Shelbourne Hotel, Dublin, Ireland, circa 1899.

IMPERIALISM AND UPRISINGS, THE INDEPENDENCE OF COUNSEL AND A WORLD BAR CONFERENCE IN IRELAND

by **Peter Kroon SC**, Gqeberha Bar

I attended the Dublin-leg[1] of the World Bar Conference held in Ireland on 16 and 17 March 2024. It was my first visit to Ireland.

The Irish poet William Butler Yeats, looking down the well of Ireland's centuries of political strife and social divides, mourned:

"*Out of Ireland have we come.*
Great hatred, little room,
Maimed us at the start…".[2]

The residue of seven centuries of occupation by the English is, it seems, yet to fully dissipate. This much I gathered from observations made by my driver, Dominic, who collected me from the Dublin Airport. Whilst pointing out landmarks en route to my hotel he would, sporadically, refer, in accusatory vein, to "*the Brits*".

I was fortunate enough to be based at the Shelbourne, itself a beautiful and imposing landmark built in 1824, overlooking St Stephen's Green. I had a day to spare before the conference. As serendipity would have it, I made an excellent decision to sign up for a four-hour walking tour of the city of Dublin. On a fresh but sunny day, I, with my guide, David, who was more a resident historian than your stereotypical tour guide, departed the Shelbourne and embarked on a journey through the old and storied streets of Dublin.

We had barely walked a few metres before David stopped at a green post box. He gestured to an area where the paint was peeling off, revealing a red undercoat. After independence in 1922, the new Irish government had flexed its muscles by ordering that the cast iron British Royal Mail post box, an ubiquitous symbol of British rule in Ireland, was to be no more. Applying, as they say, an Irish solution to an Irish problem, it was thought that the best way to do this was to paint all the post boxes green. It mattered not that there was no standard colour of green or that the outline of the royal insignia of the time remained visible through the green paint, in this particular case the royal cypher of Edward VII.

A green post box in Ireland, previously pillar-box red

By the time that we had reached the Houses of Parliament on our left, David's running commentary had brought the city to life. During a rare pause, I asked whether he could tell me about the famous uprising of 1916 which had come to be known as the Easter Rebellion. David's eyes lit up when presented with this invitation. He explained how, on Monday, 24 April

1916, a 1,300-strong army of Irish volunteers assembled in Dublin. Their headquarters was to be the general post office (the GPO) on O'Connell Street, the main thoroughfare in Dublin. After the GPO had been seized and secured, Patrick Pearse, the commander-in-chief of the Irish Forces read out the Proclamation of the Irish Republic.

At midday, the first shot was fired outside Dublin Castle. What followed was a week of acrimonious fighting as the Irish Nationalists rose up against British rule. Although hopelessly outnumbered, the rebels fought with valour as the British forces, who had initially been taken by surprise, inexorably moved in and tightened the net. The outcome was however inevitable. The uprising was, so Pearse said, meant as a "blood sacrifice" and to inspire future generations. On Saturday 29 April 1916, a week after the first shot had been fired, the rebels surrendered. They were imprisoned and their leaders executed by firing squad. One particular story moved me. It was about Joseph Plunkett, a journalist, one of the rebel leaders and his childhood sweetheart Grace Evelyn Gifford, an artist. When it was learned that Plunkett was soon to be executed, they were permitted to marry at midnight 3 May 1916. They were allowed 10 minutes together to exchange kindnesses before bidding farewell.

My co-pilot from the Eastern Cape, Bruce Dyke SC, who won the conference raffle. Anna Annandale SC of the KwaZulu Natal Bar can be seen in the background.

We were walking past Kennedy's Pub, a famous watering hole frequented by James Joyce and Samuel Beckett, and where Oscar Wilde once worked as a 14-year-old boy packing shelves. David grabbed me by my arm, directing me into a Victorian-era chemist, Sweny's pharmacy. He explained how, in James Joyce's 1922 novel, *Ulysses*, Leopold Bloom, waiting for a prescription, had bought a bar of lemon soap from this very same pharmacy. And so the walking tour would continue for another three hours.

The following day, at Dublin Castle, I collected my conference pack, replete with a large bar of chocolate and two miniature bottles of whiskey – only in Ireland. Dublin Castle is, if you like, the ultimate historical conference venue. It had been the seat of the British Government's administration in Ireland from the early 13th century. On 16 January 1922, pursuant to the English-Irish Treaty, it was handed over to the Provisional Irish Government. Legend has it that when Michael Collins, the chairman of the Provisional Government, had arrived for the handover, a British official observed curtly, "*You're seven minutes late, Mr Collins*". Collins responded: "*We've been waiting seven hundred years, you can have your seven minutes.*"

The opening address was given by the Honourable Mr Justice Donal O'Donnell, the Chief Justice of Ireland. His explanation that he had to do so by way of a pre-recorded video message was readily accepted. His son was getting married on the same day and he was required to give a speech at the ceremony. He quipped, dryly, that his son did not want his dad to get the two addresses mixed up.

The primary session of the day was titled "An Independent Bar and an Independent Judiciary". The delegates were given the perspectives of the chief justices in ICAB[3] jurisdictions. The panel chair, the Honourable Mr Justice David Barniville, the President of the High Court of Ireland, set the tone by quoting the erstwhile Chief Justice of New Zealand, Dame Sian Elias, when she succinctly observed:

"Effective judicial process cannot be obtained from independent judges without independent lawyers."

Chief Justice Zondo participated virtually. He spoke eloquently about how his commission into state capture had revealed that the tentacles of cadre deployment had, at least in two cases, possibly encroached into the province of the judiciary. The commission had obtained minutes of meetings of the African National Congress committee which dealt with cadre deployment in terms of which two judges were, so to speak, earmarked for appointment to the bench, and who had in fact subsequently been appointed. When asked whether anything had been done about this, Justice Zondo responded by stating that there was no evidence that the persons in question had any knowledge that they had been so identified.

I wondered whether this answer was satisfactory. Another view would be that, irrespective of whether the two applicants in question were, as it were, innocent, the rule of law required that they, nonetheless, be precluded from benefiting from a tainted process. One would think that the reasoning of the court in *Corruption Watch NPC and Others v President of the Republic of South Africa and Others*; *Nxasana v Corruption Watch NPC and Others* 2018 (10) BCLR 1179 (CC), would apply all the more so when it comes to the judiciary. In that matter the court rejected the attempt by then national director of public prosecutions Shaun Abrahams to make capital out of the fact that he was innocent and it was not suggested that he was not fit to hold office. The court explained why Mr Abrahams could not stay in his position in the following terms:

> *"[88] … Advocate Abrahams benefited from this abuse of power. It matters not that he may have been unaware of the abuse of power; the rule of law dictates that the office of NDPP be cleansed of all the ills that have plagued it for the past few years. It would therefore not be just and equitable to retain him as this would not vindicate the rule of law."*

It was repeatedly emphasised at the conference that counsel should be independent in the sense that counsel should guard against associating themselves with their clients or the causes of their clients. Added to this, allowing advocates to choose their clients erodes their independence and may make them vulnerable to pursuing cases with excessive zeal. When it comes to accepting briefs, counsel should be wary of being influenced or worse, intimidated, by powerful external sources of whatever nature. Hence the so-called cab-rank rule.

We were further reminded that it is unfair, and improper, to equate an advocate with a client's cause simply as the result of him discharging his functions, just as it would be unfair to identify a biographer with the subject of his biography. This principle also underlies the cab-rank rule. Representing a scoundrel, be it a murderer or paedophile, does not of course mean that the advocate sympathises with his client or his client's conduct. The proper administration of justice depends on all persons, especially those charged with the most reprehensible of crimes and who may struggle to obtain representation, having access to courts of law. Adherence to the cab-rank rule thus clothes the outcome of cases involving unpopular persons or unpopular causes with an added legitimacy.

This brought to mind the controversy which surrounded Dinah Rose QC. What was at issue was whether the Bill of Rights of the Cayman Islands, which defined a marriage as being between a man and a woman, afforded gay couples the right to marriage. Ms Rose was instructed to represent the Cayman government which took the view that the constitution did not provide such a right. She was criticised by the eminent jurist, Justice Cameron, for accepting a "homophobic" brief. Justice Cameron was concerned because at the time Ms Rose had accepted an appointment as the chair of Magdalen College at Oxford and it was one of her duties to ensure equality at that institution. He issued a statement in terms of which he, *inter alia*, recorded that:

> "Magdalen is the college of Oscar Wilde. It is appalling that, 125 years after Wilde's persecution, trial and imprisonment, the President of his college can ally herself with those who seek to persecute LGBTIQ persons in the Caribbean by denying them equal rights …"[4]

Ms Rose was also criticised by Gilbert Marcus SC in an article published in *Advocate*[5]. It was contended that her conduct in refusing to withdraw from the brief was immoral having regard to her "… recourse to technical Bar rules …"[6], that her "reputation" had been damaged[7] and that her "breach of … duty [would] continue to haunt her"[8]. At the time of the controversy, an appeal was pending before the Judicial Committee of the Privy Council.

I recalled how, at the time, I had found the criticism by both Justice Cameron as well as Mr Marcus to be unpersuasive. By agreeing to accept the brief, Ms Rose was not "allying" herself with the cause of her client as contended by Justice Cameron. Justice Cameron went so far as to suggest that Ms Rose was being "vindictive" as a cost order was apparently sought. The cost order would, however, have been sought by her client, the attorney general of the Cayman Islands. I also found the insinuation, by Mr Marcus, that Ms Rose had, in refusing to release the brief, made herself "…an instrument of oppression…"[9], difficult to understand. One does not say that an advocate who secures the acquittal of an alleged murderer or rapist is an instrument of murder or rape. More on point, when it comes to the lawyers who argued that *Roe v Wade*[10] was wrongly decided because a right to abortion was not to be found in the United States Constitution (but was rather an issue for the individual states), no person would or should say that they were instruments of the oppression of women or instruments of the violation of the integrity of women's bodies.

Advocates and their clients are often not cut from the same cloth and should not be tarred with the same brush. Lord David Pannick KC, in his book *Advocacy*[11] as published in 2023, put it like this:

> "The second recent example of a failure to understand the principles of advocacy was the criticism, in January 2021, of my Blackstone Chambers colleague Dinah Rose QC for representing the government of the Cayman Islands in the Judicial Committee of the Privy Council to argue that there is no legal right to same-sex marriage under the Cayman Constitution. Among the critics was Edwin Cameron, a former judge of the South African Constitutional Court, who expressed his 'distress and dismay' that Ms Rose, who was also President of Magdalen College, Oxford, was presenting in court what he described as a 'homophobic' case.
>
> Ms Rose was arguing a case, not agreeing with it. The principles of advocacy transcend support for a political cause, even one as important as the promotion of LGBT rights in the Cayman Islands. Some critics argued that, of course, Ms Rose was entitled to argue such a case as a barrister but she could not do so and at the same time perform her duties as head of a college which supported equality. But that again is wrongly to associate the advocate with the views or position of her clients." (own emphasis)

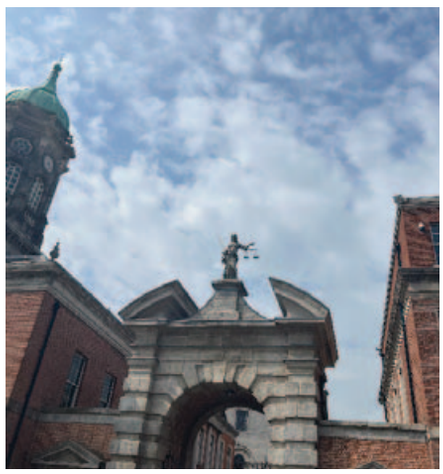
As to how matters unfolded, the Privy Council held that the wording of the Cayman Islands Constitution was clear, that there was no legal right to same sex marriage under it and that this was a matter for the legislative assembly[12]. The Bar Standards Board[13], on 22 November 2022, ultimately issued a strong statement in support of Ms Rose describing the criticism of her and her conduct as "misplaced" and recording that she was correct in continuing to act in the matter, and that advocates should not be expected to accept unfair criticism as a proverbial occupational hazard:

> "The BSB wishes to stress the importance to the administration of justice of an independent Bar, willing to take controversial or unpopular cases. Barristers are not to be identified with the views of their clients. It is wholly unacceptable for barristers to be subject to abuse or harassment for carrying out their professional duty to act in unpopular cases, regardless of their personal views. Barristers who do so are acting in accordance with the ethical standards of the Bar, and are essential to the functioning of the justice system."

As the conference drew to a close, mention was made of another incident of the cab-rank rule, namely the requirement that counsel should suspend his judgment on the merits of a case which is brought to him, the exercising of such judgment being an unenviable task for the presiding judge after having heard honest and competent representations from the legal representatives. As has often been said, counsel are paid for their advocacy and their advice not their judgment and a litigant is entitled to say that he would prefer the judgment of the court.

In the field in which I specialise, labour law, there is a growing trend to hold legal representatives accountable for taking on what the courts have called "hopeless" cases. In *University of South Africa v Socikwa and Others* (2023) 44 ILJ 1785

The gala dinner at Christchurch Cathedral. The Minister of Justice of the Government of Ireland, Helen McEntee TD, is addressing the gathering.



Lady Justice at Dublin Castle.

On exiting Dublin Castle, I was struck by the unusual statue of Lady Justice atop one of the gates to the inner castle and which had been erected by the British authorities in 1751. She is not blindfolded. The scales of justice which she holds are not balanced. She does not face the people but rather faces inwards and towards the castle, a metaphor for British rule. She is a reminder of how imperialism and the abuse of power are liable to pervert justice and that we, as counsel, should never take our hard won privilege to play our part in upholding the rule of law for granted. I was told that there is a rhyme in Irish folklore which describes her:

> "The statue of justice, mark well her station, her face to the castle and her arse to the nation!"

(LC) both attorney and counsel were, apparently without the benefit of a hearing, ordered to forfeit their fees because they had allegedly decided to "align themselves" with a "hopeless" case.[14] No mention is made in the judgment of Section 34 of the Constitution which gives all persons the right, as it were, to have his day in court.

The judgment is, in my view, based on the flawed premise that counsel can refuse an instruction if he is of the view that the case is bad in law. On the contrary, if the client sticks to his guns, counsel is entitled, and indeed ethically obliged, to prosecute the suit even though failure seems inevitable. One would thus have thought that unless it can be demonstrated that the counsel is himself responsible for the litigation[15], there can be no basis to penalise him for acting for a client solely because the case had no merit, providing of course that he conducts the case within the bounds of propriety and it cannot be said that he is making himself a party to an abuse of the process. I refer again to the words of Mr Pannick:

> "As Lord Hobhouse said in the Appellate Committee of the House of Lords in 2002, 'it is the duty of the advocate to present his client's case even though he may think that it is hopeless and even though he may have advised his client that it is'".

Lord Pearce put it more bluntly in the Appellate Committee in 1967: it is "easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed" in the litigation. But some clients are "unpleasant, unreasonable, disreputable and have an apparently hopeless case" and they too are entitled to have their case presented.

Indeed, sometimes such people succeed in their claims or defences. Mr Justice Megarry observed in a 1970 judgment: "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained." In the Court of Appeal in 1963, Lord Justice Harman said that "if it be misconduct to take a bad point, a new peril is added to those of the legal profession".[16] (footnotes omitted)

The gala dinner was held at the ancient Christchurch Cathedral, with welcome drinks served in the Crypt. It was a grand affair and a wonderful opportunity to mix with colleagues from the other independent referral Bars, and to enjoy the famed Irish hospitality.

The evening ended with the delegates meandering down to the Liffey to continue the celebrations. I would later find myself together with a newly acquainted colleague from Pretoria in a public house, in the historic cobble-stoned district of Temple Bar. After all, this was a Bar conference. Deep into the early hours of the morning we, still dressed to the nines in our tuxedos, discussed all manner of affairs of state with the plaintive tones of Irish folk ballads being sung in the background. When the time came for us to acknowledge, reluctantly so, that it was time to leave, the area remained surprisingly busy and we were unable to hail a taxi. We managed to flag down some variety of motorised rickshaw and, after careening around street corners and rushing head long through the narrowest of alleyways on a journey which seemed to last for a compressed eternity, I was grateful to arrive back at the Shelbourne in one piece. A

Notes

1 On 16 May 2024 the conference was held in Belfast and on 17 May 2024 in Dublin.
2 The third stanza of the poem "*Remorse For Intemperate Speech*" as published on 28 August 1931.
3 International Council of Advocates and Barristers.
4 As published in *Advocate*, Volume 34, No. 2, August 2021 at page 26.
5 *MS DINAH ROSE QC AND THE HOMOPHOBIC BRIEF A TEST OF PRINCIPLE* as published in *Advocate* Volume 34, No. 2, August 2021 at pages 29 to 32.
6 Page 32.
7 Page 30.
8 Page 32.
9 Page 31.
10 See Dobbs v. Jackson Women's Health Organization, No. 19-1392, 597 U.S. 215
11 Cambridge University press.
12 Day v The Government of the Cayman Islands [2022] UKPC 6 at paras 56 and 59.
13 The regulatory body for Barristers in England and Wales.
14 At paragraphs [44].
15 *Inxuba Yethemba Municipality v South African Local Government Bargaining Council and Others* (PR41/2020) [2022] ZALCPE 1 (31 January 2022) at para 159.
16 Advocacy at pages 94 and 95.