right conclusion when deciding on where the balance lies. What is more important, the privacy of a football player or the desire of a newspaper to tell its readers the sordid details of his sexual activities? How do you value the right of the media to publish the account by a former member of the secret service of what he considers to be the iniquities of MI5 as against the need for MI5 not to leak like a sieve? When should the courts decide that what has been published should be regarded as amounting to contempt? Views can differ as to where the balance falls. In relation to contempt, there have been times when the Irish approach has been more relaxed than the English though, as far as I can ascertain from his judgments, your Chief Justice's conclusions on this subject and mine are likely to coincide today. However, I hope the media of both our jurisdictions would accept that, in general (at least in my judicial lifetime), the judiciary have been conscious of the dangers involved in even 'chilling' freedom of expression. They have not allowed the laws of defamation or contempt to be used as means of suppressing the right of the media to play their role in keeping the public informed. Above all, unlike some jurisdictions the courts have not been used to intimidate the media into docility.

So the media has reason to be at least moderately grateful for the judiciary's appreciation of the importance of freedom of expression. But this is not a lecture on the law as to prior restraint, defamation or contempt. So I content myself by saying that at least the courts of both our jurisdictions are aware of the importance of getting the balance right and seek to achieve this. It involves weighing conflicting interests since, in the words of Article 10 ECHR, freedom of expression carries with it "duties and responsibilities".

By contrast, although, this may not be so obvious, it is also my belief that the judiciary have reason to be grateful to the media. The media can be among the staunchest protectors of the independence of the judiciary. They do not wish to see an executive not subject to any control. If a government is intent on destroying the independence of the judiciary the next candidate is likely to be the media. A regime intent on undermining democracy will quickly find, as Hitler and Stalin did and more recently Mugabe has, that a free and independent judiciary and media are an inconvenience that needs to be dealt with.

Media also plays another important role in relation to the judiciary. As with the media, the judiciary's independence carries with it responsibilities. The fact that, unless the interests of justice make this impossible, courts sit in public means the media can be relied on to reveal any inappropriate judicial behaviour. The protection against a judgment that is wrong is an appeal. A protection against inappropriate behaviour on the part of a judge can be exposure in the media. Such behaviour is not to be tolerated and, as long as the criticism is responsible, it is to be welcome. I have described the media as "protection" since, although an aspect of judicial independence is security of tenure, the judiciary are subject to disciplinary processes to deal with inappropriate conduct. These disciplinary processes include, as a last resort for serious misbehaviour, removal. A power that I am relieved to be able to say has not been used in my jurisdiction in recent times.

"In recent times?" Well, you may have seen on ITV on the last two Sunday nights, there has been a drama featuring Henry VIII. As you would expect, the programme has paid more attention to the fate of Henry's wives than the fact that he executed his Lord Chancellors almost as frequently as his wives, and his Lord Chief Justices fared little better. Well what can you expect of a King who took advantage of the break with Rome to require the Irish Parliament to declare him King of Ireland in 1541?

The judiciary also have an interest in achieving a public awareness of what is happening in the courts. Public confidence in the judicial system is of critical importance to the well being of a modern nation. Few have the first-hand experience that comes from actual engagement in litigation. Reporting by the media therefore provides the majority of the public with information about what is happening. Even if the reporting sometimes leaves a lot to be desired, at least the public have a prospect of learning of the sentence that is meant to deter, which the public need to know about if they are to be deterred. Many cases have wide implications for society and can be controversial. Again, the public need to know and the media usually provides the most satisfactory means of bringing them to the public's attention. In this company, I add that academic writing also can play a part.

Here in England, and I am sure the same is true in Ireland, we have the considerable benefit of first class law reporters. The fact that both countries now place their judgments on the same website - the British and Irish Legal Information Institute (BAILII) of which I am a proud patron - adds to the benefit of this. We also have excellent legal correspondents in all section of the media including the BBC. Here RTÉ's sponsorship of these lectures shows RTÉ's healthy interest in legal issues.

However, there are issues on which I have quite failed to have a rational discussion with the media, in particular issues that involve sentencing. It is sad that, in order to protect the young men who killed the Bulger baby, our courts have had to develop a lifetime injunction against disclosure of the young men's identity; even though they have both served their sentence and, as far as I know, are trying to re-establish themselves as decent members of society.

Then there is the fact that our Court System like every public service is short of resources. The media are rightly interested in the quality of public services. In part, the justice system is the weakest arm of government because, in England, it is totally dependant on the executive for its resources. In relation to this issue, the media has from time to time provided valuable assistance to the Justice System. A sympathetic article or programme can certainly encourage greater generosity on the part of the government.

Pausing to take stock; the position is that the judiciary are dependant, at least in part, on the media. But so are the media dependant upon the judiciary not using their powers to restrict inappropriately the media's powers of free expression.

The judiciary and the media therefore have interests in common and they should certainly be on speaking terms. But alas, the position is still not straightforward. The involvement of the judiciary in making rulings on the ability of media to perform its basic activity of publishing news does at least sound warning bells as to the possible dangers of too close a relationship between the judiciary and the media. The judiciary must not forfeit its independence in its dealings with the media. The media has its own agenda. Conflict between different arms of Government provides good red meat for a media that has an insatiable appetite for news. As the judiciary is regularly required to adjudicate on issues involving the media, the judiciary must be circumspect about having a relationship with the media that will raise questions as to the judiciary's impartiality. Obviously there is no difficulty in the media speaking to judges, the problem is judges speaking to the media. A litigant is entitled to have his case decided not only by a judge who is impartial, but by a judge in relation to whom there are no reasonable grounds for saying that he might be impartial.

A judge who has publicly expressed his opinions too vigorously, may not be seen as impartial if he is required to adjudicate upon the issues about which he has commented to the media.

Certainly, a judge should not have any communication with the media which suggests that he or she covets the approval of the media. All too often, judges are required to make unpopular decisions in order to perform their duty. To hesitate in that duty would be a derogation of that duty. A judge must avoid any situation that could even give a hint that being popular with the media or the public was more important to the judge than coming to a just decision.

It is when the judge has to make unpopular decisions that his independence and integrity are most important. Here I have antecedents. One of the first times I came to the notice of the press was when I was called upon to decide a case in which a man claimed damages for a personality change caused by an accident. The medical evidence supported his claim that the personality change had resulted in him committing rape. I awarded him damages, aware that he was being sued by his victim and that she would be the ultimate recipient of a large proportion of the compensation he received. This subtlety was lost on the press, who greeted my decision with uproar. My wife was door-stepped (I believe that is the technical term) and was asked for a reaction to my judgment. She replied, "I can't say a word - my husband will kill me". Her remarks were not reported. The term 'the gentlemen of the press' is not entirely archaic.

I have said that with the judiciary's independence comes responsibility. This is also true of the media. I have to be frank. They do not always show the responsibility they should. I cite sentencing. Not because some elements of the English press now refer to me as 'Chief Justice let-em-off - so wet he leaks'. Rather,

because the inaccuracy of the reporting of this issue is preventing an open debate. An open public debate is a pre-condition for sensible sentencing.

In these circumstances, it is not surprising that our judiciary has been, and still is, provided with guidance as to what its relationship with the media should be. At one time, our judiciary's position was governed by what were called the Kilmuir Rules. Rules based on a letter, by the then Lord Chancellor, Lord Kilmuir, of 12 December 1955 to the Director General of the BBC. The letter made clear that "as a general rule it is undesirable for members of the judiciary to broadcast on the wireless or to appear on television".

The letter was written in the context of a proposal by the BBC that there should be a series of lectures on the third programme about great judges of the past and the BBC wanted to have the assessment of the qualities of eminent judges of the past from an existing member of the judiciary. Hardly a matter of intense controversy. However, Lord Kilmuir, having consulted the then holder of my office and the other Heads of Division, was of the opinion that, and again I quote, "the importance of keeping the judiciary insulated from the controversies of the day" meant that it was preferable that judges did not take part. As Lord Kilmuir explained, "so long as a judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public except in the course of the actual performance of his judicial duties, must necessarily bring him within the focus of criticism". He added, therefore, it would "be inappropriate for the judiciary to be associated with any series of talks or anything which can be fairly interpreted as entertainment". The letter went on to make it clear that before engaging in public discussion, which would include discussion with the media, the judiciary should obtain the consent of the Lord Chancellor.

This was the cosy situation when I became a judge. It made life easy for the judiciary. If approached by a reporter, no matter how interesting the subject, they had a simple answer, "not allowed to contribute without the Lord Chancellor's consent" and the media was well aware the consent was unlikely to be forthcoming in practice so this was the end of the discussion.

However, when Lord MacKay became Lord Chancellor in 1987 during his first interview with the press he took a different view. He stated that regarded the rules laid down by Lord Kilmuir, as, and I quote, "difficult to reconcile with the independence of the judiciary". He therefore, stated that he would no longer require judges to seek his consent to their contributing to public discussion. He added:

"I believe that those who have been given Her Majesty's commission for the discharge of judicial office should have the judgment to decide such matters for themselves." The change which he made was to place the responsibility to decide whether to contribute to public discussion on the shoulders of the judge concerned (The remark was made in November 1987 and was subsequently repeated in Lord MacKay's Hamlyn Lecture 'The Administration of Justice' delivered in 1994 (page 26)). He added that judges; "must avoid public statements either on general issues or particular cases which cast any doubt on their complete impartiality, and above all, they should avoid any involvement, either direct or indirect, in issues which are or might become politically controversial"

On the other hand, Lord Mackay recognised that there were cases in which the media might "in a spirit of enquiry, wish to explore matters effecting the legal system," "where the value of such programmes may be enhanced by the participation of a judge."

This however still left a vacuum of which one circuit judge who had a penchant for self publicity was not slow to take advantage. I remember being consulted as to whether being engaged in a programme that was undoubtedly entertainment was misconduct. Fortunately the judge was a novelty of which the public soon tired and so the position, given time, resolved itself.

With this exception however, our judiciary has behaved with great discretion. The positive side of the relationship has gone well. That is, members of the judiciary have gone on numerous programmes that did not involve political controversy. The media have been pleased they have done so and treated them fairly.

The position of the Lord Chief Justice and the senior judiciary has been recognised to be different. In a short "Guide for Judges" issued by Lord Irvine in July 2000 he stated:

"It has long been accepted that the LCJ and the senior judges may speak out in the House of Lords and elsewhere on behalf of the judiciary on matters affecting the administration of justice, such as mandatory life sentences for murder."

The example given makes clear I was the Chief Justice (CJ) at the time. The Manual also accurately reports the fact that public scrutiny of the justice system has increased in recent years and that the number of column inches and broadcast time devoted to it has grown accordingly.

The causes are probably a combination of the growth of judicial review, the Human Rights Act and the fact that, for long periods of time, we have had a Parliamentary situation where the government has had a substantial majority and first one, and then the other, main opposition party has been in disarray.

With the increased reporting of our activities has come more misreporting, especially in relation to sentencing (which by now you will have realised is my hobbyhorse). The misreporting is often innocent, but a problem is created for the judiciary. Once there is an inaccurate report, the misreporting tends to be repeated again and again and can be extremely damaging to the public's confidence in the legal system. This is what has happened in relation to sentencing guidelines for burglary. It has been reported that I do not consider burglars should be sent to prison. Repeated sufficiently, the misquotation has become an accepted fact. That it is nonsense, the press have now accepted. We therefore try by letter to obtain retractions and, above all, a correction of the archives. We also are better in assisting the press not to make mistakes. Summaries of complicated judgments are handed down; sentencing remarks are reduced to writing and we have at many courts a judge or other official who can provide an accurate account of what actually happened in court.

We have been greatly helped by the Lord Chancellor's Press Office and, when the office of Lord Chancellor is abolished, I am sure the judiciary must have a Press Office of our own. Not, I emphasise, to spin, but to provide the media with the basic facts they need. It is to be hoped we can, in this way, proceed without again having to rely on the law of contempt to protect the dignity of our judges, though this is becoming more difficult. I remember well Lord Denning expressing the view that judges are not personally affected by what they have to read about themselves in the media. I am not sure. His remarks were in the days before the door-stepping of judges and what can be intense and unpleasant media pressure. As the Strasbourg Court has recognised, proceedings for contempt can be justified.

The relationship between the judiciary and the press is an evolving saga. It is not even possible to speculate how matters will develop. I can only express the hope that the media and the judiciary will continue to be on speaking terms. It is in the interests of both that this continues to be the position. In any event, I am most grateful to RTÉ and UCD for giving me the opportunity to speak to you tonight.