

PROFESSIONAL CONDUCT AND JUDICIAL ACCOUNTABILITY: ISSUES AND POSSIBLE ENFORCEMENT MECHANISMS

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Judge Shirley Hufstedler, in her article entitled, "New Blocks for Old Pyramids: Reshaping the Judicial System", Southern California Law Review 901 (1971), made the following lapidary remarks about the work of the Courts:

"We expect our courts to encompass every reach of the law, and we expect law to encircle us in our earthly sphere and to travel with us to the vastness of outer space. We want the courts to sustain our personal liberty, to end racial tensions, to outlaw war, and to sweep the contaminants from the globe. We ask our courts to shield us from public and private temptation, to penalize us for our transgressions and restrain those who would transgress against us, to resuscitate our moribund businesses, to protect us pre-natally, to marry us, to divorce us, and if not to bury us, at least to see to it that our funeral expenses are paid. These services, and many more are supposed to be performed in temples of justice by a small priestly caste with the help of devoted, retainers and an occasional vestal virgin."

The above remarks show in a small way the vastly important duties that we as Judges perform on a daily basis with the help hopefully of independent legal practitioners. Most importantly, it reflects how profoundly and sometimes irrevocably our daily decisions impact on the lives of litigants and other persons in almost every aspect of their lives; before the cradle until after the grave. It is with these remarks in mind that I now turn to deal with the twin concepts of professionalism and accountability, which, if properly applied, would serve to enhance the dignity, respect and esteem with which our judicial functions will be perceived and received by the members of the public at large that we serve.

Professionalism

Black's Law Dictionary defines professionalism in the following manner, "The practice of a learned art in a characteristically methodical, courteous and ethical manner".

It is beyond dispute that most judges are drawn from the ranks of the legal profession. Practice of law is an art that is or should be deeply steeped in professionalism. It is my submission that professionalism with respect to Judges should not cease when we make the transition from the Bar to the Bench. It is the only baggage that we should be

allowed to legitimately take with us and have in abundance as we discharge our judicial functions on a daily basis.

There are a few attributes that characterise professionalism. Professionalism, it would appear, is fashioned like a cross. It exacts duties on us at the vertical and horizontal planes. This is to say we, as Judges, ought to display professionalism with regard to fellow Judges i.e. at the horizontal level and also towards practitioners, witnesses and the Court staff, at the vertical level.

The attributes that stand out for mention regarding professionalism include honesty, integrity, competence, civility, courtesy, respect, patience, diligence, punctuality, protection of others against unjust or improper attacks or criticism.

At the horizontal level, it is imperative that we refrain from uttering disparaging personal sarcastic remarks, criticisms or demeaning statements about our colleagues on the Bench. Whatever our differences may be or how old or deep-seated they may be, we should remember that at the end of the day we are Brethren serving the same Master, namely justice. We are not called to like and glorify our colleagues on the Bench but we owe them respect, courtesy and civility in all our dealings with them, publicly or even privately.

This also calls upon us to work together as Judges and to try, difficult as it may be to foster a spirit of co-operation *inter se*. Where there is a spirit of co-operation, it is very easy to discuss legal issues, to agree and to disagree about them; to ask for clarity on grey areas; to seek guidance regarding obscure or novel points. Do not allow yourself to suffer alone in painful silence when there can be ready help next to your chambers in the form of a Brother or Sister Judge. We should realize that we are gifted differently and we have talent in different areas. Make use of the skill, knowledge or experience of a fellow Judge in areas where you may be lacking or where you are diffident.

One of the most remarkable indictments is where as a Judge you issue a judgment so wrong or impoverished that a by-stander is forced to ask – does he or she have no other Judges from whom he or she could have asked for guidance? I have so many times asked of my Brethren or Sisters to read my judgments before I hand them down. This gives one a sense of security and confidence that a fellow professional will assist in picking up what may be patently wrong or inaccurate legal propositions, conclusions or findings, or to enrich the judgment with latest authority or parallel views.

This would be even expected in instances where we do not agree with legal views that they may have espoused, for instance, in cases where we have decided to write a dissenting opinion. We should dissent with respect and dignity.

At the vertical level, it is important for Judges to treat Counsel with respect and courteously. This is so because when we were on the other side of the lectern as practitioners, we also wanted and expected to be treated with respect. That feeling should not necessarily change with our change in position. There are of course some lawyers who test your patience until you are at the end of your tether but even then, we should learn to exercise patience. This should also apply in relation to litigants and witnesses. We should avoid the use of words that are humiliating, demeaning or engaging in conduct that is hostile. Some of the people may be appearing in Court for

the first time and may not be as comfortable therefore as we would expect them to be. Patience, in this regard, is a virtue.

The other issue to mention is that we should give the lawyers involved in the cases a fair and impartial hearing that will allow them to develop and present proper argument. We should avoid being curt because that may be the very point at which the crux of the matter was to be delivered. This is not to say we should not, when called upon, direct Counsel on the live issues and to try and curtail them when they engage in pointless, time-consuming legal chatter. A proper balance must be struck by the Court.

It is also important to start our Courts on time. As Judges, we sometimes blow our tops off if a lawyer is late or held up but we swiftly sweep it under the carpet once we are caught on the wrong side. The worst teaching that we can spread is “Don’t do as I do, do as I say”. In other words, as Judges, we should set the good and comely examples. This will give us the moral leverage to call on others to do likewise. Punctuality should become our watchword and once we set the pace, it becomes easy for the lawyers to act in step with the Court.

Another issue worth mentioning in this regard is the promptness with which we should hand down our decisions. It has been said that justice is sweetest when it is freshest. An otherwise well-prepared meal will not be appreciated when it is served cold and almost becoming stale. There may be cases that are complex, involved and which require a lot of thought and research. Even then, the more we delay in dealing with them, the more the issues and particularly the evidence and the impressions various witnesses made on us fade from our memories and the less confident we become in dealing with them. Suddenly, these files are kept in the cupboard, away from everyday sight until they become skeletons in the cupboard, haunting us at every turn. When we meet the attorneys involved in them, we wish we could look away in avoidance of eye contact. It may be important as a Court to have time guidelines regarding timeous delivery of judgments. There will always be exceptions, which would require an explanatory note in the judgment or to the Chief Justice as the case may be.

I have adopted, as a measure of accountability and more particularly in order to apply pressure on myself in early deliver of judgments, I have decided to write on my judgments, as other jurisdictions do, the dates when the cases were heard together with the date on which the judgment in issue was developed. I have seen this as a method that works well as any tardiness in delivery of judgment will require an explanatory note in the judgment.

I need to make one small point about judgment writing: we should try and give the issues in contention deliberate, impartial and studied analysis and consideration. It may be very discouraging for lawyers to burn the midnight oil in a quest to assist the Court to reach a just decision, hopefully in their client’s favour, only for the Court to discard or debunk without demur what has been said and submitted and handing down a judgment that is as bare as can be. We have had situations occurring where the appellate Court complained about cases being brought before it where they did not, after months, have the benefit of the judgment of the High Court in order to properly assess the correctness or otherwise of the decision appealed against.

Society, including the legal profession, throws up a vagary of novel situations that need to be addressed. This points to a need to have continuing legal education in order to equip judges with knowledge to deal with unprecedented situations. These new situations may present a dilemma as to what is acceptable professional or ethical behavior in any given case.

There is also a need for the Judiciary, in order to cut down on grey areas, to develop and adopt a code of ethics for the Judiciary. This would give guidance on what conduct is permissible or impermissible, acceptable and unacceptable. This would go a long way in assisting Judges to conduct themselves circumspectly and also to let members of the public know in those situations where Judges may have erred so that a report may be made to the appropriate authority or body. In this regard, it is important not only to have the Code but to ensure that it is applied so as not to remain a Code only on paper, helping nobody.

Recently, we have had a situation where an Industrial Court Judge was charged *inter alia* under the Prevention of Corruption Act. A search warrant was issued and they seized and attached certain documents, including undelivered judgments from his chambers; cell phones e.t.c. The issue that reigned supreme and was moot was whether it would not have been proper to precede the arrest, if subsequently rendered necessary, by an impeachment process in terms of the Constitution. See in this regard the case involving Mr. Justice Benjamin Paradza. There was also a warrant of search issued for the search and seizure of documents and other material at the Judge's former law firm. Issues of judicial independence of lawyers arise from those actions.

Accountability

Are Judges accountable at all? If they are, to whom are they accountable or responsible? A story is told of a conversation between Mr. Justice Learned Hand and his clerk, which went thus:

“Sonny...to whom am I responsible? No one can fire me. No one can dock my pay. Even those nine bozous in Washington, who sometimes reverse me, can't make me decide as they wish. Everyone should be responsible to someone. To whom am I responsible”?

The judge then turned and pointed to the shelves of his library and said:“To those books about us. That's to whom I am responsible.”

It is also said that Lord Donaldson, the former English Master of the Rolls once said: “Judges are without constituency and answerable to no one except their consciences and the law”.

The Judiciary, of the three organs of State has been touted as the most accountable for the reason that although not in office through the ballot box, it conducts its daily undertakings in open Court and delivers its reasoned decisions in public, open for everyone to read. The accuracy of the statements from the learned Judges mentioned above may have to be viewed in the light of the juggernaut of transparency and accountability that has gripped the world. Can the Judiciary remain an island in this regard? I think not.

The issue of accountability is classified by Professor Shetreet in his work entitled "Judicial Accountability: A Comparative Analysis of the Models and Recent Trends" International Legal Practitioner, June, 1985 pp. 38 et seq, into three viz: legal accountability; public accountability and informal social controls. The first relates to disciplinary jurisdiction over judges e.g. appellate review of their decisions and their civil and criminal liability. The second relates to controls over judges exercised by parliament, the executive and the press and pressure groups. The last is informal social control exercised by judicial and professional colleagues.

Whatever the efficacy of these species of accountability might be, it must be mentioned quite loudly, as stated by Dr. Dató Cyrus Das in his paper entitled Judges' and Judicial Accountability, 12 November, 1999, that justice is a consumer product. For that reason, it must meet the test of confidence, reliability and dependability, like any other, if it is to survive market scrutiny. As Lord Devlin said, "The prestige of the judiciary and their reputation for stark impartiality is not at the disposal of the any government: it is an asset that belongs to the whole nation."

The accountability referred to above, has given rise to some problems. This has manifested itself in certain instances public criticism of the Judiciary. This criticism has in some instances been met with vitriolic reaction by the Judiciary, culminating in charges either for contempt or scandalizing the Court being preferred against alleged contemnors. As I speak, there are two cases pending in Court for contempt of Court against a magazine for making statements that were considered by the Attorney-General, to be contemptuous of the Court. Unfortunately, this raises a tension between the Court's dignity on the one hand and the freedom of the press and expression on the other. It remains to be seen how the High Court of Swaziland will resolve that quandary.

In regard to criticism of the Judiciary, Sir Anthony Mason said in "The Judiciary, The Community and the Media (1998) ALJ 33 at 40:

Like other public institutions, the judiciary must be subject to fair criticism and, if the occasion demands it, trenchant criticism. What I am concerned with is response to criticism, particularly criticism that is illegitimate and irresponsible."

In India, Mr. Justice Bhagwati, the former Chief Justice, had this to say in "Independence of The Judiciary In a Democracy, Human Rights Solidarity – AHRC Newsletter – Vol.7 (April-July 1997) at p.34:

"There is a pernicious tendency on the part of some to attack judges if the decision does not go the way they want or if it is not in accordance with their views. Of course, there is nothing wrong in critically evaluating the judgment given by a judge because, as observed by Lord Atkin, justice is not a cloistered virtue and she must be allowed to suffer criticism and or respectful, though outspoken, comments of ordinary men and women. But improper or intemperate criticism of judges stemming from dissatisfaction with their decisions constitutes a serious inroad into the independence of the judiciary and, whatever may be the form or shape which such criticism takes, it has the inevitable effect of eroding the independence of the judiciary.

Each attack on a judge for a decision given by him or her is an attack on the independence of the judiciary because it represents an attempt on the part of those who indulge in such criticism to coerce judicial conformity with their own preconceptions and, thereby, influence the decision-making process.

It is essential in a country governed by the rule of law that every decision be made under the rule of law and not under the pressure of one group or another or under the threat of adverse criticism by irresponsible journalists or ill-intentioned politicians; and if a judge is to be in fear of personal criticism by political or pressure groups or journalists while deciding a case, it would most certainly undermine the independence of the judiciary.

Unfortunately, this is what is happening in some countries, and those who indulge in such improper or intemperate and even sometimes vitriolic criticisms or attacks on judges little realize what incalculable damage they are doing to the institution of the judiciary.”

This, in this context, obviously calls into question the effect of marches and demonstrations e.g. by Women’s groups and political groups outside Court in cases involving their interests which they feel are under threat. In Botswana, there was a group of women called W.A.R. (Women Against Rape) which to apply pressure on Magistrate Courts, resulting in some cases in the said Courts convicting on tenuous evidence and meting sentences there were in some cases, wholly inappropriate, regard being had to the entire conspectus of the facts. Is there any impact that these may have on the Court’s independence? If these marches are outlawed, what about the right of the protesters to freedom of assembly and expression?

There is another issue on accountability that I should comment about. It is important that the manner in which cases, particularly political and human rights cases, are allocated to Judges is transparent, unbiased so as to engender public confidence. This is because the manner in which the cases are allocated may be a cause for concern in that the allocation procedure may be abused to ensure that a certain type of cases is placed before certain and not other Judges with a view to obtaining a certain political result.

The Swaziland government has recently announced that in all cases involving charges of corruption, judges will be secured from South Africa and that none of the High Court Judges will preside because we live in a small society where people know each other closely. It was also argued that the accused persons in such cases are likely to be powerful and influential. This decision, it would appear, was not taken by the Judicial Services Commission in consultation with the Judges but is a government decision. This is nothing but a vote of no confidence in the local Bench or an insinuation that the local Judges are either incompetent or themselves corrupt. If the allocation was done on a case by case basis because there is no local judge able to hear the matter that would certainly be a different story.

Issues: Impeachment – what happens in cases where Judges are allegedly guilty of conduct that falls below what would amount to dismissible conduct.

Issues of recusal both from the point of accountability by the Judges to the lawyers and parties where the Judge has an interest or for some other reason in the case before him

or her. On the other hand, it raises the issue of how the Judge should professionally handle a case where he or she is being requested to recuse himself or herself from the case, as that may be a highly charged and emotive affair.