As Delivered

Remarks of
Judge Diarmuid F. O'Scannlain
Chair, Judicial Council
International Association of Law Schools

"Teaching Challenging, Controversial and/or Sensitive Subject Matter – Rational Legal Discourse"

The Legal Perspective
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Our topic this afternoon is critical to a meaningful education at any level: how might we train students to engage with ideas with which they disagree or which even strike them as offensive. For years I taught a law school course on the United States Supreme Court—including some of its most divisive cases—so I know how relevant this question is for those of you who work daily to educate young students in the law. But from my perspective as a judge, these issues strike me as deeper than that. Indeed, they are fundamental to an effective legal system more broadly.

Speaking from the judicial perspective, I would be remiss not to observe that there is an important legal right underlying all of this: namely, the freedom of speech. In the United States—and similarly in many other countries around the world—this fundamental freedom is secured in the First Amendment to our Constitution, which guarantees that the government "shall make no law . . . abridging the freedom of speech." This promise ensures that meaningful civic discourse may flourish—and with it democracy and the Rule of Law. This requires open discourse in the educational context, also. Indeed, American law has long recognized that the Constitution's protection of the freedom of speech applies with equal force in the university setting; in the words of Justice Hugo Black:

> No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[1]

At a minimum, schools and professors must not allow the fear of causing offense to suppress open debate—and certainly not in a way that would infringe on this fundamental right to free speech. For this reason, American courts have many times struck down speech codes or other restrictive academic policies that impermissibly stifled speech at public universities.[2]

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[1] *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *see also Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

[2] *See, e.g., Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (striking down state law preventing the employment of "subversive" teachers and professors).

As the United States Supreme Court said in striking down one such policy, "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[3]

Aside from the need to preserve the freedom of speech, law schools must also prepare students to engage with ideas they oppose because that is fundamental to the profession they are entering. Almost by definition, lawyers must confront views that they oppose. But it is not an acceptable response in the profession simply to decry such views as offensive. Our civil societies are governed by laws, not sentiment; legal claims are decided on evidence and logic, not emotion. Indeed, even an argument that seems distasteful to some members of the community may well be a correct interpretation of the law. To ensure the continued and fair *rule* of such law, we must train lawyers to analyze it critically and dispassionately. They must also be sensitive, of course, to the concerns of the other side and always respectful in their interactions. Lawyers certainly should not make arguments *in hopes* of provoking offense or alarm. But if students cannot fully engage with the governing law simply because they find some arguments about it to be unsavory, then I question how well they will be able to serve their clients or the legal community more broadly.

This is an area where I consider myself most fortunate to be a judge. My colleagues on the bench hold wildly divergent views about the law and about our roles within it. Although we disagree frequently—and often deeply—about the issues before us, we do so openly and fairly. If I believe one of my colleagues has a legal argument wrong, I tell him or her that and I explain why I disagree. In turn, he or she will consider my arguments and respond explaining why he or she is or is not convinced. Sometimes these exchanges are lengthy; often other judges will chime in. But throughout, good intentions are assumed, arguments are weighed and considered, and the discussion remains grounded in the law, not in ad hominem attacks. In short, we exchange ideas directly and respectfully, no matter how contentious the matter might seem to us personally. We often will not persuade each other, but we always will listen. We hold ourselves to these high standards and we expect the same of the lawyers who appear before us.

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[3] *Papish v. Bd. of Curators*, 410 U.S. 667, 670 (1973) (per curiam).

This is exactly the environment of open and honest discourse that the Rule of Law requires. And it is therefore imperative that law schools train their students the same way in the classroom. We must not lose sight of this even amidst the current atmosphere of offense and outrage that has taken hold of so many other areas of public life.

So I propose that the time has come to develop a set of IALS principles for rational legal discourse on challenging, controversial, and sensitive subject matter. We, on the Judicial Council, will start working on this right away, and we hope that at the annual meeting in Gdansk the IALS will be able to develop a consensus on how to provide guidance and protection to colleagues around the world on this urgent subject.

Thank you.