



The judiciary in public debates: the sound of silence?

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Author(s)	Kennedy, Rónán
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The Judiciary in Political Debates: The Sound of Silence?

Rónán Kennedy*

The judiciary's approach to communicating with the public it serves has to change. If it does not--if our voice remains silent in debates on public policy, and we become irrelevant to the process--we have only ourselves to blame.¹

Extra-Judicial Speech Generally

Article 40.6.1°.i of the Constitution of Ireland 'guarantees liberty for the exercise ..., subject to public order and morality [, of] [t]he right of the citizens to express freely their convictions and opinions.' The constraints of 'public order', in combination with the traditional reticence of judges, have led to an unwritten (but not always observed) norm that the judiciary do not speak publicly off the bench on controversial issues. However, there are no rigid rules on the question in this jurisdiction.²

This norm has been reinforced by the press release issued on her recent appointment by the new Chief Justice, Denham CJ:

One of the important constitutional conventions ... is that judges refrain from engaging in matters of public controversy or political debate. In a world of instant communication and commentary the concept of silence may seem unusual but it is an inherent part of our democratic tripartite system of government. Indeed, in these difficult times the need for an institution of independence and thoughtfulness, with an obligation to maintain the rule of law, is greater than ever.³

In the context of a constitutional referendum which affects directly the remuneration of judges in a less than satisfactory manner, however, this 'silence' may cause more problems than it solves. This article examines the question of the involvement of the judiciary in political debates. While in general agreement with Denham CJ on the principle that judges should not involve themselves in political debates, it argues that certain issues are so important to the independence of the judiciary as a distinct institution that the prohibition should be relaxed in certain instances. However, looking at the experience of the judiciary in attempting to engage in a debate, it concludes that public engagement is unlikely to yield satisfactory results. It therefore argues that such a fundamental modification to the separation of powers in the Irish Constitution as is envisaged by the forthcoming referendum should

* Law School, National University of Ireland Galway.

¹ Hon. Nancy Gertner, 'Remarks Of Hon. Nancy Gertner' (2009) 64 NYU Annual Survey of American L 449, 457.

² Rónán Kennedy, 'Extra-Judicial Comment by Judges' (2005) 5(1) JSIJ 199.

³ Carol Coulter, 'Denham to forgo pay rise as Chief Justice' *The Irish Times* (Dublin, 26 July 2011). The full text of the Chief Justice's statement is available at <www.irishtimes.com/focus/2011/denhamstatement/index.pdf> accessed 19 September 2011.

not be made without ensuring that there is a proper debate, a responsibility which rests on politicians and the media.

The Free Speech Rights of Judges

While judges undoubtedly give up some of their political rights when they are appointed to the bench, they retain some right of freedom of speech.⁴ The United Nations 'Basic Principles on the Independence of the Judiciary'⁵ states

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

They also gain some advantage from their role. Article 10(2) of the European Convention on Human Rights expressly permits restrictions on the freedom of expression 'for maintaining the authority and impartiality of the judiciary'. As a result, the judiciary enjoy greater protection from attacks on their reputation,⁶ although they will lose that protection if they become politically active themselves⁷ and their right to freedom of speech can legitimately be restricted.⁸

According to Professor Steven Lubet, the purpose of the prohibition on judges speaking publicly is threefold:

(1) the need to avoid the appearance of partiality or favoritism; (2) the need to maintain public confidence in the women and men who comprise the judiciary; and (3) the need to ensure that judges will not be distracted by nonjudicial activities.⁹

The question of the freedom of speech rights of Irish judges has never been litigated. However, other jurisdictions have developed a jurisprudence on this issue. In the United Kingdom, the two significant cases are *Hoekstra v. H.M. Advocate*¹⁰ and *Locabail Ltd. v. Bayfield Properties*.¹¹ There, it seems that judges are permitted to comment on matters of public importance in a moderate fashion and 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.¹² This is a shift from the very restrictive Kilmuir Rules of 1955, which prevented judges from any contact with the media but were relaxed by the Lord Chancellor,

⁴ Robert F. Copple, 'From the Cloister to the Street: Judicial Ethics and Public Expression' (1987-1988) 64 Denver U L Rev 549.

⁵ Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁶ Luzius Wildhaber, 'The Right To Offend, Shock Or Disturb? – Aspects Of Freedom Of Expression Under The European Convention On Human Rights' (2001) 36(1) IJ (ns) 17, 24-5.

⁷ *Perna v Italy* (2004) 39 EHRR 563.

⁸ *E. v Switzerland* (1984) 38 D & R 124.

⁹ Steven Lubet, 'Judicial Ethics And Private Lives' (1984) 79 Northwestern U L Rev 983, 985-6.

¹⁰ [2000] UKHRR 578, 2000 JC 387.

¹¹ [1999] EWCA Civ 3004, [2000] 1 All ER 65.

¹² See Judges' Council of England and Wales, Guide to Judicial Conduct, 21-2.

Lord Mackay of Clashfern, in 1987.¹³ This change in culture has permitted speeches such as Lord Woolf's Squire Centenary Lecture at Cambridge University,¹⁴ which was highly political.¹⁵

The Canadian Judicial Council deals with alleged breaches of ethics occasioned by the speech of judges, something has led to litigation in the Supreme Court of Canada and a conclusion that 'judicial freedom of expression stops where a serious undermining of public confidence in the judiciary begins.'¹⁶ The American situation is somewhat unique, combining a strong freedom of speech culture with the election of judges in many states (although not for the federal courts).¹⁷ This has led to a sophisticated (although incomplete) jurisprudence.¹⁸ There are examples of American judges involving themselves in public debates, including issues of remuneration.¹⁹

Examples of the Irish Judiciary in Political Debates

It is very rare for the Irish judiciary to involve themselves in political debates. However, some judges do speak extrajudicially, sometimes on important topics. Irish judges give speeches in a variety of contexts or write books and articles on legal topics.²⁰ The recent development of the *Judicial Studies Institute Journal* has seen many useful and thoughtful contributions from members of the judiciary on questions relating to the administration of justice in Ireland.²¹ Retired judges also contribute from time to time.²²

The most salient example of judicial engagement with contentious issues in Ireland is O'Hanlon J. Noted for his strong views on abortion, he called for Ireland to leave the European Union if it should lead to the introduction of abortion in this country. In response, the Taoiseach asked him to step down

¹³ Gerry R. Rubin, 'Judicial Free Speech versus Judicial Neutrality in Mid-Twentieth Century England: The Last Hurrah for the Ancien Regime?' (2009) 27(2) L and History Rev 373.

¹⁴ Lord Woolf, 'The Rule of Law and a Change in the Constitution' (Squire Centenary Lecture, 3 March 2004) < www.law.cam.ac.uk/faculty-resources/download/lord-woolf-squire-centenary-lecture-the-rule-of-law-and-a-change-in-constitution-transcript/1415/pdf > accessed 23 September 2011.

¹⁵ Keith Ewing, 'Judges and Free Speech in the United Kingdom' in H. P. Lee, *Judiciaries in Comparative Perspective* (Cambridge University Press 2011) 247.

¹⁶ See Leo Barry, 'Judicial Free-Speech and Judicial Discipline: A Trial Judge's Perspective on Judicial Independence' (1996) 45 U of New Brunswick L J 79, 80-1; *Ruffo v Conseil de la Magistrature* (1995) 130 DLR (4th) 1 (SCC).

¹⁷ Ferris K. Nesheiwat, 'Judicial Restraint: Resolving the Constitutional Tension Between First Amendment Protection of Political Speech and the Compelling Interest in Preserving Judicial Integrity During Judicial Elections' (2006) 24 Quinnipiac L Rev 757, 766-9.

¹⁸ Steven Lubet, 'Professor Polonius Advises Judge Laertes: Rules, Good Taste and the Scope of Public Comment' (1989) 2 Georgetown J L Ethics 665, 667.

¹⁹ See, for example, Judith S. Kaye, 'Free Judges' Pay' *The New York Times* (New York, 7 June 2007).

²⁰ Kennedy (n 2) 200-202.

²¹ For a general discussion of the gradual relaxation of the traditional prohibition of public speech by the judiciary, see Raymond Byrne and Paul McCutcheon with Claire Bruton and Gerard Coffey, *Byrne and McCutcheon on the Irish Legal System* (5th edn, Bloomsbury Professional 2001) 168-171.

²² For example, on the question of judicial salaries, see Barrington J's appearance on Tonight with Vincent Browne (TV3, 20 January 2010) and the contribution from Keane J in this issue.

from his presidency of the Law Reform Commission, something which he did, although claiming that he was under no obligation to do so.²³

Among sitting judges, Hardiman J is noted for being outspoken on current issues such as the reporting of court cases by the media.²⁴ However, his remarks have fallen short of involvement in 'live' political controversies and particularly matters which are more likely to come before the public decision by way of election and referendum. Carney J has also been unafraid to take a public stance on issues which concern him.²⁵ Generally, however, the Irish judiciary maintain the 'silence' praised by Denham CJ.

The Permissibility of Judges Engaging in Political Debate

It is clear, therefore, that the constitutional convention of 'silence' highlighted by the new Chief Justice is not an absolute prohibition. According to Professor William Ross, an American expert on judicial freedom of speech issues,

[i]t is particularly appropriate for judges to speak out about proposed legislation or other actions by coordinate branches of government that would affect their own court. ... Indeed, judges have a virtual duty to make such communications to the extent that they are in a special or unique position to inform legislators or the general public about the benefits or dangers of various forms of legislation. ... When a judge cannot bring anything other than his own prestige to a controversy over judicial administration, however, the propriety of comments is more troublesome.²⁶

The need to avoid even the appearance of bias is a vital element in respect for the judiciary. However, with regard to the particular issue of judicial salaries, the Irish judiciary have already shown that they are willing to deal with this issue.²⁷ Imperfect as it is as a solution, if a constitutional question over judicial salaries should arise, the Supreme Court is prepared to deal with it. (Litigation can also be a means to spark a public debate, as the experience of the New York State judiciary shows.²⁸ However, the wording of the present proposed amendment is likely to prevent any arguable legal objection to reducing judicial salaries.)

Reticence and diffidence are valuable traits in a judge. Nonetheless, there is a long tradition of judges standing up for the independence of the judiciary when it proves necessary. Sir Edward Coke, a vital figure in the development of the common law, did not shirk from defending the independence of the courts, once so enraging the King by his railings against the Ecclesiastical High Commission that the King almost struck him.²⁹

²³ *ibid* 170 fn 320.

²⁴ See, for example, Carl O'Brien, 'Supreme Court Judge Criticises Media' *The Irish Times* (Dublin, 25 November 2011).

²⁵ See, for example, Kennedy (n 2), 201-202, and Paul Carney, 'The Central Criminal Court: The Limerick Experience' (2005) 5(2) JSIJ 1.

²⁶ William G. Ross, 'Extrajudicial Speech: Navigating Perils and Avoiding Pitfalls' (2001) 38(2) *Court Rev* 36, 38.

²⁷ *O'Byrne v Minister for Finance* [1959] IR 1 (SC).

²⁸ Anemona Hartocollis, 'New York's Top Judge Sues Over Judicial Pay' *The New York Times* (New York, 11 April 2008).

²⁹ Talbot D'Alemberte, 'Searching For The Limits Of Judicial Free Speech' (1987) 61 *Tulane L Rev* 611, 625, citing Catherine Bowen, *The Lion And The Throne: The Life and Times of Sir Edward Coke: 1552-1634* (8th edn, Little, Brown & Company 1957), 279-305.

Writing about the constraints on the judges of the Supreme Court of the United States, and citing as an example attacks by politicians on Judge Baer of the Southern District of New York and his subsequent defence by four judges of the Court of Appeals for the Second Circuit, Dubeck argues that

[m]embers of the legislative and executive branches gain political points by attacking the substance of decisions made by individual federal judges and by threatening the judiciary. This situation may make extrajudicial responses appropriate in order to defend the independence of the judicial branch, since failing to respond may give the appearance that the judiciary is under the thumb of a political branch.³⁰

While we might hope that professional bodies and the academy might respond to protect the judiciary from unwarranted criticism, and this does sometimes happen,³¹ this has not occurred in a coherent or comprehensive fashion in Ireland in the context of this particular issue. This justifies the judiciary in responding themselves.

Judge Blue explains the restriction on the free speech rights of judges as a calculus that the extrajudicial silence of judges is a small price to pay for the worthy tradition of judicial integrity [which] makes sense if the only sacrifice weighed in the balance is that of the silenced jurists. Judges, a numerically small group in the first place, receive numerous benefits in return for the voluntary assumption of their duties. The potential hindrance of their self-fulfillment as individuals that speech restrictions inevitably pose is not a matter of major concern. But perhaps the real sacrifice is elsewhere. Judges have no monopoly on wisdom, but they nevertheless have something to say. What they have to say is not the product of innate wisdom or high constitutional position, at least not necessarily. It is the product of judicial experience. The experience of listening to the stories and problems of persons representing the entire spectrum of humanity and resolving those problems (or at least attempting to do so) in principled ways is not a common experience in our society. When the extrajudicial speech of judges is limited to anodyne topics of judicial administration, our political discourse loses the benefit of this experience and perspective. This is hardly a fatal loss in a political environment already filled with the contending voices of commentators, but it is not a negligible loss.³²

Of course, as we are reminded by the former Chief Justice of the High Court of Australia,

the United States experience in this area [may not be] a reliable guide to developments elsewhere. What is appropriate in terms of judicial conduct and public communication depends very much on the traditions and the climate of opinion prevailing in a particular society.³³

Permission to engage in public debate also does not mean an untrammelled freedom to get involved in the rough-and-tumble of the media, as the Court of Appeal reminded us in the *Hoekstra* case:

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

³⁰ Leslie B. Dubeck, 'Understanding "Judicial Lockjaw": The Debate Over Extrajudicial Activity', 82 NYU L Rev 569, 576-577.

³¹ *ibid* 577.

³² Jon C. Blue, 'A Well-Tuned Cymbal? Extrajudicial Political Activity', (2004) 18 Georgetown J L Ethics 1, 33.

³³ Anthony Mason, 'Judicial Independence and the Separation of Powers – Some Problems Old and New' (1990) 13(2) U of New South Wales L J 173, 180.

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.³⁴

The Experience of the Irish Judiciary in the Salary Referendum Debate

However, even if the judiciary, or individual members thereof, choose to engage with a public debate, their experience is unlikely to be a happy one. The traditional bar on public engagement means that the Irish judiciary have little knowledge of how to deal with the media. This is obvious from their handling of the initial stages of the public debate regarding the proposed judicial referendum on constitutional referendum on judicial salaries.

The judiciary initially prepared a memorandum which was sent directly to the Attorney General, the traditional conduit for information between the judiciary and the cabinet. They subsequently sought, and received, the permission of the AG to release this memorandum to the public.³⁵ When it was placed on the website of the Courts Service, this action was criticized in strong terms by the Minister for Justice, who characterized the discussion on judicial salaries as an industrial relations matter:

I am disappointed that this memorandum continues to be posted on the website, ... I am not aware of any similar publication being posted in the past on the website of a Government department or a State agency in circumstances in which an issue arose concerning the salaries of individuals paid through such Government department or State agency.³⁶

The memorandum was subsequently removed from the Courts Service website.³⁷ This clumsy attempt to put their case before the public did the judiciary few favours. It led to a seeming capitulation and a response which shifted the focus of the debate from the broad question of protecting the rule of law to the narrow question of a row over pay levels. It is difficult to out-manoeuvre a professional politician in the media.

Before this, the judiciary had put forward an anonymous spokesperson who said that '[s]enior members of the judiciary are very concerned about the way in which their pension concerns have been presented.'³⁸ These unfortunate actions seem more likely to confirm the common impression that the judiciary are a remote elite, unable to engage in a public debate.³⁹ It would be unwise for them to cement this perception amongst the electorate.

³⁴ Hoekstra (n 10) [23].

³⁵ Carol Coulter, 'Judiciary warns State over damage to Ireland's reputation' *The Irish Times* (Dublin, 5 July 2011).

³⁶ Mary Fitzgerald, 'Minister "disappointed" memo still on courts website' *The Irish Times* (Dublin, 11 July 2011).

³⁷ Carol Coulter, 'Memo on judges' pay removed from website' *The Irish Times* (Dublin, 13 July 2011).

³⁸ Carol Coulter, 'Judiciary spokesman raises fears over tax bill on pensions' *The Irish Times* (Dublin, 7 May 2011).

³⁹ See, for example, Stephen Collins, 'Pension woe of our judges not inspiring popular pity' *The Irish Times* (Dublin, 28 April 2011).

Conclusion

All this raises a practical and serious issue. The traditional structure and framework of a referendum campaign, as with any public debate, is that there are at least two interlocutors. In the case of a referendum on reducing judicial salaries in the context of a severe recession and drastic reductions in public spending and general pay levels, such a debate is very unlikely to arise. All political parties and most commentators are likely to agree that reductions in judicial salaries are necessary and to be welcomed without giving much thought to the detail.⁴⁰

Indeed, it is likely that many judges and lawyers also agree with this principle.⁴¹ This author would certainly support a reduction in judicial salaries and any referendum that proved necessary to bring this about in a proper manner. However, as the other contributions in this issue highlight, the text of the proposed referendum contains a number of significant flaws which either have not been noticed by or are welcomed by the Oireachtas. Without a robust debate, these flaws may not come to the attention of the public at large, leading to popular support for a measure which is poorly understood and which could have adverse consequences for the rule of law in this country.

Therefore, in order for any constitutional change to protect and safeguard the rule of law in Ireland, it needs to be dealt with in a manner that respects the importance of the principle at stake:

The need for public defence of judicial institutions is a problem that needs to be remedied. Neither the issue of press statements nor the employment of public relations officers is an appropriate answer. The solution, if one exists under the Westminster system, is to encourage a bipartisan political approach to the protection of traditional institutions and a return to the old tradition that politicians should be reluctant to attack the Judiciary because there is no acceptable way in which a judge to mount a defence.⁴²

With the judiciary (the most obvious contributor to a debate on judicial salaries) unable, because of constitutional convention and lack of experience, to put forward its point of view, a healthy discussion is unlikely to take place. This risks leaving us with a very unsatisfactory outcome and a likelihood that the people will pass a change to the constitution that they may come to regret in future years. There is therefore an obligation on Irish politicians and the Irish media to ensure that there is an honest exploration of the possible consequences of the proposed text so that we do not respond to the current financial crisis and the perceived non-cooperation of the judiciary with public austerity initiatives in a hasty fashion. Irish voters deserve nothing less.

⁴⁰ See, for example, the comments of Dara Calleary TD (Fianna Fáil) and Jonathan O'Brien TD (Sinn Féin), along with other deputies, welcoming the Twenty-Ninth Amendment of the Constitution (Judges' Remuneration) Bill 2011 at Dáil Deb 14 September 2011, vol 740, col 25 et seq.

⁴¹ See, for example, Carol Coulter, 'Judiciary not against pay cut vote, says Chief Justice' *The Irish Times* (Dublin, 3 June 2011).

⁴² Mason (n 33) 181.