

PAPER FOR THE FOURTEENTH CONFERENCE OF CHIEF JUSTICES OF  
ASIA AND THE PACIFIC

(SESSION 4: PART 1)

Seoul, Korea

Tuesday 14 June 2011

***Between “Lock-Jaw” and Locked Horns, What Scope for  
Extra-Judicial Speech by Judges?***

\* Sian Elias

In my jurisdiction until quite recently the convention was that judges did not speak publicly. An exception was made for Chief Justices, who could be relied on to be uncontroversial and dull. A further exception was made for speeches and papers to legal audiences on technical legal topics. Such papers not infrequently touched on matters of policy, and were occasionally controversial. But a fig leaf of decency was preserved because the audience was limited and law was not a popular sport.

Speech cannot be limited today. And popular interest in law and judges means that anything said that is different or can be construed as critical is likely to be seized on and published under lurid headlines. Indeed, Chief Justices cannot be relied upon to be entirely uncontroversial, particularly at a time of diminishing funding for courts. So the exceptions no longer protect judicial timidity.

At the same time, modern circumstances (including modern communication) make it increasingly unacceptable for those who exercise judicial authority in our communities to be remote and mysterious. Speaking only through judgments may no longer be best policy in all cases, even if it is preferable policy in most cases. We need better compass through these shoals than we have had to date.

The rules promulgated by Viscount Kilmuir in 1955, which prevented Judges making public comments, were based on the rather unsatisfactory opinion that it was the only way to preserve the judge’s aura of wisdom and impartiality. This is reminiscent of the advice given by Mark Twain – “[k]eep your mouth shut and people may not think you’re a fool. Open it, and they’ll know you’re a fool.”<sup>1</sup>

---

\* The Rt Honourable Dame Sian Elias, Chief Justice of New Zealand.

<sup>1</sup> Stephen Cameron “Silence is Golden (But my Heart Still Cries): The Case Against *Ex Tempora* Judicial Commentary” (1996) 45 UNBLJ 91 at 91.

The Kilmuir Rules have fallen away in most jurisdictions. It certainly seems strange to modern thinking to remember that they were put forward to decline an invitation by the BBC for judges to participate in a programme about the contribution of past judges, a subject that hardly seems controversial or inconsistent with judicial function.

That is not to say that it is wrong to be cautious about extra-judicial statements. Not because keeping quiet is the only way to conceal the fact that the Judge is a fool. But because even wise statements may be inappropriate coming from a judge. Indeed, wise statements may seem to some more inappropriate than foolish statements.

The principal reason for caution remains the risk to the appearance of impartiality in judging. But a further reason is the borrowing of the authority of the judge to further personal views. Just as we resist attempts by the political branches of government to use judges to cloak political decisions in a show of impartiality, we need to recognise that judges are not entitled to use the authority of their office for personal political agendas.

It is not always clear where matters are of legitimate concern to the judiciary or where judges have particular expertise which should be made available in a wider discussion. There are no hard and fast rules. There is a middle path between what Justice Frankfurter described as “judicial lock-jaw”<sup>2</sup> and unacceptable horn locking on matters of controversy or which would undermine confidence in the judiciary. The middle path may amount to nothing more ambitious than what Justice Hayne of the High Court of Australia described as a norm of “judicial reticence”.<sup>3</sup>

### **Guidelines for judicial conduct**

Most jurisdictions provide guidance to judges in the way of guidelines for judicial conduct. Some have been adopted under international statements.

---

<sup>2</sup> Felix Frankfurter “Personal Ambitions of Judges: Should a Judge ‘Think Beyond the Judicial’? (1948) 34 ABA J 656 at 658.

<sup>3</sup> Kenneth Hayne “Letting Justice Be Done Without the Heavens Falling” (The Fourth Fiat Justitia Lecture, Monash University, 21 March 2001). The late Lord Bingham has also spoke of the “habit of reticence”: see Lord Bingham of Cornhill “A New Supreme Court for the United Kingdom” (The Constitution Unit Spring Lecture, 1 May 2002).

In 1995, the conference of Chief Justices of Asia and the Pacific adopted a joint Statement of Principles of the Independence of the Judiciary. The 'Beijing Statement' affirms in article 8 that:<sup>4</sup>

To the extent consistent with their duties as members of the judiciary, judges, like other citizens, are entitled to freedom of expression, belief, association and assembly.

Such affirmation of judicial free expression is consistent with the United Nations Basic Principles on the Independence of the Judiciary<sup>5</sup> and the Bangalore Principles of Judicial Conduct.<sup>6</sup> The Bangalore Principles provide:<sup>7</sup>

A judge, on appointment, does not surrender the rights to freedom of expression, association and assembly enjoyed by other members in the community, nor does the judge abandon any former political beliefs and cease having any interest in political issues. However, restraint is necessary to maintain public confidence in the impartiality and independence of the judiciary. In defining the appropriate degree of involvement of the judiciary in public debate, there are two fundamental considerations. The first is whether the judge's involvement could reasonably undermine confidence in his or her impartiality. The second is whether such involvement may unnecessarily expose the judge to political attacks or be inconsistent with the dignity of judicial office. If either is the case, the judge should avoid such involvement.

---

<sup>4</sup> LAWASIA *Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region* (adopted in its final form at the 7th Conference of the Chief Justices, Manila, August 1997).

<sup>5</sup> As endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985:

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.

<sup>6</sup> *The Bangalore Principles of Judicial Conduct* (2002) at [4.6]. As noted in the *Commentary* published by the United Nations Office on Drugs and Crime in September 2007, the *Bangalore Principles* "have increasingly been accepted by the different sectors of the global judiciary ... these principles give expression to the highest traditions relating to the judicial function as visualised in all cultures and legal systems."

<sup>7</sup> *Commentary on The Bangalore Principles of Judicial Conduct* at [134].

Guidelines in many jurisdictions give effect to these principles in different ways. In my jurisdiction, New Zealand, the Guidelines we have adopted attempt a balance between the two objectives of preserving the judge's freedom of speech and preserving judicial integrity.<sup>8</sup> Extra-judicial comments "which inform the public about the administration of justice generally" are not objectionable unless the judge expresses views which may be taken to pre-determine issues which may arise for judicial determination or unless the remarks cross into areas of political controversy.

Similarly, Australia's Guide to Judicial Conduct, published by the Australasian Institute of Judicial Administration, notes that:<sup>9</sup>

Appropriate judicial contribution to [public] consideration and debate is desirable. It may contribute to the public's understanding of the administration of justice and to public confidence in the judiciary. At the least, it may help to dispose of misunderstandings, and to correct false impressions.

The guidelines observe, however that "care should be exercised to avoid using the authority and status of the judicial office for purposes for which they were not conferred". They lists some relevant factors to be considered by judges, including the place of extra-judicial comment, the need to distinguish between discussion of legal principle and specific issues, and the importance of being cautious in expressing a personal view even in a private setting.<sup>10</sup>

The Indian judiciary observes a Restatement of Values of Judicial Life,<sup>11</sup> ratified and adopted in 1999. Article 8 states, in terms similar to the Australian and New Zealand guidelines:

A Judge shall not enter into public debate or express his views in public on political matters that are pending or are likely to arise for judicial determination.

In Pakistan, a Code of Conduct promulgated by the Judicial Council is more salutary.<sup>12</sup> Article 5 provides:

---

<sup>8</sup> At 5.6.1. (These are available online, at <http://www.courtsofnz.govt.nz/business/guidelines/guidelines-for-judicial-conduct>)

<sup>9</sup> The Australasian Institute of Judicial Administration Incorporated *Guide to Judicial Conduct* (2nd ed, Australasian Institute of Judicial Administration Incorporated, Melbourne, 2007) at 23.

<sup>10</sup> Ibid.

<sup>11</sup> *Restatement of Values of Judicial Life* (1999) [http://www.judicialreforms.org/files/restatement\\_of\\_values\\_jud\\_life.pdf](http://www.judicialreforms.org/files/restatement_of_values_jud_life.pdf).

Functioning as he does in full view of the public, a Judge gets thereby all the publicity that is good for him. He should not seek more. In particular, he should not engage in any public controversy, least of all on a political question, notwithstanding that it involves a question of law.

In Hong Kong, the Guide to Judicial Conduct preserves to judges freedom to participate in legal discourse except on controversial issues likely to arise in the courts.<sup>13</sup>

[72] There is no objection to judges contributing to legal and professional education such as by delivering lectures, teaching, participating in conferences and seminars, judging moots and acting as honorary examiners. Nor is there any objection to judges contributing to legal texts as authors, writers of forewords, editors and the like. On the contrary, such professional activities by judges are in the public interest and are to be encouraged. ...

[74] A judge should avoid expressing views on controversial legal issues which are likely to come before the courts in a way which may impair the judge's ability to sit.

Guidelines such as these do not provide a blueprint for the judge. They are a prompt to "judicial reticence". But the reticence they counsel comes to be applied in a very different world than existed when Viscount Kilmuir's rules were established. It is necessary to consider the modern context in which judges now operate and the expectations it places upon them.

### **The role and competencies of the judge**

Law is centrally concerned with argument. Those who practice as lawyers in the courts become accustomed to public reasoning. When lawyers become judges, their skills in argument are even more important in their new role. Judges do not deliver verdicts. Judicial reasons for reaching a particular result must be fully justified. If the arguments for judgment do not convince, the result is unlikely to survive appeal or

---

<sup>12</sup> Supreme Judicial Council *Code of Conduct for Judges of the Supreme Court and the High Courts* (2009) <http://www.supremecourt.gov.pk/web/page.asp?id=435>.

<sup>13</sup> Hong Kong Special Administration Region of China *Guide to Judicial Conduct* (October 2004).

reconsideration. So judges are usually formidable exponents of public reasoning.

As Neil McCormick<sup>14</sup> and Amartya Sen<sup>15</sup> have recognised, there is wider public benefit in this institutionalised form of discourse beyond the achievement of the particular result for which arguments are shaped. The late Peter Birks thought that the public arguments developed by judges are themselves important in achieving “equilibrium”<sup>16</sup> in today’s increasingly “flat, secular, plural, and sophisticated” democracies.<sup>17</sup> And Ronald Dworkin takes the view that judicial methodology (examining all sides of an issue) has particular appeal to modern culture, full of strictures and doubt.<sup>18</sup> A South African academic coined the term “culture of justification” to describe a change in how our societies operate.<sup>19</sup> This change is to be seen wherever power is exercised over others. It has led, for example in many jurisdictions to freedom of information entitlements about government, which has transformed the way governments operate.<sup>20</sup> And it is to be seen in requirements of disclosure by employers about information held about employees.<sup>21</sup> Such developments indicate contemporary community expectations about justification and the role of public argument.

Since the deliberative processes of the courts provide the best known model of public reasoning and are the forum in which claims of right under statements of right are publicly made, it is perhaps not surprising that legal process seems to be playing an increasing role in the public life of many jurisdictions. For many seeking change in our communities, law is “life blood” and is constantly under scrutiny.<sup>22</sup> In some cases the deliberative processes of court proceedings and the marshalling of the reasons of justice for one position or another may be critical in achieving the leap in insight that the unpopular and overlooked have just claims. In such cases, judgments may feed into the wider social and political

---

<sup>14</sup> Neil MacCormick “Beyond the Sovereign State” (1993) 56 MLR 1.

<sup>15</sup> Amartya Sen *The Idea of Justice* (Penguin Books Ltd, London, 2009) at 392–398.

<sup>16</sup> Peter Birks “Adjudication and interpretation in the common law: a century of change” (1994) LS 156 at 175.

<sup>17</sup> Peter Birks “The academic and the practitioner” (1998) LS 397 at 402.

<sup>18</sup> Ronald Dworkin “The Judge’s New Role: Should Personal Convictions Count?” (2003) JICJ 4 at 12.

<sup>19</sup> Etienne Mureinik “Emerging from Emergency: Human Rights in South Africa” (1994) 92 Mich L Rev 1977 at 1986.

<sup>20</sup> See, for example: Murray Gleeson “Outcome, Process and the Rule of Law” (2006) 65 AJPA 5 at 12.

<sup>21</sup> See, for example: Privacy Act 1993 (NZ), s 6.

<sup>22</sup> Peter Birks “The academic and the practitioner” (1998) LS 397 at 402.

debate. This is the notion of “dialogue” between the courts and the political branches most developed in Canada.<sup>23</sup>

To fulfil their roles under modern conditions, judges need insight into the values of their societies. Without such insight, they will not convince in their identification of what is in the public interest in a particular case, what is demonstrably justified in a free and democratic society, and what is “reasonable” or “fair”, the types of standards common in modern legislation.

These conditions, common to most of our societies, mean that today’s judges cannot help but be participants in wide public discussion in their judicial work. They may also be qualified through their work to participate in public discussion more generally.

In less conscientious times, judges had little inhibition about participating in the controversies of the day. There seems to have been greater readiness to draw a distinction between judicial conduct on the bench and conduct by judges off the bench. Until comparatively recently English judges, for example, seemed to have no qualms about corresponding with newspaper editors about current issues of the day.

Until the setting up of the United Kingdom Supreme Court, the Law Lords could participate in debates in the Upper House. It is only quite recently that they seem to have had any inhibition about hearing a case dealing with legislation upon which they had expressed opinions in their legislative capacity. When the vexed question of fox-hunting came before the House of Lords in its judicial capacity a few years ago,<sup>24</sup> Lord Scott did not sit because he had spoken against the legislation in the Parliamentary debates. But that was a modern response. In the past, it was generally thought that the judicial oath was sufficient to overcome earlier expressions of opinion on the matter in issue. Engagement in politically partisan activities, even in relation to the controversy in issue, was not formerly thought to overcome the expectation that, in judging, the judge would adhere to the judicial oath and bring an open mind.

Today, out of court utterances which give rise to a reasonable apprehension that the judge will not bring an open mind to judging will disqualify the judge. The scope of apprehended bias is not confined to public statements on matters of political controversy. It applies to any statement on a matter which comes before the court for determination. This has implications for judges who write scholarly articles and present

---

<sup>23</sup> See, e.g., Peter W Hogg and Allison A Bushell “The Charter of Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All)” 35 Osgoode Hall LJ 75.

<sup>24</sup> *Jackson v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262.

papers at conferences.<sup>25</sup> Fear of overstepping boundaries has meant that judges are not generally lively speakers even on purely legal topics. They have to be careful not to state any position too firmly. In addition to the dangers of being taxed with presumed bias because of earlier out of court expression of views which come for determination in an actual case, there are more general inhibitions on judicial contributions off the court: a scrupulousness not to use office to push personal barrows, a fear of stirring up criticism, a preference to stick to judicial function. David Pannick accurately says of most judicial speeches that they consist largely of “platitudes about the legal system, cosy recollections of lawyers and other judges ... and lengthy accounts of the otherwise forgotten disputes decided by the judge before his retirement”.<sup>26</sup> Such dullness can be expected to remain the norm.

I have indicated that in my view reticence is best policy, but I do not think it is desirable to be too black and white. It is necessary to remember that there are public benefits in permitting appropriate judicial contribution. Such benefits are the matter to which I now turn.

### **The public benefit in permitting extra-judicial comment**

Extra-judicial speaking has risks. If appropriate boundaries are maintained, there are however also public benefits. They include: enriching public discourse where judges have particular perspective which should be shared; promoting public confidence in the administration of justice through de-mystification of judges; and improving opportunities for judges to be engaged in and to know the communities they serve.

Judges may have important perspective which it is highly desirable to share. Very often, such perspective is sought by the Executive or by Law Reform agencies to assist them in promoting legislative change. If it is appropriate for such assistance to be given (and sometimes it is not), it should be publicly available. The Honourable Keith Mason, the former President of the New South Wales Court of Appeal, has spoken of the “significant contribution” made in Australia to the “market-place of ideas” by serving judges speaking or writing on a range of topics, including some of real controversy.<sup>27</sup> They include whether or not Australia should enact a Bill of Rights, policy relating to sentencing, drug control, and aspects of environmental law.

---

<sup>25</sup> See, for example, *Locabail (UK) Ltd v Bayfield Properties Ltd* [1999] EWCA Civ 3004, [2000] QB 451.

<sup>26</sup> David Pannick *Judges* (Oxford University Press, Oxford, 1988) at 171.

<sup>27</sup> Keith Mason “Should Judges Speak Out?” (JCA Colloquium, Uluru, 9 April 2001).



Some may look askance at direct involvement in matters of public debate, but very often apparently dry legal papers delivered to legal audiences will entail comparable engagement with matters of legal policy which may be politically contentious. Caution is required. The judge should always ask himself whether he is using his judicial status inappropriately or compromising the appearance of impartiality if a matter on point should arise for decision in the future. But modest and tentative expression of view and a willingness to admit contrary viewpoints (as is usual in extra-judicial writing or speaking on technical legal topics) is likely to enable the judge to make a contribution without compromising judicial function.

I do not think we should be too pessimistic about the ability of judges to stay within proper bounds. After all, judges are members of a “profession in which carefulness in speech of every type is a watchword”, in the words of Beverley Smith.<sup>28</sup> Such freedom to contribute is important on matters relating to the legal system, in respect of which judges have especial responsibility.

In my jurisdiction, for example, the role of the courts is not well understood. That is because our constitutional arrangements are themselves remarkably opaque. In such a system, the courts are vulnerable and so too, potentially, is the rule of law. No doubt for this reason, when I became Chief Justice, a former Prime Minister urged me to speak about the role of the judiciary on every possible occasion, because of his concern about the level of understanding about civics in our community. That is what I have tried to do in a great number of papers and talks delivered to farmers, justices of the peace, Rotarians, lawyers, and all-comers. Usually the topic is thought to be rather dull. But sometimes it engenders great excitement and suspicion of judicial aggrandisement. I do not think the fact that it can provoke controversy means that the subject can responsibly be avoided.

Extra-judicial speeches may also improve public confidence in and awareness of the judiciary through greater familiarity with the functions we discharge. It may be that the public is becoming more interested in judges. Such interest may explain the boom in academic scholarship on judicial biography<sup>29</sup> and the recent success of books by sitting or retired judges on the practice of judging.<sup>30</sup> Extra-judicial lectures, seminars, or

---

<sup>28</sup> Beverley Smith “Judicial Free Speech in Canada” (1996) 45 UNBLJ 161 at 162.

<sup>29</sup> See, e.g., the London School of Economics and Political Science Department of Law Legal Biography Project (which has a website, <http://www.lse.ac.uk/collections/law/projects/legalbiog/lbp.htm>). There is also work emerging out of the Australian National University, particularly the project, “Judicially Speaking: An Oral History of the High Court of Australia”, overseen by Dr Fiona Wheeler, Professor Michael Coper, and Professor John Williams.

<sup>30</sup> See, e.g., in the American context: Richard Posner *How Judges Think* (Harvard University Press, Cambridge, Mass., 2008); Stephen Breyer *Making Our*

addresses by judges may give members of the public a more rounded picture of judicial function.<sup>31</sup> The sight of judges engaging with the community may also promote the confidence that judges are fit to develop and apply the law to meet the needs of real people. It may rectify misconceptions about judges. As Lord Bingham put it in his essay on judicial ethics, there is “a faint hope that the more grotesque caricatures of the modern judiciary will lose credibility if the public generally has a better idea of what judges are actually like”.<sup>32</sup>

Extra-judicial engagement through speaking and writing may also assist judges in judging. The late Justice Sopinka pointed out that “total abstention from political discussion will transform judges into social eunuchs”,<sup>33</sup> and harm judges’ ability to discern the values of a community. Justice Margaret Wilson of the Supreme Court of Queensland has expressed a similar sentiment. In a speech to the Supreme and Federal Court Judges’ Conference in New Zealand, she said that “[a]s members of our communities we owe it to others to be active participants in those communities.”<sup>34</sup> Such engagement may assist in the contextual judging demanded by modern statutes, particularly statements of rights, with their expression of broad and overlapping values.

And, as recognised by some of the Ethical Guidelines I have mentioned, judges too have rights of free speech which should not be unreasonably restricted. If free speech enhances “self-determination or fulfilment”,<sup>35</sup> judges should not be excluded from such fulfilment.

---

*Democracy Work: A Judge’s View* (Alfred A Knopf, New York, 2010); and in New Zealand, E.W. Thomas *The Judicial Process: Realism, Pragmatism, Practical Reasoning* (Cambridge University Press, Cambridge, 2010).

<sup>31</sup> Dworkin discusses public misunderstanding of the courts in strong terms. He writes: “No department of state is more important than our courts, and none is so thoroughly misunderstood by the governed. Most people have fairly clear opinions about how congressmen or prime ministers or presidents or foreign secretaries should carry out their duties, and shrewd opinions about how most of these officials actually behave. But popular opinion about judges and judging is a sad affair of empty slogans, and I include the opinions of many working lawyers and judges when they are writing or talking about what they do.” See Ronald Dworkin *Law’s Empire* (Hart Publishing, Oxford, 1986) at 11.

<sup>32</sup> Tom Bingham *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, Oxford, 2000) at 78.

<sup>33</sup> John Sopinka “Must a Judge be a Monk – Revisited” (1996) 45 UNBLJ 167 at 170.

<sup>34</sup> Justice Margaret Wilson “Extra judicial activities while a serving judge” (Supreme & Federal Court Judges’ Conference, Wellington, New Zealand, 22–26 January 2011).

<sup>35</sup> Grant Hammond “Judges and Free Speech in New Zealand” (2010) Courts of New Zealand/Te Kōti Teitei o Aotearoa Website < <http://courtsofnz.govt.nz>>

It is the case that where judges enter areas of political controversy, there may be adverse reaction that the judge upon which the judge is not well-placed to respond. I do not think too much should be built upon this concern. It arises equally in relation to judgments that upset powerful actors. Lord Denning said of judgments that they have to be their own vindication.<sup>36</sup> And it seems to me that the same is true of extra-judicial statements. Judges cannot expect to be able to carry on sustained public debates. So when entering such territory, first shots had better be best shots. And thereafter a dignified silence may be best policy unless correcting factual inaccuracies about what the judge has said. It may also be best policy to leave matters of general concern to the judiciary to be ventilated by the Chief Justice. That is not of course to dampen controversy, as is illustrated by the recent exchanges in the United Kingdom over the funding of the Supreme Court.

In February of this year Lord Phillips of Worth Matravers, President of the United Kingdom Supreme Court, spoke out about the constitutional implications of funding for the United Kingdom Supreme Court being dependent on the Ministry of Justice. Lord Phillips said that “our present funding arrangements do not satisfactorily guarantee our institutional independence”.<sup>37</sup> The Supreme Court is becoming a mere “outlying part” of the Ministry of Justice’s “empire”, Lord Phillips added.<sup>38</sup> Those remarks were met with a sharp response from Justice Secretary Kenneth Clarke. Clarke said he was “rather surprised” by the comments of Lord Phillips.<sup>39</sup> He said, “the independence of the court ... doesn’t extend to telling me how much public money they are going to spend without question.”<sup>40</sup> He went on: “He can order me through his court to do whatever he likes. He can’t tell me that he wants to be free of cuts.”<sup>41</sup> This exchange highlights the difficulties. But it also illustrates the responsibility to voice constitutional concerns though extra-judicial statements which cannot be avoided because they trench on the different responsibilities of the Executive.

## Conclusion

---

<sup>36</sup> *R v Commissioner of Police of the Metropolis, Ex parte Blackburn (No 2)* [1968] 2 QB 150 at 155. Lord Denning’s words were: “We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.”

<sup>37</sup> Lord Phillips of Worth Matravers “Judicial Independence and Accountability: A View from the UK Supreme Court” (Judicial Independence Research Project Launch, University College London, 8 February 2011).

<sup>38</sup> *Ibid.*

<sup>39</sup> Hélène Mulholland “Kenneth Clarke rejects claim of threat to Supreme Court independence” *The Guardian* (United Kingdom, 9 February 2011).

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

Attitudes about extra-judicial speech have changed. In 1955 Lord Kilmuir thought it would be “inappropriate” for the “judiciary to be associated with any series of talks or anything which could be fairly interpreted as entertainment”.<sup>42</sup> Engagement through modern forms of communication with our societies cannot be as readily dismissed as “entertainment” today. Most courts now communicate through websites or written reports. And although few judges have been prepared to follow the example of Chief Justice Doyle of South Australia and participate in talk-back radio, many of us have been prepared to make ourselves available for radio, television, and print interviews on occasion. While there is rightly caution, and many judges prefer a more austere profile, judges today are generally less fearful of associating themselves with “any series of talks” or “anything which could be fairly interpreted as entertainment”.

The change of attitude is marked in the United Kingdom. The Kilmuir Rules were relaxed in 1987.<sup>43</sup> In early 2011 Lord Phillips, Lord Hope, Lady Hale, and Lord Kerr of the United Kingdom Supreme Court were interviewed in a documentary, *The Highest Court in the Land: Justice Makers*, on the behind-the-scenes lives of judges of that Court. Similar profiles have been undertaken in Australian jurisdictions.

If judicial lock-jaw is no longer tenable, as I believe to be the case, locking horns with other branches of government and other members of the community is still to be avoided. The middle way of reticence while willing to engage in explaining judicial function and drawing on judicial experience is likely to best serve the public good.

\*\*\*\*\*

---

<sup>42</sup> Pannick, above n 26, at 174.

<sup>43</sup> The Rt Hon the Lord Mackay of Clashfern *The Administration of Justice* (Sweet & Maxwell, London, 1994) at 26–27.