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Title	Extra-judicial Comment by Judges
Author(s)	Kennedy, Rónán
Publication Date	2005
Publication Information	Kennedy, R. (2005)'Extra-judicial Comment by Judges' Judicial Studies Institute Journal 5(1) 199-206
Publisher	Judicial Studies Institute
Item record	http://hdl.handle.net/10379/1293

Downloaded 2024-04-26T13:02:40Z

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EXTRA-JUDICIAL COMMENT BY JUDGES

RONAN KENNEDY*

I. INTRODUCTION

The issue of what judges may say (or write) when they are not on the bench is an important one, but one that is rarely considered in Ireland. This is probably for a number of reasons. Firstly, there are no rules governing such conduct, which makes it difficult to begin dealing with it. Also, the lack of judgments and academic writings on the topic means that there is little clarity in the area. Finally, judges have traditionally been very reticent off the bench, something which is slowly changing.

Perhaps this reticence means that the limit to extra-judicial speech or comment is not of great moment in Ireland. Nonetheless, there have been some significant controversies involving remarks by judges here and in neighbouring jurisdictions in recent times. Given the possible establishment of a Judicial Council, with responsibility for regulating judicial conduct and ethics,[1] it is perhaps time that we looked at the topic in the Irish context.

This article looks at recent occasions where extrajudicial speech has been the subject of public comment in Ireland. It then examines case law from other jurisdictions, focusing on examples from common law countries and looking in some detail at the American experience, where formal rules have been drawn up and applied to a large number of cases. It attempts to distil these into a theory of how extra-judicial comment should be limited and to provide practical guidance.

II. WHY SHOULD JUDGES SPEAK OFF THE BENCH?

By speaking publicly, judges leave themselves liable to accusations of bias and perhaps to having their decisions overturned on appeal. The boundaries of what they should and should not say

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[1] The Report of the Committee on Judicial Conduct and Ethics, published on 25 January 2001, called for the establishment of a Judicial Council which would deal with judicial salaries and working conditions, education and discipline. Coulter, "Report wants council to discipline judges," *Irish Times,*26 January 2001. The Government proposed to create it by amending the Constitution but abandoned this due to opposition protests. O'Halloran and Newman, "Ahern postpones referendum on removal of judges," *Irish Times,* 4 May 2001. According to the Minister of Justice, a bill dealing with the topic will be tabled in 2004. O'Regan, "Judicial conduct Bill to be tabled this year," *Irish Times*. 6 May 2004.

or write when they are not on the bench are not clear. Because of this, many judges prefer not to speak or write extra-judicially and it is argued that judges should not make public pronouncements or statements when they are not sitting.

On consideration, however, if judges were to take this stance, they would deny public access to a considerable body of expertise, built up from a particularly important perspective within the justice system. From their unique vantage point, judges have much valuable experience to share with others and can begin or make vital contributions to debates on issues central to our democracy.[2] It could be argued that judges have a duty to work for the improvement of the administration of justice[3] and, indeed, it was once customary for English judges to meet regularly and provide recommendations for reform.[4] There are, therefore, certain topics on which it is appropriate for them to comment, although the manner and means must be carefully chosen.

III. EXTRA-JUDICIAL SPEECH BY IRISH JUDGES

There are, of course, many examples of judges engaging in public comment in Ireland. Several judges are respected authors of legal textbooks. Judges commonly write articles for legal periodicals such as the *Bar Review* and the *Irish Jurist*. The Judicial Studies Institute's own *Journal* has published articles by judges. Autobiographical writings by judges, however, are rare and avoid commentary on points of legal controversy.[5] It is interesting to note that it is common for American judges to teach in universities,[6] but Irish judges almost never do.[7] This likely results from the greater divide between academia and practice here and the prohibition on a judge holding a position of emolument in Article 35.3 of the Constitution.

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[2] Lubet. "Professor Polonius Advises Judge Laertes: Rules, Good Taste and the Scope of Public Comment," 2 Geo. J. Legal Ethics 665, 674-677 (1989).

[3] McKay, "The Judiciary and Nonjudicial Activities," 35 *Law and Contemporary Problems* 9, 21 (1970).

[4] Pannick, *Judges,* pp. 182-183.

[5] See for example O'Higgins. *A Double Life*. In America, there are "increasing numbers of articles and speeches by judges, especially Supreme Court Justices...in which they discuss all sorts of issues that seem likely to come before them and discuss also the views and foibles of their colleagues." Kaufman, "Judicial Ethics: The Less-Often Asked Questions," 64 Wash. L. Rev. 851. 867 (1989).

[6] Sometimes, it seems, due to economic necessity. *See* Kaufman, "Judicial Ethics: The Less-Often Asked Questions," 64 Wash. L. Rev. 851, 870 (1989). It is interesting to note that Judge Richard Posner has contributed to the Web log, or blog. of Professor Lawrence Lessig at Stanford University. *See* http://www.lessig.org/blog/archives/posner.html. 2 November 2004. *See also* "The Blogger in theBlack Robe," ABA Journal eReport 3 September 2004, http://www.abaiict.org/joumaI/ereport/s3blog.html, 2 November 2004.

[7] It does occasionally happen in the United Kingdom. Shetrect, *Judges on Trial,* p. 326.

Judges also speak publicly to conferences, university students and other bodies with relative frequency. These speeches are sometimes very topical. For example, in March 2001, the Chief Justice delivered a paper to the UCC Law Society on "The Irish Legal System in the 21st Century: Planning for the Future," in which he was critical of the operation of the courts. Although the paper was widely reported at the time (and was subsequently published in the Law Society *Gazette,* the *Bar Review* and the *Judicial Studies Institute Journal),* there were no suggestions that the remarks were inappropriate.

Some extra-judicial writing has, however, brought with it considerable controversy. In 1993, Mr. Justice O'Hanlon publicly disagreed with the Supreme Court decision in *Attorney General v. X.,*[8] in effect saying that any attempt to amend the Constitution or pass legislation to legalise abortion would be contrary to natural law.[9] The Government of the time was committed to such a course and purported to terminate his appointment as President of the Law Reform Commission. He challenged the validity of this termination, but simultaneously withdrew from the position. (After retiring, he brought legal proceedings for damages, which were settled out of court.)[10]

In recent times, some of Mr. Justice Carney's remarks have attracted controversy. In a paper delivered to the National University of Ireland, Galway, he suggested abolishing the distinction between murder and manslaughter on the basis that it would greatly reduce the length of lists in the Central Criminal Court (due to the mandatory life sentence, murder defendants have no incentive to plead guilty).[11] Professor Finbarr McAuley, a member of the Law Reform Commission, criticised these comments on the grounds that it was inappropriate for a sitting judge to offer an opinion on such a controversial topic.[12] It was interesting to note that Mr. Justice Carney's remarks were subsequently defended by Lord Lester of Herne Hill in a letter to the *Irish Times* in which he said:

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[8] [1992] 1 I.R. 1.
[9] O'Hanlon, "Natural Rights and the Irish Constitution," (1993) IIILT 8.
[10] Byrne and McCutcheon, *The Irish Legal System* (4* ed., 2001), p. 142 fn. 282.
[11] Coulter, "Judge calls for single charge of unlawful killing: Area of contest hinges on manslaughter or murder," *Irish Times,* 30 October 2003. The paper was subsequently published in the Bar Review: see Carney, "Decriminalising Murder?," (2003) 8(6) *Bar Review,* 254.
[12] Brecn, "Issue is for politicians not judges, says reform commission," *Irish Times,* 30 October 2003. Prof. McAuley subsequently clarified that he was speaking in a personal capacity and was not representing the Commission.

> British judges frequently make proposals for law reform whether in their judgments or in public lectures. It has not been suggested in recent times that this is in any way against the public interest. To the contrary, their contribution is valued both by the British Law Commissions and by the wider public.[13]

In early 2004, Mr. Justice Carney was due to speak at a conference in Dublin on the criminal justice system. His paper commented on the sittings of the Central Criminal Court in Limerick in late 2003. The Chief Justice, who was chairing the conference, was not prepared to attend the conference if the paper was delivered as drafted. According to the *Irish Times,* Mr Justice Keane objected to three elements in the paper: the fact that it referred to matters in the recent past or still current; the fact that these matters may present themselves before the courts in another form; and his concern that judges should not talk in public about cases they had presided over.[14]

Mr. Justice Carney did not speak at the conference.

A. Practical Examples

Case law can give some guidance in sketching the parameters for appropriate comment. Unfortunately, relevant common law decisions are scarce. There does not seem to be any Irish case law on the issue. There are some from neighbouring jurisdictions, but even the United States, with a much larger judiciary, does not have a specifically delineated body of law on the topic.[15] On the other hand, in civil law jurisdictions, where judges are often civil servants and subject to explicit codes of conduct, there is a large volume of commentary and decisions,[16] but the different context renders these of limited relevance here.

1. Great Britain

In Great Britain, there are some cases where extra-judicial

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[13] Lester, "Murder or Manslaughter," *Irish Times,* 1 November 2003.

[14] Coulter, "Limerick trial outcomes cited in Carney paper," *Irish Times,* 1 March 2004. *See also* Coulter, *Irish Times,* 1 March 2004, "Chief Justice worried about judges airing cases": "What the controversy reveals is the lack of any forum where the judiciary can decide collectively what should and should not be commented on publicly, and the mechanisms for maintaining any agreement arrived at."

[15] Lubet, "Professor Polonius Advises Judge Laertes: Rules, Good Taste and the Scope of Public Comment," 2 Geo. J. Legal Ethics 665, 667 (1989).

[16] *See, e.g.,* Bohlander, "Criticizing Judges in Germany" in Addo, *Freedom of Expression and the Criticism of Judges,* pp. 67-68.

comment has transgressed the boundaries of what is acceptable. Perhaps the most striking example is *Hoekstra v. H.M. Advocate*.[17] In this case, four defendants were convicted of drug offences in Scotland on 13 March 1997. Appeals were lodged in the Appeal Court, grounded partially on the European Convention on Human Rights and Fundamental Freedoms, but eventually rejected on 28 January 2000. Leave to appeal to the Privy Council was refused on 31 January 2000 and it was directed that a further stage of the appeal was to be heard on 6 March 2000.

One of the judges on the Appeal Court, Lord McCluskey, formally retired on 8 January 2000, but was appointed to sit as a retired judge in accordance with section 22 of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1985. On 6 February 2000, the first of a series of three articles written by the judge appeared in the *Scotland on Sunday* newspaper. Part of this article was critical of the European Convention on Human Rights and Fundamental Freedoms and its adoption into domestic Scots law.

On 6 March 2000, at the further hearing, a motion was lodged, asking the bench, comprising the Court of Appeal, to disqualify itself "on the basis that justice cannot be seen to have been done in the past or to be seen to be done in the future." The case then went before a differently constituted court. Counsel for the appellants did not argue that actual bias could be detected in the original Opinion of the Court of Appeal but "that the Appeal Court could not be regarded as being or as having been impartial, when judged by an objective test, since there was a legitimate reason to fear a lack of impartiality in view of the terms of the article written by one of its members."

After considering the relevant tests in English and Scots law and the language of the article, the court concluded "that the article, published very shortly after the decision in the appeal, would create in the mind of an informed observer an apprehension of bias on the part of Lord McCluskey against the Convention and against the rights deriving from it, even if in fact no bias existed in the way in which he and the other judges had actually determined the scope of

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[17] 2000 J.C. 387.

those rights in disposing of the issues in the case." Of particular interest, for present purposes, is the next paragraph of the judgment:

> We stress that, in reaching this conclusion, we attach particular importance to the tone of the language and the impression which the author deliberately gives that his hostility to the operation of the Convention as part of our domestic law is both long-standing and deep-seated. The position would have been very different if all that Lord McCluskey had done was to publish, say, an article in a legal journal drawing attention, in moderate language, to what he perceived to be the drawbacks of incorporating the Convention into our law. Judges, like other members of the public and other members of the legal profession, are entitled to criticise developments in our law, whether in the form of legislation or in the form of judicial decisions. Indeed criticism of particular legislative provisions or particular decisions is often to be found in judges' opinions. Similarly, judges may welcome particular developments in our law. It is well known that in their extra-judicial capacity many prominent judges - not only in England - publicly advocated incorporation of the Convention and equally publicly welcomed the Government's decision to incorporate. But what judges cannot do with impunity is to publish either criticism or praise of such a nature or in such language as to give rise to a legitimate apprehension that, when called upon in the course of their judicial duties to apply that particular branch of the law, they will not be able to do so impartially. Unfortunately, for the reasons which we have given, the nature and tone of the language used by Lord McCluskey in criticising the Convention does in our view give rise to such an apprehension, not just in relation to the Convention generally but more particularly in relation to Article 8 which formed the basis of certain of the submissions in the appeal.

In England, the position was dealt with by the Court of Appeal in *Locabail Ltd.* v. *Bayfield Properties,*[18] a series of cases heard together. This case is well-known for the following quotation:

> We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or *extra-auricular utterances* (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any part)', solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers.[19]

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[18] [2000] 1 AJ1E.R. 65.
[19] At 77-78. Emphasis added.

One of the series of cases involved was *Timmins* v. *Gormley* Here, a Recorder at Liverpool County Court had given an award to a plaintiff in a personal injury action. The recorder was a prolific writer and a consultant editor of the textbook, *Kemp and Kemp*. From some of the articles which he had written, the Court concluded that the recorder had "pronounced pro-claimant anti-insurer views" and allowed an appeal and retrial on the grounds of bias. The Court made this observation on extra-judicial comment:

> It is not inappropriate for a judge to write in publications of the class to which the recorder contributed. The publications are of value to the profession and for a lawyer of the recorder's experience to contribute to those publications can further rather than hinder the administration of justice. There is a long-established tradition that the writing of books and articles or the editing of legal textbooks is not incompatible with holding judicial office and the discharge of judicial functions. There is nothing improper in the recorder being engaged in his writing activities. It is the tone of the recorder's opinions and the trenchancy with which they were expressed which is challenged here. Anyone writing in an area in which he sits judicially has to exercise considerable care not to express himself in terms which indicate that he has preconceived views which are so firmly held that it may not be possible for him to try a case with an open mind. This is the position notwithstanding the fact that, as Mr Edis submits, there can be very real advantages in having a judge adjudicate in the area of law in which he specialises. But if this is to happen it must be recognised that his opinions as to particular features of the subject will become known. The specialist judge must therefore be circumspect in the language he uses and the tone in which he expresses himself. It is always

> inappropriate for a judge to use intemperate language about subjects on which he has adjudicated or will have to adjudicate.[20]

Of course, not all inappropriate comment ends up in court. For example, Lord Hewart, then Lord Chief Justice of England and Wales, published *The New Despotism* in 1929. This attacked administrative lawlessness and accused the civil service of deliberately seeking to infringe the liberty of the citizen. It "was not generally accepted as appropriate for a work by a judge [then] and its equivalent would certainly not be acceptable now."[21]

In the United Kingdom, therefore, judges are permitted to comment on matters of public importance, but this commentary should be moderate, not trenchant. Above all, it should not create an apprehension in the mind of a reasonable observer that a judge would be biased or have overly fixed views on topics that are likely to come before her for judicial consideration. The test is objective; it is sufficient that the apprehension would be created, even if the decision itself seems free from bias. This is likely to be the test in Ireland also.

2. The United States of America

There is a large body of cases involving extra-judicial statements made by American judges. In the United States, unsurprisingly, there are also various codes of conduct (e.g., the ABA Code of Judicial Conduct and the Judicial Conference of the United States' Code of Conduct for United States Judges), which assist in guiding judges. It should be borne in mind that many American state judges are elected, which can give their speech a political dimension lacking here. America has a vibrant freedom of speech jurisprudence and the issue is often framed as a conflict between free speech and judicial ethics.[22]

Canon 4 of the ABA Code provides:

> A. Extra-judicial Activities in General. A judge shall conduct all

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[20] At 90.
[21] Shetreel, *Judges On Trial*, pp. 328-329.
[22] *See, e.g.*, Ross, "Extrajudicial Speech: Charting the Boundaries of Propriety," 2 Geo. J. Legal Ethics 589 (1989).

of the judge's extra-judicial activities so that they do not:

1. cast reasonable doubt on the judge's capacity to act impartially as a judge:
2. demean the judicial office: or
3. interfere with the proper performance of judicial duties.

B. Avocational Activities. A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

Canons 4 and 5 of the Judicial Conference Code provide:

4. A judge may engage in extrajudicial activities to improve the law, the legal system and the administration of justice.
5. A judge should regulate extrajudicial activities to minimize the risk of conflict with judicial duties.

American judges, then, are permitted to speak off the bench to the extent that this does not conflict with their duties to the court, in terms of time and in terms of creating an apprehension or risk of bias.

Examples of unacceptable speech include:[23]

- writing to newspapers defending sentences which had been vacated and remanded for re-sentencing;[24]
- sharing a draft decision with a reporter and discussing it before delivery;[25]
- defending a contempt order under review in a superior court in a press interview;[26]
- discussing a contempt order with the press and writing a letter explaining the sentence;[27]
- discussing a case with a newspaper reporter in a prejudicial manner;[28]

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[23] The two lists which follow are based on Ross, "Extrajudicial Speech: Charting the Boundaries of Propriety," 2 Geo. J. Legal Ethics 589 (1989).
[24] *In reBenoit,* 523 A.2d 1381 (Me. 1987).
[25] *Ryan v. Commission on Judicial Performance,* 45 Cal. 3d 518, 247 Cal. Rptr 378. 754 P.2d 724 (1988).
[26] *Ryan v. Commission on Judicial Performance,* 45 Cal. 3d 518. 247 Cal. Rptr 378, 754 P.2d 724 (1988).
[27] *Ryan* v. *Commission on Judicial Performance,* 45 Cal. 3d 518. 247 Cal. Rplr 378, 754 P.2d 724 (1988).
[28] *Papa* v. *New Haven Federation of Teachers,* 186 Conn. 725, 444 A.2d 196 (1975).

- discussing a proceeding for constructive contempt pending in one's court;[29] and
- stating at a public meeting, that a certain fixed punishment would be imposed in all liquor cases where a guilty plea was entered.[30]

Cases where the American courts have ruled extra-judicial speech did not exceed the bounds of propriety include:

- writing to newspapers and a church newsletter to express strong views about the death penalty;[31] and
- stating publicly a preference for sentencing drug offenders to prison rather than placing them on probation.[32]

3. The European Convention of Human Rights

It is interesting to note that a Swiss judge, who was reprimanded for distributing a political leaflet (which severely criticised the authorities and called for pending prosecutions to be withdrawn), brought an application to the European Commission on Human Rights alleging a breach of Article 10 of the Convention (the right to freedom of speech). The Commission held that the judge had, in common with any other citizen, a right to freedom of speech. His particular situation and the duties and responsibilities attaching to his position, however, meant that "the interference suffered by the applicant in the exercise of his freedom of expression is justified in this case as being necessary in a democratic society for maintaining the authority and impartiality of the judiciary, within the meaning of Article 10 para. 2 of the Convention."[33] The application was found to be inadmissible. It seems, therefore, that while judges have the right to freedom of speech, that right can be limited, but only to the extent "necessary in a democratic society."

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[29] *Matter of Sheffield,* 465 So. 2d 350 (Ala. 1984).
[30] *Edminson v. State,* 167 Tex. Crim 225, 320 S.W.2d 8 (Crim. App. 1959). The judge in question sat in a Texas dry county.
[31] *In re Inquiry Concerning a Judge, Gridley.* 417 So.2d 950 (Fla. 1982). The Supreme Court of Florida disapproved of the statements but held that they did not violate die Florida Bar Code of Judicial Conduct. See also *Smith v. State* 197 So.2d 497 (Fla. 1967), which is similar.
[32] *Slate* v. *Ellis,* 239 S.E.2d 670 (W. Va. 1977). The rationale was that this was not an individual bias but a judicial philosophy.
[33] *E. v. Switzerland* (1984) 38 D. & R. 124.

IV. THE THEORY

It is not easy to distil any coherent set of principles from the foregoing case law. It is clear from *Hoekstra* and *Locabail* that it is appropriate for judges to comment on issues of public importance with a view to improving the administration of justice. They have a particular expertise in terms of court organisation and practice and temperate commentary on this topic should be welcomed.

All such remarks are circumscribed, however, by the risks that they run. The most important is bias. As *Hoekstra* illustrates, this is not simply actual bias, where a judge has publicly made a statement which directly prejudices the outcome of a case before her, but also an objective apprehension of bias - saying something which implies that the judge has a point of view which would lead a reasonable person to believe that she will not approach a particular issue with an open mind. Judges are as vulnerable to prejudices and misunderstandings as others, but they should attempt to put these frailties to one side when sitting on the bench. To take a fixed position on an issue is likely to lead litigants and observers to lose confidence in the judge's fairness.

This leads to another risk, that of loss of confidence in the judiciary as a whole. The public are not likely to trust judges who express strong views on topical subjects. In a democracy, it is important that those who are called upon to resolve issues of law and fact stay out of the arena of public debate unless they have a particular contribution of special importance to make.

This is particularly important because of the tenure which judges enjoy. Under Article 35.4 of the Constitution, judges can only be dismissed for stated misbehaviour or incapacity by a resolution passed by both Houses of the Oireachtas. Judges occupy a position of particular importance and respect in Irish society. Their comments are generally taken seriously by the media. A judge could abuse this position as a pulpit from which to make controversial statements on matters of public importance. This type of "political" behaviour would be quite inappropriate and reflects badly on the judiciary generally:

> ... there must be limits on what judges may say and

> do. For example, a judge must not campaign on behalf of a candidate for political office. To do so would detract from the perceived neutrality of such a judge.[34]

The context of the comment may also have some bearing on its appropriateness. A Justice of the Supreme Court of Louisiana has suggested four factors which should be borne in mind:

1. the subject-matter;
2. the degree of present public interest or controversy concerning the topic;
3. the forum; and
4. the audience.[35]

There is clearly a difference between a judge speaking at, or participating in, a learned symposium on a legal topic, and appearing on a television chat show, or between a judge writing a paper for a learned journal and writing a column in a tabloid newspaper. This is not to say that it would necessarily be improper for a judge to do any of these things, but the context can be as important as the content of the message. Judges should choose their *fora* for comment and debate with care. The wrong event, publication or audience can make innocuous remarks seem quite inappropriate. In one of the standard German works on the topic,

> ... the former presiding judge of the Federal Administrative Tribunal, Horst Sendler, ... distinguishes between utterances at the hearing, in the wording of the judgment, public discussion in (legal) journal, parliamentary hearings and the media in general. He urges judges to use '*Pietät und Takt*' meaning moderation and non-offensive language. The more public interest there is in a matter, the more careful a judge should be when stating his

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[34] Ratushny. "Judicial Independence and Public Accountability", Appendix B to the *Report of the Committee on Judicial Conduct and Ethics* (December 2000), p. 67. Professor Kaufman suggests that such abuse of status could lead to a loss of self-regulation by the judiciary. *See* Kaufman, "Judicial Ethics: The Less-Often Asked Questions," 64 Wash. L. Rev. 851, 870 (1989).

[35] Tate, "The Propriety of Off-Bench Judicial Writing or Speaking on Legal or Quasi-Legal Issues," 3 J. Legal Prof. 17, 22-23 (1978).

opinion on a certain issue.[36]

In the United Kingdom, the "Kilmuir Rules," set down in 1955 by Lord Chancellor Kilmuir, codify guidelines for judges' interaction with the media.[37] These rules have been somewhat relaxed since 1989. Here, there are no such rules, largely because the rule was simple: judges did not talk to the media.[38] That position is changing somewhat and if this trend continues, there will be a need for rules in the future. Any rules will obviously require careful consideration, something which lies outside the scope of this short piece. If the Judicial Council is established, this is something with which it will have to concern itself. As with any of the rules and procedures which the Council may establish, particular thought will have to be given to the proper role of ordinary citizens, professional bodies and other branches of government in this process.

V. CONCLUSION

While judges have much of value to contribute to public discourse and debate on the law and the legal system, they should be careful that when they are speaking or writing off the bench, they are both sensible and sensitive. Careless comment leaves the judge open to allegations of bias and, if particularly thoughtless, can lead to very damaging controversy.

Taking this theory and applying it to practical situations is not straightforward. There are some things which are clearly inappropriate. For obvious reasons, it is inappropriate to comment on pending cases, either in one's own court or in another judge's.[39] Likewise, it is inappropriate to comment adversely on other judges or on other judges' decisions or to explain one's own decisions.[40] Commenting on matters of political controversy (unless the judge has very particular expertise in the area) is also inappropriate.[41]

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[36] *See, e.g.,* Bohlander. "Criticizing Judges in Germany", in Addo. *Freedom of Expression and the Criticism of Judges,* p. 68.
[37] Pannick, *Judges,* p. 173.
[38] Byrne and McCutcheon. *The Irish Legal System* (4th ed., 2001). p. 140-142.
[39] Ross, "Extrajudicial Speech: Charting the Boundaries of Propriety," 2 Geo. J. Legal Ethics 589, 597-601 (1989).
[40] Ross, "Extrajudicial Speech: Charting the Boundaries of Propriety," 2 Geo. J. Legal Ethics 589, 601-612 (1989). It is interesting to note that in O'Flaherty, "Democracy, the Judiciary and the Constitution," in *Justice, Liberty and the Courts,* pp. 44-48, a Supreme Court judge explains some controversial decisions of that court.
[41] Ross, "Extrajudicial Speech: Charting the Boundaries of Propriety," 2 Geo. J. Legal Ethics 589, 637-640 (1989).

It is appropriate and useful for a judge to comment (in a restrained fashion) on matters relating to the courts and law in general. Judges may write articles and textbooks on legal matters.[42] Commentary on non-political issues (for example, arts, culture or history) is generally acceptable, provided no particular agenda is being promoted.[43] They should be careful not to take a fixed or dogmatic position in any writings or speeches, as although they are obviously not binding on the individual judge, they are likely to be of considerable persuasive authority even if they are not cited in court.[44]

It is not possible to lay down rigid rules, however, and the best guide is the judge's own conscience:

> In the final analysis, the judge must determine for himself whether the good he is attempting to do for the law and society is outweighed by the disrespect he may create for the judiciary in some or in many people, either because the substance of his expression is distasteful to them or because they perceive him less as an impartial and disinterested judge and more as an active political candidate.[45]

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[42] It seems that the prohibition on the holding of a position of emolument in Article 35.3 of the Constitution does not prevent the judge from receiving royalties: Hogan and Whyte, *The Irish Constitution* (3rd ed., 1994), p. 550.

[43] Ross. "Extrajudicial Speech: Charting the Boundaries of Propriety," 2 Geo. J. Legal Ethics 589, 640-641 (1989).

[44] See Tate, "The Propriety of Off-Bench Judicial Writing or Speaking on Legal or Quasi-Legal Issues," 3 J. Legal Prof. 17, 19-22 (1978) (for a discussion of some practical examples).

[45] Tate. "The Propriety of Off-Bench Judicial Writing or Speaking on Legal or Quasi-Legal Issues," 3 J. Legal Prof. 17, 25 (1978).