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The Extrajudicial Voice

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Abstract

Judges communicate outside of the courtroom on a regular basis. They give speeches at universities and to societies; appear before select committees; write for a range of publications; and engage in both media and outreach activities. Existing literature has charted the value and perils of such extrajudicial communication. This paper contributes an explanation of what motivates judges towards such communication, and what shapes their discourse. The work draws on 13 semi-structured interviews with senior serving and recently retired judges, along with an extensive range of examples of judicial speech beyond the bench. It argues that extrajudicial communication is shaped by a shared conception amongst the judicial community of what is appropriate. This conception of propriety is principally motivated by a communal pursuit of sustaining public confidence in the judicial office. The conception also informs the limits of appropriate discourse and establishes the ramifications for breach.

Keywords: judges; public law; judicial independence; extrajudicial discourse; communication; interpretive communities

Introduction

In the UK constitutional settlement, Parliament and the Executive derive legitimacy, principally, from their public communication. It is through open political discourse that governments rise and fall, that public opinion is swayed, and that policy battles are resolved. The same constitutional settlement prizes judicial independence, isolating the courts from the influence of public or political opinion. In this system, the principal source of legitimacy afforded to the judiciary is their method: their mastery of the art of law, ability to solve complex problems and to bring finality to contentious disputes. But placing such weight on the magic of the law and adjudicators' ability to resolve the 'strange compound which is brewed daily in the caldron of the courts', can result in a gap in public understanding of who judges are and what it is they actually do.[1] As Riddell notes, 'a society needs demonstrably to view the position with high regard, understanding better than we do currently the judicial process'.[2] One solution is for judges to step beyond the bench and pull back the curtain by communicating directly with the public about their work and processes.[3]

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[1]B Cardozo *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) p 9.

[2]P Riddell and D Neuberger *The Power of Judges* (London: Haus Publishing, 2018) p 13.

[3]See, inter alia, D Pannick *Judges* (Oxford: Oxford University Press, 1987) p 175; L Dubeck 'Understanding "judicial lockjaw": the debate over extrajudicial activity' (2007) 82 New York University Law Review 569; M McMurdo 'Should judges speak out' (JCA Colloquium, Uluru, 9 April 2001) available at https://www.ajoa.asn.au/wp-content/uploads/2013/11/mcmurdo.pdf.

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And yet, until recent decades the tendency in the British tradition has been a commitment to judicial silence.[4] The system had mirrored Francis Bacon's instructions that 'Judges ought to be more learned, than witty, more reverend, than plausible, and more advised, than confident.'[5] That culture was characterised in Lord Kilmuir's rules against judicial public engagement (1954–1987), founded on the assumption that 'so long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable'.[6] This broad, inter-generational, debate over whether judges speak too little or too much has also been well rehearsed in other jurisdictions.[7]

Our contribution to the debate about whether judges *should* speak extrajudicially is an exploration of *why* they speak and what shapes that communication. As O'Brien and Yong note, the primary basis for regulating judges – in any respect – has been the 'trust in their capacity to understand the conventions and to do the right thing, reinforced by social bonds amongst judges and lawyers'.[8] This underlying social basis tends to be treated as an elusive concept; a realm of expectations which cannot be coherently explained and so is best left untouched. It is framed in a variety of ways: as conventions, practices, cultures, internal behaviour, and personal expectations, but rarely theorised. This paper addresses that gap in the UK context. In doing so, it connects to ongoing work in other common law jurisdictions where there is a developing body of scholarship on the evolving practice of extrajudicial discourse.[9]

For the study we conducted 13 semi-structured interviews with judges. Interview questions were directed at ascertaining judicial views on the purpose, propriety, and perceived value of extrajudicial communication. Our sample was restricted to senior judges, as our preliminary research indicated that they were far more likely to engage in extrajudicial communication. We were also mindful that senior judges were likely to influence the culture of junior colleagues. In order to inform a representative understanding, our selection included male and female judges, and judges from across England and Wales, Scotland, and Northern Ireland. We were also mindful that interviews themselves are a form of extrajudicial engagement and that responses may have been restricted had we only interviewed serving judges.[10] Our sample therefore includes recently retired judges.[11] While we have focused on judges sitting at the Court of Appeal level and above, we have drawn out examples of practice from lower courts where possible. Our initial research demonstrated a considerable variance in the practice of extrajudicial communication across senior judges, which led us to conduct interviews on the presumption of non-anonymity. This would enable us to situate published extrajudicial work by discussion with the author and to shed light on the judicial insight of their own extrajudicial practice.

[4]AW Bradley 'Judges and the media – the Kilmuir rules' [1986] Public Law 383.

[5]J Spedding et al (eds) *Works of Francis Bacon*, vol VI (New York: Hurd and Houghton, 1861 reprint) p 3.

[6]Letter from Lord Kilmuir to Sir Ian Jacob KBE of 12 December 1955, reprinted in Bradley, above n 4, 384–385. See further G Rubin 'Judicial free speech versus judicial neutrality in mid-twentieth century England: the last hurrah for the ancien regime?' (2009) 27 Law and History Review 373.

[7]eg R Kennedy 'The judiciary in political debates: the sound of silence? (2011) 29 Irish Law Times 198; S Bartie and J Gava 'Some problems with extrajudicial writing' (2012) 34 Sydney Law Review 637; McMurdo, above n 3; HP Lee *Judiciaries in Comparative Perspective* (Cambridge: Cambridge University Press, 2011). Note that there are clear differences in respect of the propriety of extrajudicial comment across the common law world.

[8]P O'Brien and B Yong *Work in Judicial Retirement: A Policy Report* (June 2023) p 6.

[9]See eg G Appleby and S Le Mire 'Ethical infrastructure for a modern judiciary' (2019) 47 Federal Law Review 335; Bartie and Gava, above n 7; C Schmidt 'Beyond the opinion: supreme court justices and extrajudicial speech' (2013) 88 Chicago-Kent Law Review 487; WG Ross 'Extrajudicial speech: charting the boundaries of propriety' (1989) 1 Georgetown Journal of Legal Ethics 589.

[10]Eg A Paterson *Final Judgment: The Last Law Lords and the Supreme Court* (Oxford: Hart Publishing, 2013); P Darbyshire *Sitting in Judgement: The Working Lives of Judges* (Oxford: Hart Publishing, 2011); H Tyrrell *UK Human Rights Law and the Influence of Foreign Judgments* (Oxford: Hart Publishing, 2018).

[11]Our sample for the project was as follows: Serving Judges: Lord Reed, Lord Briggs, Lord Burrows, Lady Chief Justice Keegan and a Senior Scottish Judge who – pursuant to Scottish Courts rules on engagement with academic research – shall remain anonymous. Retired Judges: Lady Hale, Lord Sumption, Lord Dyson, Lord Hope, Sir Declan Morgan, Lord Brown, Lord Collins and Baroness Hallett. We were fortunate that all but one of the judges approached (at the UKSC, not named here) agreed to be interviewed.

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Nevertheless, to encourage candid discussion, we offered all judges the option to remain anonymous in respect of some, or all, of their contributions. This option was taken up by some judges.

Drawing on that interview material, as well as evidence from extrajudicial outputs in recent decades, we contend that the extrajudicial voice is shaped principally by a communal understanding, amongst senior judges, of valid practice within their role. While formal rules enable and disable judges in respect of extrajudicial engagement (eg relating to bias, behaviour, and judicial conduct), it is a shared – informal – conception of appropriate discourse in judicial office which predominantly shapes the nature, content, and form of extrajudicial speech. Thus, although there is a direct relationship between this conception and the textual enablers and disablers of judicial speech (unsurprisingly, judges view adherence to documented standards as indicative of appropriate judicial conduct), it is the amorphous personal constraints felt as members of the community that are more comprehensive. In fact, it could be said that judicial conceptions of appropriate conduct have crystallised into conduct manuals, rather than the other way around.[12] These informal rules or conventions also reach into areas uncharted by official directions, as is made more obvious by their lingering influence over the behaviour and expectations of retired judges.

We start by demonstrating how the patchwork of existing rules alone is insufficient to explain what shapes extrajudicial discourse. Drawing on Stanley Fish's work on interpretive communities, we position the judiciary as a community of individual personalities bonded together not merely by their titles and positions, but by a shared conception of appropriate behaviour in judicial office.[13] Fish's work is instructive as he considered a defining characteristic of such communities to be their implicit understanding of what was appropriate and inappropriate practice. Drawing from both interview responses and examples of extrajudicial communication, we outline appropriate discourse as that which serves educational, public engagement, or constitutional functions. Each of these illustrate that a broad motivation for extrajudicial discourse is to enhance the legitimacy of the judiciary through sustaining public confidence. We then turn to the parameters of appropriate practice, what Fish describes as the 'bounded argument space'.[14] We identify how acutely aware senior judges, both serving and retired, are of 'the line'. Rather than merely charting the topics considered off-limits to the judiciary, our focus is on how these parameters are constructed and infringed through social practices. Thus, we identify how these limits are established by improper practice and how such transgressions are sanctioned through reputational damage. We further outline how repeat offenders may even see themselves to be disconnected from judicial office, and how the lines of propriety are susceptible to change over time. Our contribution is therefore a theory of judicial practice in respect of the extrajudicial voice.

1. A patchwork of enablers and disablers

A patchwork of formal provisions offers a partial explanation of both why judges speak outside of the courtroom, and what shapes that speech. The point of departure is that judges are entitled to speak. Their freedom of expression is affirmed in a host of international human rights treaties as well as in international agreements specifically pertaining to the judiciary.[15] The Basic Principles on the Independence of the Judiciary, the Bangalore Principles of Judicial Conduct and the Bologna Milano Code of Judicial Ethics all recognise that, like any other citizen, judges enjoy freedom of expression.[16]

[12]It is worth bearing in mind that judicial conduct guides are a relatively recent innovation, first adopted in England and Wales in 2003; at the UK Supreme Court in 2009; the Statement of Principles of Judicial Ethics for the Scottish Judiciary is from 2010 and in Northern Ireland from 2007.

[13]S Fish *There's No Such Thing as Free Speech* (Oxford: Oxford University Press, 1994).

[14]S Fish *Winning Arguments: What Works and Doesn't Work in Politics, the Bedroom, the Courtroom and the Classroom* (New York: Harper, 2016) p 72.

[15]See inter alia Art 10 of the European Convention on Human Rights 1950 and *Perna v Italy* (2004) 39 EHRR 563; Art 19 International Covenant on Civil and Political Rights 1966 and Art 19 Universal Declaration on Human Rights.

[16]Bangalore Principles of Judicial Conduct, adopted 1 June 2002, [4.6]; Basic Principles on the Independence of the Judiciary, adopted 6 September 1986, [2]; Bologna Milano Code of Judicial Ethics, approved June 2015, [5.2.6].

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In particular, a judge may '[w]rite, lecture, teach and participate in activities' relating to law and legal affairs, as well as appear at public hearings.[17]

For some judicial office holders, speaking is not merely a right but an expectation. In England and Wales, there is a practice that senior judges will attend when invited to Parliamentary Select Committees.[18] There is an annual expectation that the Lord Chief Justice will sit before the Commons Justice Committee and that the President and Deputy President of the Supreme Court, will attend the Lords Constitution Committee.[19] The expectation of public communication is similarly embedded in the role descriptor for appointment to the UK Supreme Court which includes promoting understanding of the justice system and Court 'through lectures, visits to schools and universities'.[20] The selection criteria for appointment includes an '[a]bility and willingness to engage in the wider representational and leadership role of a Supreme Court Justice, including … delivering lectures, participating in conferences, and talking to students and other groups'.[21] In the latest appointment round for the Chief Justice of England and Wales, the appointee is described as someone who 'engages directly with the media to ensure that the judicial position is well understood, speaks in public on matters relating to the administration of justice, and promotes the work of the judiciary through outreach into communities and schools'.[22] Unsurprisingly, then, most of the current and retired judges told us that responding positively to invitations and requests for extrajudicial lectures or similar was 'the right thing to do'.[23] It is something that judges in top courts are 'expected to do',[24] and an 'important aspect of the role'.[25]

Judges also have the right not to say anything at all. While expected, judicial participation at select committees and parliamentary hearings remains voluntary. Judges are not compelled to attend, or to answer particular questions, and the relevant code even outlines the process for when agreement cannot be reached on attendance between the respective judge and panel.[26] Even in respect of the Supreme Court Justices, Lord Reed explained that while public speech was 'an expectation of the job' it was 'not a formal requirement that you could be disciplined for' not fulfilling.[27] Indeed, there are Supreme Court justices in recent years who have made few (published) public utterances.[28]

Formal disablers are similarly incomplete in explaining extrajudicial speech, leaving much to individual interpretation. Freedoms pertaining to expression are not absolute and the judicial role invites further qualification than other professions. The right is balanced by the need to maintain 'the authority and impartiality of the judiciary'.[29] Respect must be given to the 'special duties and responsibilities'[30] that come with a judicial role so as to 'preserve the dignity of the judicial office and the

[17]Bangalore Principles, ibid, [4.11].

[18]On the conduct of judges before such committees, see Judicial Executive Board 'Guidance to Judges on appearances before select committees' (October 2012). Note that the LCJ of England and Wales has a statutory responsibility to represent the views of the judiciary to various audiences. Constitutional Reform Act 2005, s 7(2)(a). A similar provision exists for the LCJ of Northern Ireland: s 11(1)(b).

[19]R Hazel and P O'Brien 'Meaningful dialogue: judicial engagement with parliamentary committees at Westminster' [2016] Public Law 54 at 66.

[20]'Information Pack – Vacancies for appointment as a Justice of the Supreme Court' p 4, available at https://www.supremecourt.uk/docs/information-pack-for-justices-role-2019.pdf.

[21]Ibid 6.

[22]'Lord Chief Justice Candidate Information Pack' available at https://judicialappointments.gov.uk/lord-chancellor-asks-jac-to-recommend-new-lord-chief-justice/.

[23]Lord Dyson interview with authors. Confirmed also by Sir Declan Morgan and anonymous judge.

[24]Lady Hale interview with authors.

[25]Lord Reed interview with authors.

[26]Judicial Executive Board, above n 18, at [24]–[26].

[27]Lord Reed interview with authors.

[28]Eg Lord Saville (2009–2010), Lord Collins (2009–2011) and Lord Hughes (2013–2018) did not provide public speeches which were recorded on the Supreme Court website. Although note that their extrajudicial contributions were evident elsewhere, eg Lord Saville *Report of the Bloody Sunday Inquiry* (2010) HC29-I.

[29]Art 10(2) European Convention on Human Rights.

[30]Art 19(3) International Covenant on Civil and Political Rights.

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impartiality and independence of the judiciary'.[31] As former President of the Supreme Court of Israel, Barak, put it: 'judging is a way of life that involves some degree of … restriction on the freedom of expression'.[32] But the extent, depth and scope of that restriction is unclear.[33] Interpretation is required of these terms and phrases in order to develop coherent guidelines but, even then, there is considerable disagreement.

Greater detail is provided in judicial conduct guides. These guidelines are generally permissive in respect of extrajudicial discourse. Prior participation in public debate is noted as 'not normally … cause for a Justice not to sit'.[34] Conduct guides codify conventions on judicial silence in respect of government policy, public appointments and the merits of individual cases.[35] They encourage caution, circumspection, and conversations with senior judges when individual judges are concerned about propriety.[36] Nonetheless, these guides principally shift the onus for interpreting the limits of extrajudicial speech to the individual judge. They note that 'primary responsibility' is with 'the individual Justice', acknowledging for Supreme Court Justices that there will exist 'a range of reasonably held opinions on some points'.[37] The Courts and Tribunals Judiciary 'Guide to Judicial Conduct' also disclaims that it is intended 'to offer assistance' with respect to judicial conduct but that responsibility ultimately 'rests with each individual judicial office holder'.[38] The Guide is therefore 'not a code' but 'a set of core principles which will help judges reach their own decisions',[39] and a 'highly ambiguous' one at that.[40] As Lord Hope remarked in the Holdsworth address, trying to box judges in by a precise set of rules 'would tend to impede the freedom of action which they must enjoy in the public interest'.[41] The buck ultimately stops with the individual judge as '[c]ircumstances will vary infinitely and guidelines can do no more than seek to assist judicial office holders in reaching their own decisions'.[42]

The 'bite' to formal provisions is that judges could be sanctioned, or even sacked, for their discourse.[43] Such sanctions are, however, so exceptional that they are fairly weak as a constraining factor of judicial speech.[44] Lord Hope describes them as a 'sanction of last resort'.[45] The examples where transgressions are penalised are rare. In 2022 a Justice of the Peace was given a formal warning for commenting in a radio interview on Covid-rule breaches by the (then) Prime Minister and Chancellor.[46] In 2013, Mr Justice Coleridge was disciplined for criticising the government's policy on same-sex marriage in a letter to *The Times*.[47] He subsequently resigned. When sanctions are meted out, it is often for an indiscretion which would result in some form of sanction in almost any profession. For instance, a Recorder was struck off in 2017 for posting abusive comments on a

[31]Bangalore, above n 16, at [4.6].

[32]A Barak *The Judge in a Democracy* (Princeton: Princeton University Press, 2006) p 110.

[33]*Hansard* HC Deb, 6 December 1977, col 1305 (Mr Millan): 'This is no doubt an area in which it is extremely difficult to lay down hard and fast rules.' See also K Ewing 'Judges and free speech in the United Kingdom' in Lee, above n 7, p 242.

[34]United Kingdom Supreme Court 'Guide to Judicial Conduct' (2019) at [3.14].

[35]Courts and Tribunals Judiciary 'Guide to Judicial Conduct' (2023) p 16.

[36]Ibid, p 17 and Supreme Court, above n 34, at [1.4].

[37]Supreme Court, above n 34, at [1.4].

[38]Courts and Tribunals Judiciary, above n 35, p 5.

[39]Ibid, p 4. See also Lord Hope 'What happens when the judge speaks out?' (The Holdsworth Address 2009–10) p 4.

[40]Ewing above n 33, p 242.

[41]Hope, above n 39, p 4.

[42]Courts and Tribunals Judiciary, above n 35, p 9; Supreme Court, above n 34, at [3.8].

[43]Lord Carnwath 'Discipline and removal of senior judges' (Commonwealth Magistrates' and Judges' Conference, Zambia, 9 September 2014). See also Constitutional Reform Act 2005, s 33 and s 108.

[44]See case of Sheriff Thomas discussed by Ewing, above n 33, p 250.

[45]Hope, above n 39, p 16.

[46]Judicial Conduct Investigations Office 'Statement Judicial Conduct Investigations Office: Colin Adams JP, JCIO3422' (30 March 2023).

[47]D Leppard 'Senior judge attacks Chief Justice' (*The Times*, 19 May 2014).

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newspaper website about readers who had questioned one of his verdicts.[48] Another judge was struck off in 2021 for posting and sharing 'inappropriately provocative and racist' content on social media.[49]

The rules on bias are a more obvious constraint. Several of the interviewed judges noted that having to recuse themselves from a case, particularly one in an area which they were interested, would constrain their discourse. Lord Burrows remarked that 'you have to be careful what one writes and give talks about because the last thing I want to do when a case comes up in an area I am interested in is to say, I'm going have to recuse myself'.[50] The reigning authority on bias is the case of *Locobail*,[51] concerning a series of circumstances in which the applicants had complained of potential bias from the sitting judge. In one of these, *Timmins v Gormely*, a recorder had sat in a case concerning the quantum of damages for a personal injury. The recorder was an experienced member of the Bar whose publications were sometimes articulated in an intemperate tone, demonstrating sympathy for claimants in obtaining damages from insurers.[52] Although noting that 'extra-curricular comment in textbooks and articles was not incompatible with the discharge of judicial functions and would not ordinarily of itself give rise to a real danger of bias', the tone adopted in the judge's extrajudicial discourse had on this occasion given rise to a reasonable apprehension of bias and a retrial was ordered.[53]

The significance of tone was also decisive in the contemporaneous Scottish case of *Hoekstra (No 2)*.[54] Here a group of applicants who had alleged violations of the European Convention on Human Rights 1950 in their detention complained that the lead judge in their application, Lord McCluskey, could not be regarded as impartial. Lord McCluskey had long-stated publicly his concerns over the incorporation of the ECHR into domestic law, including in the Reith Lectures of 1986.[55] In this case the problematic comments were a more recent series of publications in *Scotland on Sunday*, where he had described incorporation as a 'Trojan Horse' and repeated a claim that it would present 'a field day for crackpots, a pain in the neck for judges and legislators and a goldmine for lawyers'.[56] The Court held this had given rise to a reasonable apprehension of bias in respect of implementing the law. Again, a distinction was drawn, as the court noted that it was not the extrajudicial publications themselves, but 'the nature and tone of the language used' that gave rise to a legitimate apprehension that he could not apply that particular branch of the law impartially.[57] Thus, as Ewing notes, it is not so much 'a rule against bias or partiality, but a rule against misjudgement in the forceful expression of views'.[58]

In summary, as Ewing continues 'in the British system there does not appear to be any significant [formal] restraint' on extrajudicial discourse.[59] International provisions advancing and qualifying their right to speak are so vague and amorphous as to require considerable interpretation. Judicial conduct guides are considerably clearer, but ultimately position responsibility on the individual judge. Sanctions imposed for breach are rare, and the rule against bias – while clearly influential on the judicial mind – is more pointedly a rule on the extrajudicial tone. A considerable grey area is left.[60] Judges

[48]D Gayle 'Judge says his sacking for posting abusive comments was unfair' (*The Guardian*, 13 April 2017). Others have been reprimanded for 'ill-judged' remarks online. Judicial Conduct Investigations Office 'Statement Judicial Conduct Investigations Office: Louise Cook JP 05/22' (17 June 2022).

[49]Judicial Conduct Investigations Office 'Statement Judicial Conduct Investigations Office: Eric Murphy JP 07/21' (15 March 2021).

[50]Lord Burrows interview with authors. Also confirmed by Lord Brown. See also Lord Woolf 'Should the media and judiciary be on speaking terms?' (2003) 38 Irish Jurist 25 at 30.

[51]*Locobail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451.

[52]Ibid, at 451–452.

[53]Ibid, at 454. Supreme Court, above n 34, at [3.14].

[54]*Hoekstra v HM Advocate (No 2)* 2000 SCCR 367.

[55]JH McCluskey *Law, Justice and Democracy* (London: Sweet & Maxwell, 1987).

[56]J McCluskey 'The law laid bare: part 1' (*Scotland on Sunday*, 6 February 2000).

[57]*Hoekstra*, above n 54, at [23].

[58]Ewing, above n 33, p 251.

[59]Ibid, p 250.

[60]Ibid, p 242.

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walk a 'tightrope' when they enter the public domain,[61] and the terrain is particularly contested at the 'margins', where different reasonable opinions may be held.[62] Ultimately '[t]here is no easy manner in which judges may assess the propriety of any particular form of extrajudicial speech'.[63] Despite all of this, judges generally do get it right. The dearth of examples of judges overstepping the boundaries is a testament to this but across our interviews, too, respondents noted that their colleagues tended to stay on the right side of the line. Lord Sumption said he could not think of a single instance of a senior judge overstepping the limits while in office.[64] One judge felt most got it right;[65] another estimated about 95% did.[66] Our contention is that the judges 'get it right' because they are indeed constrained, but that the constraint is neither formal nor tangible – it is something more implicit.

2. The judicial community

Beyond formal enablers and disablers, extrajudicial discourse is principally provoked and shaped by an intrinsic communal appreciation of the appropriate behaviour for judicial office. Aspects of Stanley Fish's work on interpretive communities provide explanatory power to this. Fish was a literary theorist who sought to explain how disparate groups of individuals more or less rendered the same meaning to the same text. His explanation was that by working together towards the same 'purposive enterprise', the individuals formed a 'common understanding of what constitutes valid practice' in interpretation.[67] Thus, it was not the individual characteristics, homogeneity or otherwise, of the readers that rendered agreement. Nor was it the clarity, determinacy, or other properties of the text. Instead, it was a shared conception of the appropriate practice, in this case, of interpretation. It is this shared understanding which 'disciplines and channels' behaviour.[68] For us, Fish's observations are more useful in respect of the shared assumption of what is valid practice than in respect of textual definitions.[69] Nonetheless they provide an explanation of how such individualistic characters as senior judges are, can exhibit the same assumptions of valid practice in extrajudicial communication, without having rigidly formal textual guides to aid them.[70]

Fish's theory was that interpretive communities arose when individuals were so deeply inside a practice that they adhered to its 'norms, standards, definitions, routines, and understood goals' unconsciously, or without discussion.[71] Members of the community are so embedded within it that they 'see with its eyes and walk in its ways without having to think about it'.[72] These implicit drivers were noted throughout our interviews. Lord Dyson was particularly reflective of this approach, remarking on the instances when he accepted invitations to speak: 'I never really

[61] J Williams 'Judges' freedom of speech: Australia' in Lee, above n 7, p 154.

[62] Ibid, p 168.

[63] WG Ross 'Extrajudicial speech: charting the boundaries of propriety' (1989) 1 Georgetown Journal of Legal Ethics 589 at 641–642. See also Hope, above n 39, p 3; S Shetreet and S Turenne *Judges on Trial: The Independence and Accountability of the English Judiciary* (Cambridge: Cambridge University Press, 2014) p 364.

[64] Lord Sumption interview with authors.

[65] Anonymous interview with authors.

[66] Anonymous interview with authors.

[67] J D'Aspermont 'Professionalisation of international law' in J D'Aspermont et al *International Law as a Profession* (Cambridge: Cambridge University Press, 2017) p 29.

[68] M Waibel 'Interpretive communities in international law' in A Bianchi et al (eds) *Interpretation in International Law* (Oxford: Oxford University Press, 2015) p 150.

[69] On Fish's role in legal interpretation see D Kenny 'The game goes on: why legal theorists can never admit that Stanley Fish is right' in T Bustamante and M Martin (eds) *New Essays on the Fish-Dworkin Debate* (Oxford: Hart Publishing, 2023).

[70] On the individuality of judges see inter alia J Lee 'The judicial individuality of Lord Sumption' (2017) 40(2) UNSW Law Journal 862; R Cahill-O'Callaghan *Values in the Supreme Court: Decisions, Division and Diversity* (Oxford: Hart Publishing, 2020); B Dickson and C McCormick 'The development of Lord Kerr's judicial mind' in B Dickson and C McCormick (eds) *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore* (Oxford: Hart Publishing, 2021).

[71] S Fish 'Fish v. Fiss' (1984) 36(6) Stanford Law Review 1325 at 1332.

[72] Fish, above n 14, p 160. On the UK Supreme Court see B Dickson *Human Rights and the United Kingdom Supreme Court* (Oxford: Oxford University Press, 2013) pp 11–12.

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stopped to think much as to why I was accepting, it just seemed the right thing to do'.[73] On the parameters of such discourse he continued: 'you just innately know what you probably should do and what you probably shouldn't do'.[74] Lord Burrows similarly explained that 'judges have not traditionally analysed what they are actually doing. They just sort of do it intuitively'.[75] Different judges have given varying definitions to these intrinsic rules. For Lord Briggs they are 'essentially an aspect of proper judicial conduct'.[76] Lord Burrows suggested that it was 'the prevailing culture within the court … an internal convention'.[77] Another judge referred to them as an 'internal ethic'.[78] Rather than textual coherency and determinacy, it is something deeply implicit that shapes extrajudicial discourse.

For Fish, the interpretive community is constituted into such a subconscious state through 'a mode of instruction that has been indirect'.[79] Express training is not required. As much was recounted by our interviewees. While a number of judges referred to media training, formal training on the content, style or tone of extrajudicial comment appears historically to have been minimal.[80] Lord Dyson commented that 'at no stage of my judicial career was I given any advice or guidance as to how to deal with these things, what were the dos and the don'ts'.[81] Lord Hope responded that there 'was nobody to train us about this at that time'[82] and Lord Sumption was 'not sure who could train [judges] to better effect' than their participation in the legal system; 'judges only get to higher courts after considerable experience in deciding cases, or participating in them, in the forensic system. And that is the only training that they need.'[83]

Rather than through formal training, then, the community is constituted through a matter of intense cultural conditioning.[84] For British judges this begins largely, although not exclusively, with their practice at the Bar and is traced through judicial appointments. Again, Lord Dyson articulated this the clearest: 'you sort of pick up instinctively like so much at the Bar and on the Bench about how to behave. It's very odd isn't it? How you just know what to do [and] what not to do'.[85] Lord Hope again characterised this approach, noting that having come from being counsel, judges 'are well aware of the rules just by understanding and working within the system'.[86] Behaviour is then adapted from following the example of others within the legal profession and integrated into the pre-existing culture of this community.

This cultural conditioning is also drawn from the context within which the community operates. Demonstrating that the knowledge of the community lies not only with the judiciary, some judges referred to the staff around them who understood the practices relevant to the discourse.[87] And an expectation of this is made more obvious by the fact that judges often work on extrajudicial outputs

[73]Lord Dyson interview with authors.
[74]Ibid.
[75]Lord Burrows interview with authors.
[76]Lord Briggs interview with authors.
[77]Lord Burrows interview with authors.
[78]Anonymous interview with authors.
[79]Fish, above n 13, p 5.
[80]Confirmed by Sir Declan Morgan and anonymous judge, interviews with authors. See also J Dyson *A Judge's Journey* (Oxford: Hart Publishing, 2019) p 111. Note that the most recent Judicial Conduct Guide indicates 'A number of judges have received training so that an informed judicial perspective can be given on topics when appropriate and beneficial to do so': Courts and Tribunals Judiciary, above n 35, p 16.
[81]Lord Dyson interview with authors.
[82]Lord Hope interview with authors.
[83]Lord Sumption interview with authors.
[84]Fish, above n 13, p 5.
[85]Lord Dyson interview with authors.
[86]Lord Hope interview with authors.
[87]Confirmed by Keegan LCJ; Sir Declan Morgan; Lord Dyson.

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with support from judicial assistants and secretaries.[88] Indeed, in Australia there are examples of judges co-authoring with associates and judicial assistants.[89]

The communities' communal understanding is implicitly understood by its members. This is reflected in the fact that although many judges may run a speech by colleagues on the Court in advance,[90] the aim is consultation within the community rather than any acquisition of permission. Sir Declan Morgan noted that 'anybody who is making a speech is going to be sensible enough, usually, to come and say "look I'm going to say this" and they'll talk to somebody about what is involved'.[91] Others commented that there was a practice of seeking advice from colleagues, particularly in leadership positions. As noted, this has crystallised into advice in judicial conduct guides.[92] But consulting colleagues in leadership positions on intentions for extrajudicial discussion is 'not systematic':[93] 'there's not an expectation that you'll get a talk/lecture/a speech okayed by the president',[94] for example. Rather, as Lady Hale recounts, 'the expectation is that you'll keep within the bounds of what you should be saying'.[95]

In forgoing the analytical shackles of formal provisions, we are able to access a more comprehensive characterisation of areas which are on and off-limits for the judiciary. As we will return to, it is evident that there are areas which judges feel are off-limits and which have not yet been codified in conduct manuals, guides or pronouncements. This is particularly the case with the disclosure of the internal panel deliberations. The implicit and informal nature of this shaping power also explains why many judges feel that some form of restraint continues into retirement. Retired judges 'are not yet subject to the disciplinary procedures'.[96] Even where broad guidance is offered in conduct guides, there are no formal coercive measures to encourage compliance.[97] Nonetheless, there was a general sense amongst our interviewees that retirement did not bring total communicative liberation. Lord Briggs cautioned that some retired judges had 'sailed pretty close to the wind' with their commentary.[98] Similarly, Sir Declan Morgan noted his cognisance of a 'line'.[99] The 'line' was also referred to by Lord Burrows.[100] Lord Collins noted that he would counsel against retired judges becoming involved in politics.[101] Lady Hale remarked that while she had been somewhat liberated by retirement she 'still tried to be reasonably cautious about wading into controversies'.[102] And so, however ill-defined and diluted it is, there remains 'a line' for the retired judge.[103] Absent a formal line, this has to be characterised as a product of social or cultural convention.

In summary, it is a heavy socialisation which shapes an implicit understanding within the senior judiciary so that, on obtaining office, they are deeply embedded within a system of appropriate practices. While formal rules are available, judges are principally driven by an unconscious compulsion

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[88]Dyson, above n 80, p 146. See eg Lord Kerr 'The impact of the Supreme Court on the law of Northern Ireland' (Ten Year Anniversary Lecture, UK Supreme Court, 4 December 2019) p 1.

[89]Eg J Edelman and S Connolly 'Book Review: P Daly, "Understanding Administrative Law in the Common Law World"' (2022) 29 Australian Journal of Administrative Law 215; J Edelman and A Kittikhoun 'Menzies and the law' in Z Gorman (ed) *The Young Menzies: Success, Failure, Resilience 1894–1942* (Melbourne: Melbourne University Press, 2022).

[90]Lady Hale interview with authors.

[91]Sir Declan Morgan interview with authors.

[92]Courts and Tribunals Judiciary, above n 35, p 5.

[93]Lady Hale interview with authors.

[94]Ibid.

[95]Ibid.

[96]Anonymous interview with authors. Noting also that 'this is now under review'. For more on this see O'Brien and Yong, above n 8.

[97]Courts and Tribunals Judiciary, above n 35, p 6; *Northern Ireland Judicial Ethics Guide* (2nd rvs, 2011) at [10.2].

[98]Lord Briggs interview with authors.

[99]Sir Declan Morgan interview with authors.

[100]Lord Burrows interview with authors.

[101]Lord Collins interview with authors.

[102]Lady Hale interview with authors.

[103]See further on this G Appleby and A Blackham 'The shadow of the court: the growing imperative to reform ethical regulation of former judges' (2018) 67 International and Comparative Law Quarterly 505; and O'Brien and Yong, above n 8.

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towards their sense of appropriate judicial behaviour. It is a sense shared with colleagues and which lingers into retirement. This intrinsic compulsion towards appropriate judicial conduct is underpinned not only through practice, but also a loyalty towards others in the community – including judges and the institution of the Court. Having outlined our theory on what shapes extrajudicial discourse, we now turn to what motivates judges to communicate in the first place.

3. Why judges speak beyond the bench

An interpretive community does not provide meaning: it sets the limits of acceptable practice. Fish distinguished the community conception of appropriate from inappropriate through reference to a 'bounded argument space'. This is a metaphorical area wherein appropriate practice, and for our purpose, discourse, takes place. This area is to be contrasted with inappropriate practice laying outside the confines of that space.[104] Nothing is fixed about the space, other than its existence and the fact that there is a line of demarcation. By fleshing out what sits within the bounded argument space of appropriate discourse, we get a deeper insight into how senior judges perceive the role of communication to be part of their conception of appropriate judicial office, and, in turn, how their aim through such discourse is to enhance and protect their legitimacy. In this respect, we see that judges speak, and thus consider speech appropriate, for one of three reasons: legal education, public engagement, or constitutional responsibility.

(a) Legal education

A commonly expressed motivation for extrajudicial discourse flows from a perception that judges should participate in education. For some, education is the driving force. Lord Collins felt that the aim of extrajudicial communication was 'purely educational' in nature.[105] Lady Hale remarked that most communication was 'educational in the broadest sense of the term'.[106] Legal education, that is, education for those practicing or studying towards a career in law, is perhaps the most common and least contentious form of extrajudicial communication.[107] Supreme Court Justices alone delivered lectures at universities on at least 32 occasions between March 2018 and March 2023.[108]

Adding such commitments on to their day-job of adjudication is indicative of the characters who rise to senior judicial positions. Lord Reed observed that 'being the sort of people that justices are, you've got to be somebody with a deep interest, intellectually, in the law'.[109] This is evidenced in the long tradition of judicial publications of academic outputs, as well as in Lady Hale's and Lord Burrows' backgrounds as former legal academics.[110] There is also something of a pay-off for judges regularly engaged in such work as it helps deepen their understanding of the topic under consideration: 'giving lectures is a good way of training oneself'.[111] A payoff is welcome, as it was stressed

[104]Fish, above n 14, p 72.

[105]Lord Collins interview with authors.

[106]Lady Hale interview with authors.

[107]Although note that they occasionally cause a stir, as Lady Hale did by summarising some of the anticipated arguments in the *Miller* litigation in advance of the hearing: Lady Hale 'The Supreme Court: the guardian of the constitution?' (Sultan Azlan Shah Lecture, Kuala Lumpur, 9 November 2016). This provoked the Supreme Court to issue a press release noting that she was 'in no way offering a view' on the likely outcome of the case: Supreme Court 'A response to reactions to Lady Hale's explanation of the Article 50 "Brexit" case' (15 November 2016) available at https://uksclive.azurewebsites.net/news/lady-hales-lecture-the-supreme-court-guardian-of-the-constitution.html.

[108]UK Supreme Court, available at https://www.supremecourt.uk/news/speeches.html. See also the database of United Kingdom Judiciary Speeches on BAILII, available at https://www.bailii.org/uk/other/speeches/.

[109]Lord Reed interview with authors.

[110]See also J Dyson *Justice: Continuity and Change* (Oxford: Hart Publishing, 2018); R Singh *The Unity of the Law* (Oxford: Hart Publishing, 2021); T Bingham *The Business of Judging: Selected Essays and Speeches* (Oxford: Oxford University Press, 2000) On the current bench, it is worth noting that Lord Sales has given at least 15 speeches of an academic nature since his arrival on the court in 2019.

[111]Lord Hope interview with authors.

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to us on a number of occasions how time-consuming this aspect of the role was.[112] Lord Brown described them as 'hard work – [there is] no point giving a lecture unless…you really worked at it'.[113]

The audience for this type of education practice will vary. We were told that 'judges … have a real role to play as part of their Inns of Court in providing further professional development and legal education, advocacy training, and things of that kind'.[114] Lord Burrows expressed a desire to speak with academic lawyers and social scientists about the court and what judges do.[115] Some educational talks to professional audiences are aimed at 'helping people think about things, giving people ideas, and giving people information',[116] while at other times this output may be aimed at a judge's own colleagues, discussing, for example, judgment writing styles,[117] or arguing for particular approaches to statutory interpretation.[118]

(b) Public engagement

A closely related motivation for extrajudicial discourse is public engagement, wherein judges are attempting to communicate with the public. It is 'talking to people who are not lawyers'.[119] Lord Reed characterised this as being 'to explain ourselves to the people on whose behalf we're acting'.[120] It was also referred to as '*Public* legal education'.[121] We consider this to capture any effort to improve public knowledge and awareness about the legal system and its operation. Initiatives like the Supreme Court's 'Ask a Justice' programme fall into this category, as would any involvement with activities such as moot judging or contributing to online courses or documentaries, as well as more formal education endeavours relating to the Court.[122] Two trends dominate this type of extrajudicial engagement: explanations about who judges are, and explanations about the purpose of the court as an institution (including the judiciary's role within it).

In respect of the 'who', there is a sense of importance around demonstrating that judges are 'actually ordinary human beings – intelligent hard working conscientious human beings [who] are doing a difficult job to the best of their ability'.[123] Lady Chief Justice Keegan remarked that she felt in order to be an effective Chief Justice she had a responsibility to the public to explain 'who I am, what I do, what my priorities are and what the challenges are'.[124] Lord Hope stressed that a key aim was trying 'to get across that judges are in touch and interested in everyday life'.[125]

As to institutional awareness, extrajudicial discourse can serve the needs of the respective court. For instance, there has been sustained engagement from Supreme Court Justices across the first 15 years of the Court's existence in respect of raising public awareness to the role of the new institution. Lord Briggs emphasised a need to 'make our mark with the public' and that as a new court the Justices have 'had a slight missionary zeal about it'.[126] Lord Hope reflected on his time as Deputy President

[112] Lord Dyson and anonymous judge, interviews with authors. See also Dyson, above n 80, p 30.
[113] Lord Brown interview with authors.
[114] Lord Briggs interview with authors.
[115] Lord Burrows interview with authors.
[116] Lady Hale interview with authors.
[117] Eg Lord Burrows 'Judgment-writing: a personal perspective' (speech at the Annual Conference of Judges of the Superior Courts in Ireland, 20 May 2021); P Sales 'Modern statutory interpretation' (2017) 38 Statute Law Review 125; Lord Sales 'Long waves of constitutional principle in the common law' (Presentation, Public Law Conference, Dublin, 8 July 2022).
[118] Lord Burrows 'Statutory interpretation in the courts today' (Sir Christopher Staughton Memorial Lecture 2022, University of Hertfordshire, 24 March 2022).
[119] Lord Briggs interview with authors.
[120] Lord Reed interview with authors.
[121] Lord Briggs interview with authors.
[122] Eg BBC 'The highest court in the land: justice makers' (8 December 2016).
[123] Lord Dyson interview with authors.
[124] LCJ Keegan interview with authors.
[125] Lord Hope interview with authors.
[126] Lord Briggs interview with authors.

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where there was a strategic aim to: 'make the presence of the Court known'.[127] Of real importance to this was to prevent an image of the Court being created externally: 'We wanted to be in charge of the creation of the image'.[128] Lord Burrows noted that a general consensus amongst Justices was 'to educate a wide range of people about the work that we do on the Supreme Court'.[129] This much is reflected in his 2023 Neill Lecture, 'Seven Lessons from Inside the UK Supreme Court', which includes discussion, amongst other things, of the collegiate process of judgment production and of the judicial reasoning process.[130] In similarly strategic fashion, Lord Dyson recounted how as Master of the Rolls he decided to be interviewed by *The Times* Legal Correspondent. Conscious of the traditionally sidelined position of the Court of Appeal, he sought to 'tell the world if you like, what the Court of Appeal did and how important it was',[131] despite the protestations of his staff.[132]

For some judges, such public engagement discourse is now a central aspect of the judicial role: the purpose of much extrajudicial work was 'actually to increase awareness of the justice system and some of the issues facing the justice system – what the justice system is and does'.[133] In some respects, a greater urgency was voiced from judges on this extrajudicial function than on others. This concern was diagnosed as a responsive, remedial, issue:

> I think our public legal education in this country is very deficient. I think people just don't understand how the courts work, what the courts do for them, what they can get from the courts, or their means of getting there.[134]

Lord Burrows drew on similar threads remarking that a better appreciation of the court could make 'unjustified attacks on the judiciary' less likely, particularly those 'based on fundamental misunderstandings'.[135] Some scholars have therefore observed this type of extrajudicial work to be key to judicial independence, which requires a 'necessary but rather delicate engagement with the public on appropriate occasions'.[136] It is not merely described as a function; it is a responsibility.[137]

A final aspect to this role is then not merely to explain to the public who judges are and what the courts do, but to translate judicial processes. As Lord Reed reflects, 'we are acting on behalf of 60 million people and our judgments are not in a form which we can expect very many of those people to read and understand'.[138] Similarly, Lady Chief Justice Keegan remarked that there was a role in 'trying to make law – the decisions – understandable'.[139] This might include responding to mischaracterisations. One judge noted that 'if the press, as they will often do, are criticising certain areas of the judicial system, we do have a responsibility to respond to these'.[140] Similarly, while never actively seeking confrontation, Lord Reed explained: 'if I'm being interviewed, and the opportunity arises to respond to

[127]Lord Hope interview with authors.

[128]Ibid.

[129]Lord Burrows interview with authors.

[130]Lord Burrows 'Seven lessons from inside the UK Supreme Court' (Neill Lecture, 15 May 2023). See also Lady Hale 'What is the United Kingdom Supreme Court for? (Macfadyen Lecture, Edinburgh, 28 March 2019); Lord Reed 'The Supreme Court: ten years on' (Bentham Lecture, UCL, 6 March 2019); Lord Neuberger 'The Supreme Court seven years on – lessons learnt' (Bar Council Reform Lecture, London, 21 November 2016); Lady Hale 'The UK Supreme Court in the United Kingdom constitution' (University of St Andrews, 8 October 2015).

[131]F Gibb '"We are the powerhouse, the real engine room" says Dyson' (*The Times*, 16 October 2014).

[132]Dyson, above n 80, p 145.

[133]Lady Hale interview with authors.

[134]Lord Briggs interview with authors.

[135]Lord Burrows interview with authors.

[136]Shetreet and Turenne, above n 63, p 361.

[137]Ibid.

[138]Lord Reed interview with authors.

[139]LCJ Keegan interview with authors.

[140]Anonymous interview with authors.

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inappropriate criticism, then obviously I would'.[141] The value in articulating clearly what decisions are about and how they have been reached can be critical to the court's institutional legitimacy.

(c) Constitutional

A final function of extrajudicial speech is broadly constitutional. It occurs when judges use communication to sustain the loose separation of powers framework in the UK and arises in both reactive and proactive formats. In a reactive sense, judges are often asked to speak to a variety of select committees. Hazel and O'Brien calculated that, on average, a judge sits before a committee of some form roughly once a month.[142] Depending on the committee and the subject-matter, these can be occasionally testy affairs. In 2022, Lord Reed and Lord Hodge were faced with a series of pointed questions at the House of Lords Constitution Committee. When asked to comment on whether judges were, in one case, seeking to become the ultimate authority on constitutional matters, Lord Reed was forced to remind the panel '[w]e do not go looking for cases; they come to us'.[143] Elsewhere in the same proceeding, they were pushed to further explain the reasoning in the *Miller; Cherry* case which concerned the prorogation of Parliament.[144] It took Lord Reed to remind the committee and its Chair that members of the Supreme Court are 'not accountable for [their] judgments to any institution'.[145]

Discourse also becomes contentious when judges feel a compulsion to voice concerns proactively. While most judges were cautious about criticism of government policy, a number spoke about exceptions relating to the courts and justice system, especially where there would be an operational or practical effect on the courts.[146] In doing so, they followed a long tradition of judicial safeguarding of the legal system.[147] In these instances, judges are compelled by their intrinsic sense of appropriate judicial office to stand up when they feel the courts, or the broader legal system, are under threat. Lord Dyson noted that in circumstances affecting the justice system, senior judges had a 'responsibility … where I think it is necessary to speak out'.[148] Lord Sumption questioned whether it could be termed a 'responsibility' but saw extrajudicial speech as having the potential to improve the reasoning behind policy.[149]

There remain limits. Lady Chief Justice Keegan remarked that 'if there is going to be an operational effect on courts then that is something I am prepared to talk about', but 'what I can't talk about is what the policy might be on certain areas'.[150] In these instances, judges can merely give 'clear warnings' about their consequences.[151] Sir Declan Morgan stated that '[n]o matter how critical that may be of the outcome there is absolutely no difficulty of a judge doing that'.[152] Examples of this in practice can be drawn from extrajudicial speech against the access to justice implications which would arise

[141]Lord Reed interview with authors. See also Lord Dyson 'Criticising judges: fair game or off-limits? (BAILII Lecture, 27 November 2014) at [82]. It should be noted that there is an emerging trait for judges to clarify the judicial role and scope of analysis in the introduction to some judgments that are likely to generate controversy: eg *Miller*; *Cherry v Prime Minister* [2019] UKSC 41 at [1]; *R (AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42 at [2].

[142]Hazel and O'Brien, above n 19, at 55.

[143]House of Lords, Constitution Committee (6 April 2022) 30.

[144]Ibid, at 8.

[145]Ibid, at 10.

[146]Anonymous; Sir Declan Morgan interviews with authors.

[147]Kennedy, above n 7, at 200. Lord Woolf 'The rule of law and a change in the constitution' (Squire Centenary Lecture, March 2004).

[148]Lord Dyson interview with authors; Hope, above n 39, p 12.

[149]Lord Sumption interview with authors.

[150]LCJ Keegan interview with authors. See also Lord Neuberger 'Where angels fear to tread' (Holdsworth Club 2012 Presidential Address, 2 March 2012) at [44].

[151]Lady Hale interview with authors.

[152]Sir Declan Morgan interview with authors. See eg BBC 'Lord Chief Justice hits back at criticism of handling of Troubles inquests' (*BBC*, 27 January 2019) available at https://www.bbc.co.uk/news/uk-northern-ireland-38776762.

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from implementation of the Legal Aid, Sentencing and Punishing of Offenders Bill,[153] or in the candid assessments of the (now withdrawn) Bill of Rights Bill.[154] Lord Reed extended the scope of this to include defending the legal profession. He recounted adopting a particular strategy when the Supreme Court refused permission to appeal to a group of asylum seekers who the government sought to deport to Rwanda as part of a flagship immigration policy.[155] Lord Reed noted how on this occasion he decided the Court should give its reasons on camera and put them in writing on the Court website. Moreover, in the statement he specifically referred to the lawyers acting for the asylum seekers as carrying out their duty to protect their clients from any unlawful behaviour on the part of the government so as to counter the growing narrative that 'lawyers who act for asylum seekers are politically motivated and are seeking to frustrate government policy'.[156] Issues 'directly affecting the courts and the administration of justice' might thus be excepted from the general reluctance to speak critically of government policy,[157] although some subjects would still be controversial enough that the 'better course would be to speak to the minister in private'.[158]

A more openly critical position – and sometimes more effective – might be taken by retired judges. Lady Hale remarked that retired judges could be 'a little bit more candid'.[159] Lord Sumption has been outspoken on several matters, including the government response to Covid-19 and aspects of Supreme Court reform,[160] while Lord Brown considered there to be no problem with writing about the backlog of untried Crown Court cases.[161] The only real limits for retired judges' contributions on such topics, he explained, would be when they 'become so out of touch that what they say doesn't have contemporary relevance',[162] although it should be noted that there is greater disagreement around the appropriate conduct of retired judges.[163] This proactivity is not restricted to providing uninvited responses to policy changes, but also to making advancements in the law. One interviewee noted that since the government had increasingly done little to advance initiatives to improve the legal system, 'most of the initiatives in relation to improving the judicial system come from the judges themselves'.[164]

(d) The purpose of extrajudicial communication

What we see in these educational, engagement and constitutional functions is a perception that, while judges see their 'primary responsibility' as 'judging, not public relations', their role requires them to engage their extrajudicial voice from time to time.[165] Speaking on these issues is valid practice for senior judges but validity itself is not an explanation of motivation. Fish noted that practice was informed by a shared 'purposive enterprise'.[166] Judges may be deeply socialised into behaving in

[153] Lady Hale called the proposals 'fundamentally misconceived': B Hale 'Opening address' at the Law Centres Federation Annual Conference, 25 November 2011) p 5. See also Judicial Executive Board 'Written evidence from the Judicial Executive Board' (MSC 84) available at https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/written/9472.html.

[154] Eg Lady Hale 'Do we need a British Bill of Rights?' (NIHRC Annual Lecture, Belfast, 4 July 2022). See also J Croft 'Revived Bill of Rights faces opposition in both houses of Parliament' (*Financial Times*, 20 November 2022).

[155] Supreme Court 'Rwanda permission to appeal application refused' (15 June 2022) available at https://www.supremecourt.uk/news/stories/rwanda-permission-to-appeal-application-refused.html#:~:text=On%20behalf%20of%20the%20Secretary,to%20appeal%20in%20this%20case.

[156] Lord Reed interview with authors.

[157] Ibid.

[158] Ibid. See also P O'Connor 'A conversation with Lord Dyson' *Counsel Magazine* (February 2020) p 14.

[159] Lady Hale interview with authors.

[160] House of Lords Select Committee on the Constitution, Lord Sumption, Constitutional implications of COVID-19 (2 December 2020); J Ames 'Supreme Court reforms are "cheap revenge", Lord Sumption says' (*The Times*, 16 November 2020).

[161] Lord Brown interview with authors.

[162] Ibid.

[163] See Appleby and Blackham, above n 103.

[164] Anonymous interview with authors.

[165] Dyson, above n 141, at [83].

[166] S Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989) pp 141–142.

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accordance with a shared conception of appropriate judicial conduct, but what is it that they are working towards when they communicate? When we asked judges what they saw as the purpose of extrajudicial discourse, the dominant theme in the responses was to instil public confidence in the judiciary and legal system. According to Sir Declan Morgan, the 'overriding purpose' boiled down to a simple question: 'Is this going to increase the confidence of the public in the role of the judiciary in this jurisdiction?'[167] This remark was echoed by Lord Reed who saw the purpose as being 'to maintain public confidence in the judiciary'.[168]

Public confidence was not the exclusive explanation for extrajudicial comment, and yet it permeated many of the responses we received and can be seen as the thread running through the three functions which are deemed most appropriate in extrajudicial discourse. Through education, judges demonstrate their intellectual and communicative proficiency, while reaffirming links with academics, practitioners and students joining the discipline. Public engagement speaks directly to transparency, enhancing public knowledge in the system and, notably, of the judges who administer it. These activities reflect the fact that public confidence is recognised as a significant contributor to the institutional legitimacy of the courts and judiciary. Constitutional activities might also allow judges, on occasion, to publicly safeguard the system. Thus, sustaining public confidence is the dominant purpose of extrajudicial discourse and the principal guide for judges to stay on the right side of the line. Indeed, it was referred to as a 'lodestar against which you have to make the judgment'.[169] It is also a core characteristic for where we turn to next: the other side of the line.

4. The boundaries of propriety

As members of the same interpretive community, judges are acutely aware of the limits of valid practice in their extrajudicial discourse. These limitations are largely intuitive and influence *how* judges speak, *what* they say, and *when* it is said. Three examples demonstrate this judicial cognisance. In terms of *how* judges speak, one judge recounted that when speaking about the thorny issue of funding for the justice system, they would always frame any criticism over a period, rather than contemporaneously:

> I always say 'for decades', in other words, I include other political parties. I'm not just attacking the present government. If you weren't experienced in doing that, you might just say, well, 'the present system is disastrous'. And people would interpret it as you attacking the government and that could be the headline, you know: 'senior judge attacks government'.[170]

On *what* is said, Sir Declan Morgan reflected on a difficult experience with a Select Committee. Prior to questioning he had considered the limitations of what he felt able to say:

> I mean I had appreciated that what I was going to say was going to go as far as it did, but I was quite clear that that was the limit of all that I could say. I certainly was at least on the line there and wanted to make sure that that was it, that I wasn't going any further. I don't believe I crossed the line although I know that politicians weren't happy about it.[171]

Finally, Lord Sumption's retirement from the bench serves as an example in respect of how judges are constrained in *when* they speak. It also illustrates how swiftly the constraints can dilute in retirement. On his retirement from the Supreme Court in December 2018, Lord Sumption took up a position on

[167]Sir Declan Morgan interview with authors.
[168]Lord Reed interview with authors.
[169]Sir Declan Morgan interview with authors.
[170]Anonymous interview with authors.
[171]Sir Declan Morgan interview with authors.

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the supplementary panel where he heard cases until the Spring of 2019.[172] In September of that year, he wrote to then Supreme Court President Lady Hale to indicate that he felt he should not sit in any upcoming cases, given that he was engaged in public criticism of the government, largely in relation to their handling of Brexit.[173] In January of 2021 he sent a further communication to the new President Lord Reed, indicating that given his ongoing criticism of the government in respect of Brexit and of their handling of the Covid-19 pandemic he doubted whether it would be appropriate for him to sit in the Supreme Court again and suggested his name be withdrawn from the supplementary list.[174] Lord Reed accepted this as 'the right decision, given [Sumption's] high public profile in relation to controversial questions of public policy'.[175]

When elaborating on this decision in our interview, Lord Sumption's response returned to the gel that unites the interpretive community: the conception of appropriate judicial conduct. He said: 'I thought it was wrong for me to assume the status of a Supreme Court judge, even for a single case, at a time when I was writing pieces critical of the government'.[176] The Freedom of Information response which documents this episode is further demonstrative of Lord Sumption's awareness of the necessity of propriety in respect of the judicial office. When the *Daily Mail* uncovered that he was no longer on the supplementary panel and contacted him for comment, his reaction was to contact the Media and Communications Manager at the Supreme Court in order to inform and brief them on his response.[177] Mindful of the reputation of the Court, and public confidence in it, his response to the media included a line to make clear that he had not been pressured to step back from the supplementary panel.[178] Of course, Lord Sumption's reputational concern here may have been personal as well as institutional, but the nature of these events suggest that he has given thought to wider ramifications for the Court in his response.

These instances provide anecdotal evidence that judges are highly conscious of 'the line' and of the propriety of their speech. That line is otherwise indicated through a series of topics which are identified as being simply off-limits for a judge to comment on.[179] These include recent past cases,[180] legal advice,[181] party political controversy,[182] and personal criticism.[183] Our pursuit, however, has not been to establish the categories of what is on- and off-limits, but to understand instead what constructs these lines of valid practice, and how they are fashioned. On the latter, we find that, rather than crystallising into formal rules, these lines tend to be revealed through transgressions which draw a response from the community. The disclosure of panel deliberations is a case in point.

(a) Deliberations

The formal disablers on extrajudicial discourse outlined earlier contain nothing explicit on the disclosure of deliberations which take place on panel courts.[184] While there are mentions of confidentiality

[172] United Kingdom Supreme Court 'Guide to Conduct for Members of the Supplementary Panel' (last updated August 2021).

[173] Eg R Tombs, 'Lord Sumption is a fearless public voice on civil liberties – but is he right on Brexit? (*Daily Telegraph*, 6 March 2021).

[174] FOI Request, Emails relating to Lord Sumption's resignation from the supplementary panel, available at https://www.supremecourt.uk/docs/foi-2021-29-recorded-information-12-7-21.pdf.

[175] Ibid, p 1.

[176] Lord Sumption interview with authors.

[177] Sumption emails, above n 174, p 8.

[178] Ibid.

[179] These topics are not intended to provide an exhaustive list of areas which judges should not stray into in their discourse. For a more comprehensive list see Shetreet and Turenne, above n 63, pp 365–382 and Lord Neuberger, above n 150, at [46]–[53].

[180] Lord Hope; Lord Sumption; Lord Hope interviews with authors.

[181] Sir Declan Morgan interview with authors.

[182] Lord Reed, Lord Dyson, Lord Collins interviews with authors.

[183] Anonymous; Lord Hope interviews with authors. Indeed, note how some of our interviewees refused to be named in respect of personal criticism of Lord Hope's diaries below.

[184] Supreme Court, above n 34, at [5.4] notes a bar on using confidential information but does not indicate that this applies to deliberations. A similar term is included in the *Northern Ireland Judicial Ethics Guide* (2nd rvs, 2011) at [6.1(X)].

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and secrecy in, for instance, the Oath of a Privy Counsellor or in the Oath and Rules of Court at the European Court of Human Rights, there is no such direction for the courts in the jurisdictions we have studied.[185] Nonetheless, there was a clear theme across our interviews identifying disclosure of panel deliberations as off-limits. Much of this arose in response to the publication of Lord Hope's diaries, wherein he recounted several informal post-hearing conferences.[186] In her book, Lady Hale wrote that she considered some of the content to be 'indiscreet.[187] Others described the publication of deliberations to be 'outrageous'[188] and 'plain wrong'.[189] It was characterised as a 'breach of confidence',[190] 'a gross breach of faith',[191] and 'the basic obligations of courtesy that you owe to judges that are speaking to you privately'.[192] The transgression was felt across the senior judiciary, with one respondent noting that 'every person I've spoken to, well, certainly amongst the judiciary and off the bench, just thinks it was wholly inappropriate'.[193] There were also judges who did not specifically mention Lord Hope's diaries but articulated a rule not to put in a public place the deliberations that lie behind a decision, or that doing so would be 'not appropriate'.[194]

Based on these responses by members of the interpretive community, publishing private judicial deliberations seems clearly to fall outside the Fishian bounded argument space. Absent any formal prohibition, for most members of the senior judiciary this was simply an implicit understanding. For example, Lord Dyson explained: 'one was never told to treat what goes on between judges as confidential because it just seems to me so obvious that it is'.[195] Another judge remarked that '[i]t's just understood'.[196] The disclosures were a transgression not merely because of a personal breach of collegiality or loyalty towards other judicial office holders, but because they went against the shared conception of appropriate conduct in judicial office. Indeed, they went further in that they could be seen to threaten both the procedural and institutional legitimacy of the court. The concern was that a chilling effect could pervade judges in deliberations if they felt their views were to be recounted in public later. The results would be 'inhibiting on free exchange of views',[197] and thus liable to constrain debate. Ultimately, such disclosures risked 'undermining the justice system'.[198]

(b) Ramifications for breach

There are arguments that some content in Lord Hope's diaries, particularly relating to the sharing of information around the process of judicial appointments, could face legal sanction.[199] Our focus, however, has been on panel deliberations and our pursuit has been more social than legal. In interpretive communities' terms, the sanction for transgression is not formal, but reputational. The best characterisation of reputational sanction was provided by the judge who told us that:

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[185] European Court of Human Rights 'Rules of the Court' Rule 3.1 Oath or solemn declaration and Rule 22.1; Privy Council 'The oath of a Privy Counsellor', available at https://privycouncil.independent.gov.uk/wp-content/uploads/2023/01/Privy-Counsellors-Oath-2023.pdf.

[186] For a brief analysis of Lord Hope's diaries, see L Graham 'Lessons from Lord Hope's diaries: judicial ideology and panel selection' (18 June 2020), available at https://ukconstitutionallaw.org/2020/06/18/lewis-graham-lessons-from-lord-hopes-diaries-judicial-ideology-and-panel-selection/.

[187] B Hale *Spiderwoman* (London: Bodley Head, 2021) p 217.

[188] Anonymous interview with authors.

[189] Anonymous interview with authors.

[190] Anonymous interview with authors.

[191] Anonymous interview with authors.

[192] Anonymous interview with authors.

[193] Anonymous interview with authors.

[194] Anonymous interview with authors.

[195] Lord Dyson interview with authors.

[196] Anonymous interview with authors.

[197] Lord Dyson interview with authors.

[198] Anonymous interview with authors.

[199] J Lee '"Ah yes, I remember it well": judging memoirs beyond the bench', paper delivered at 'Beyond the Bench' (15 September 2022, forthcoming).

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> [T]he current judiciary will look upon the past judiciary – whether alive or dead – just in a similar way that a child will look at their parents or their grandparents and very often with a degree of, I hesitate to use the word, affection, but that the degree of appreciation varies over time. So a judge may have a very good reputation at some point in his career, which is subsequently significantly diminished by what he or she says in retirement.[200]

One could question whether Lord Hope's publication of his diaries was such a transgression that it effectively removed him from the interpretive community of judges. Have his actions demonstrated such variance with the shared conception of appropriate judicial practice that he simply fails to belong to the same community? There was a strand of responses which suggested that his action in doing so set him apart from other judges. One remarked that 'I don't know who else, apart from Lord Hope, would regard that as acceptable'.[201] Lord Dyson noted that '[u]ntil I read his diaries it had never crossed my mind that anyone would do this'.[202] Another referred to the publications as 'a unique case'.[203] And yet his transgression, so to speak, of candid disclosure, is one which other judges may have also committed, albeit to differing degrees.[204]

Despite breaching the implicit practice of the community on this instance, Lord Hope's general motivations appear to come from a similar understanding of appropriate judicial practice as other judges. He recounted how he saw the diaries as an educational tool. Part of the purpose of publication was 'to explain what goes on to make the system work'.[205] Where he was moving towards the margins of propriety he notes: 'I felt it was acceptable because I thought that people might find it interesting to know what was going on'.[206] Lord Brown defended Lord Hope's publication in similar terms, indicating a sense of 'duty to the wider public to indicate something of how it all works'.[207] Lord Brown notes in his own book that while Lord Hope's diaries provide 'unusually candid character descriptions and accounts of how certain judicial decisions were arrived at', he thought it was excessive to suggest they betrayed 'confidential exchanges'.[208] Isolating the transgression committed by Lord Hope then, the issue appears to be in failing to edit certain deliberations out of the publications. While he indicated he was conscious of the sensitivity of disclosure, he may have made a critical miscalculation about what was already visible. At interview, he explained: 'I believed what I was saying could be seen in the judgments themselves'.[209] Indeed, in the preface to his third collection he notes he hoped the diaries would 'add colour to what was seen in public and can be detected from their published judgments'.[210]

By contrast, Lord Sumption's exit from the judicial community is less contested. Rather than merely overstepping the parameters of proper judicial speech, Lord Sumption's behaviour, particularly since leaving the supplementary panel, suggests an entire liberation from the social constraints of the community. This was evident in his characterisation of the only limits subject to him as a retired judge as being those of respectable debate:

> I don't think there are any limits to what may legitimately be discussed, but in case of a judge that I think that one has to stay within a very broad notion of the range of – for want of a better word – acceptable opinion.[211]

[200]Anonymous interview with authors.

[201]Anonymous interview with authors.

[202]Lord Dyson interview with authors.

[203]Anonymous interview with authors.

[204]Note that several judges have given reflections to academics on their participation in panel deliberations. See Paterson, above n 10. Others have discussed the constitution of panels: eg P Millett *As in Memory Long* (London: Wildy, Simmonds and Hill Publishing, 2015) p 189.

[205]Lord Hope interview with authors.

[206]Ibid.

[207]Lord Brown interview with authors.

[208]S Brown *Second Helpings* (London: Marble Hill, 2021) p 140.

[209]Lord Hope interview with authors.

[210]Lord Hope, *UK Supreme Court 2009–2015 (and afterwards)* (Edinburgh: Avizandum, 2019) p vi.

[211]Lord Sumption interview with authors.

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Thus, *his* perception of constraint is considerably more diluted than what we see with others. His frequent forays in political debate are quite clearly at odds with the practice of other serving and retired judges. Indeed, he acknowledged as much himself, noting in an interview with *The Times* that '[t]he conventional view is that retired judges should not speak on politically controversial issues … I actually approve of that convention although I have been an egregious breaker of it'.[212] The same can be said for some of his characterisations of the legal system. In his first Reith Lecture, he answered a question in respect of assisted suicide by suggesting that there was no moral obligation to obey the law. He remarked: 'I think the law should continue to criminalise assisted suicide, and I think that the law should be broken from time to time'.[213] While perhaps reflecting the realities of how the law is enforced, such a candid public opinion in respect of law breaking is an unusual position for a judge. Not only is his practice therefore at odds with the rest of the community, but it is evident that his purposive enterprise in extrajudicial speech was something other than sustaining public confidence in the system and its judiciary. While Lord Hope's transgressions may indicate a lack of personal loyalty, Lord Sumption's are more institutional in nature. And by seeing the constraints on himself so differently to other members of the judicial community, Lord Sumption effectively removed himself from it. Somewhat counterintuitively, it is through broadly remaining as a member of the judicial community that Lord Hope suffers the reputational damage. By exiting the community entirely, and demonstrably forgoing its constraints, Lord Sumption may not.[214]

Conclusion

The line of propriety which sets the parameters of appropriate discourse is flexible. The only thing that is fixed is that there is a line. The categories of what are within, and beyond, the limits of propriety remain 'but what fills them is different'.[215] Slippages can happen. Topics which were once improper can become acceptable, and vice versa. These slippages are informed by the context of contemporary society and the enterprise of the community.

In recent decades, there have been several significant changes that could affect 'the line' in extrajudicial discourse, specifically because these changes have had the potential to impact on public confidence and the legitimacy of the judiciary. The demise of the Kilmuir Rules in 1987 returned judges to the public sphere after a three decade long enforced hiatus.[216] The expanding scope of judicial review, administrative law and human rights appears to have stimulated a greater sense of judicial responsibility with respect to justifying judicial engagement and outcomes to the public they serve.[217] Simultaneously, increasing attacks on the judiciary from politicians have led to a collapse of the convention against judicial criticism, with the result that more judges may feel compelled to speak in defence of the system and their role in it.[218]

Beyond this, the long-overdue acknowledgement of the need for a more diverse judiciary has taken hold, and extrajudicial discourse has been recognised as one tool towards public engagement.[219] Since 2005, this has been against the backdrop of a more formal recognition of judicial independence within the constitutional settlement.[220] These same developments eliminated the automatic life-peerages pathway for retired senior judges to return to the House of Lords, where they could participate in public debate within the confines and expectations of that community.[221] These factors, together with a

[212]D Jones 'Jonathan Sumption on war with France, Brexit and cancel culture' (*The Sunday Times*, 27 August 2023).

[213]J Sumption 'The Reith Lectures 2019: law and the decline of politics: lecture 1 law's expanding empire' (21 May 2019) available at http://downloads.bbc.co.uk/radio4/reith2019/Reith_2019_Sumption_lecture_1.pdf.

[214]Our thanks to Conor McCormick for highlighting this conceptual tension.

[215]Fish, above n 13.

[216]Rubin, above n 6.

[217]Eg Lord Dyson 'What's wrong with human rights?' (Hertfordshire University, 3 November 2011).

[218]L Blom-Cooper 'The judiciary in an era of law reform' (1966) 37 Political Quarterly 378. Dyson, above n 141, at [80].

[219]Eg Lady Hale 'It's a man's world: redressing the balance' (University of East Anglia, 16 February 2012); Lady Hale '100 years of women in the law' (King's College London, 20 March 2019).

[220]Neuberger, above n 150, at [33].

[221]Constitutional Reform Act 2005, Part 3.

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rising life-expectancy and, for a period, lowering of the mandatory retirement age, have also increased the space for extrajudicial speech on the part of retired judges.

There has, therefore, been considerable scope for the line of propriety to change over time in response to some of these significant, sometimes constitutional, developments. And yet, the parameters for extrajudicial speech ('the line') have not much moved. What was off-limits 30 years ago, largely remains off-limits today. It may be that the explanation for the lack of change is a result of the slow evolution of diversity within the professions.[222] As the social rules are constructed and sustained by the participants of the enterprise, we need just look at the historic lack of diversity of the participants to understand why the boundaries may have not yet shifted. If anything, the major change has not been the content of extrajudicial speech, but how pervasive it is. Judges are speaking more frequently, across different mediums and to wider audiences, than perhaps ever before. They are speaking so much, in fact, that Lord Neuberger has wondered whether it was devaluing 'the coinage'.[223]

This relative stability returns us to our principal argument: the line is defined by the shared conception of appropriate judicial practice – a social expectation. Even against the backdrop of significant constitutional developments, this conception has remained relatively static. And it is this common, largely informal, understanding which informs and shapes the extrajudicial voice to a much greater effect than any formal standards. This expectation is motivated towards securing public confidence and sustaining the legitimacy of the judiciary, and the current practice appears to be serving that mission well. Recent evidence suggests not only that judges have the confidence of the public, but that they are trusted more than politicians.[224] Even if communication only plays a fractional role in this, it suggests that the extrajudicial voice continues to serve its primary purpose. And yet despite these positive findings, there remains work to be done in respect of public knowledge and understanding of the judiciary. While the extrajudicial voice is a critical tool to that agenda, it would be assisted by a wider commitment towards public legal education across all institutions of state.

[222]On this see E Rackley 'A short history of judicial diversity' (2023) 76 Current Legal Problems 265.

[223]Neuberger, above n 150, at [53].

[224]A Renwick et al 'Public preferences for integrity and accountability in politics', *The Constitution Unit: Democracy in the UK after Brexit* (March 2023) p 11.

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