

GOVERNING JUDICIAL CONDUCT

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Although when one considers the topic of "Governing Judicial Conduct" one's thoughts go immediately to the area of judicial councils and the concept of disciplining errant judges, there are other factors which have the effect of governing judicial conduct. These affect how judges conduct themselves both on and off the bench and can even affect the decisions judges make. One of these factors is community expectations.

It is the right of each and every accused person to be tried by a court that is independent and impartial. The requirement of impartiality is not difficult to accomplish. The judge does not learn of the circumstances of the offence until they are proved in court, nor does the judge know of the past history of the accused person prior to any relevant information in this area being adduced according to the rules of evidence. The judge decides the matter on the legally proven facts.

Community pressure on the other hand may impinge upon judicial independence. Today, society seems to be demanding more severe sentences and harsher treatment of offenders. Communities appear to have come to the end of their rope where crime is concerned. Perhaps the perception of what is being done in the courtrooms of the nation is largely shaped by media reports which focus upon the most sensational of cases – those which can be relied upon to rouse strong public opinion and cries for "justice" in one form or another. The general feedback one gets when listening to or reading the various media is that the public thinks the police do all they can to catch the criminals, and the courts and judges do all they can to let the criminals go. Judges are coming under increasing pressure to take a hard line with accused persons coming before them almost to the point that the legal maxim "innocent until proven guilty" risks becoming a secondary concern.

The days of judges holding themselves totally apart from the community have passed. Judges can no longer place themselves in towers distanced from the realities of the world around them. Judges must be aware of the mood of the community and the standards by which the people feel themselves bound. This is quite different, however, from saying that judges are bound by the current feeling in the community in relation to particular issues in reaching their decisions or imposing sentences. Judges should be guided by the social climate in order to make judgments and impose sentences which are relevant to the public and which reflect current realities. Nonetheless, judges must also be free from and immune to public pressure if they are to perform their tasks properly. To have it otherwise

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would be to render judges mere extensions of the will of special interest groups or simply mirrors of current public preoccupations.

One might also reflect on the present mood in Canada concerning young offenders. The impression one gets from the media is that all citizens are of the opinion that the youth of this nation are literally getting away with murder and that much harsher sentences must be imposed in order to bring the youth crime wave under control. If a judge were to react to this sentiment by imposing secure custody dispositions in all allowable cases, regardless of the individual needs of youth, in order to address the perceived need to provide protection to the public then it would be fair to conclude that the judge's conduct was being governed by public opinion to the detriment of the rehabilitation of the young offender. If such a situation were to occur, the independence of the judge could be said to have been impaired by community expectations.

Clearly, just because the public cries, "Lock them all up!" is no reason for the judge to be compelled to do so. Judges are, however, human. They will have such pressures brought to bear upon them. It is the duty of the judge both to recognize the mood of society and to resist being swept along by the flood of public outcry. Decisions must be relevant, but first they must be just.

Public opinion or community expectations can affect the way judges conduct themselves off the bench as well. I have always been of the opinion that if one's ordinary conduct prior to appointment did not preclude one from being named to the Bench, then very little should have to change in one's conduct once one is appointed. Yet, there are certain expectations held by the public when it comes to judges, which, for the most part, have been reduced to informal rules of judicial conduct concerning conflict of interest, outside employment, associations, public comment, and general behaviour. Less and less are judges being perceived by the public as perfect. They are seen, for better or worse, as being human with human flaws. This may be a result of the current growing disrespect for authority figures or merely a result of judges' making themselves more visible and more willing to be seen as part of the community. Whatever the reason, judges are finding themselves subject to greater scrutiny, both in their public and private lives. To some extent such scrutiny has the natural effect of governing judicial conduct.

Another factor that has an effect on judicial conduct is government policy, that is, government decisions in the areas of law reform, the administration of justice, and fiscal decision-making. For instance, judges are charged with ensuring that the business of the court is conducted in a safe and secure environment. It is the duty of the judge to determine whether sufficient measures have been taken to ensure the safety of all persons appearing before the court, be they accused persons, counsel, witnesses, spectators, or court staff. When decisions are made by the executive branch of government which limit the resources available for the provision of such measures, the ability of the judge to act is affected. The judge

may have to decide whether to refuse to sit until suitable arrangements are made to ensure proper security in the court. This has the effect of raising public awareness of the issue and, depending on how it is reported in the media, may result in either support for or opposition to the action of the judge in response to a serious problem. Either way, the manner in which the judge conducts his or her court is affected by the government decision respecting resources allocated to court security.

Sentencing options for the judge are also affected by government policies formed in times of fiscal restraint. As community-based resources decrease, there are fewer options for the judge who wishes to impose a sentence which will have some real possibility of being fulfilled. The reality of the increasing load placed upon those involved in mental health programs, family counselling programs, probation services, and supervised community work programs mean longer and longer waiting periods before these programs, which could greatly assist in the rehabilitation of an offender, can be accessed. In some cases, whole periods of probation pass before assessments for counselling can be made, let alone programs of counselling commenced. Indeed, the entire sentence of the court is, in effect, nullified because required programs are not available. This reality can operate to affect the sentencing process. If options are not available to give effect to what the judge feels is an appropriate sentence, then to some extent the judge is constrained in his or her actions.

Another force that seeks to have an effect on judicial conduct is the media. The "investigative reporter" has become the self-appointed watchdog of public institutions, and in some minds, this includes the judiciary and the courts. With the increasing demand for accountability on the part of decision-makers, including the courts and judges, the media have taken on the task of reporting select cases which are chosen for either their sensational aspects or their apparent relevance to matters of immediate public interest. The media has the power to stir up public reaction through this selective journalism, be that reaction positive or negative. In most cases, the encouraged response is negative, and in many cases, the media is acting on its own agenda.

This is unfortunate. The public has a right to be fully informed about what is taking place in the courts of this country. The courts are open, and the business of the courts is open to the public. Any member of the public may attend any court session, with rare exceptions, and take away his or her own impression of the system and how it works. The difficulty arises, however, when the media, by selectively deciding what will and what will not be reported, either by case or by topic, present a biased view of the operation of the courts and the decision-making of the judge. Newsworthy "sound bites" or quotes of the judge are reported, often out of context, because they have the ability to grab the attention of the viewer or reader. They may or may not fairly represent the crux of the comments or the decision of the judge; yet, this type of reporting has the effect of requiring the

judge to double think his or her decisions to ensure that they cannot be misconstrued or misrepresented, thereby giving an erroneous impression to the public.

“Fine”, you might say. “This is what we want: judges who express themselves in a manner that can be easily understood by the public.” I would agree. However, this ignores a serious problem: judges are being forced by the media to think not only of the legal consequences of their decisions but also to concentrate on how the decision is going to be presented in the media. Forcing the judge to phrase legal concepts in “sound bites” hardly serves the cause of justice.

Another way the media affects the conduct of the judge is by focusing public attention on a particular case because of some aspect of the case or the accused which the media feels is out of the ordinary. I have already referred to the effect of public opinion on the conduct of the judge. By taking any case out of the ordinary and focusing extra attention upon it, the media exerts pressure upon the judge to deal with the offender in an extraordinary way. Pressure may be exerted upon the judge to treat the offender in a more severe manner if the public perceives the case to be one where the rich or privileged will receive a higher grade of justice. This serves neither the accused nor the public and does the administration of justice a disservice. There is a difference between reflecting public opinion and creating it. “The media have a grave responsibility to ensure that in performing their duty they do not ‘interfere’ in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decisions”.¹

There are various influences and pressures that have an effect on the conduct of judge. As was stated by Scott C.J.: “Judges cannot decide as they choose. We are bound by rules of procedure, and by precedent”² and as we have seen, the influences of public scrutiny, and the effects of economic change. Judges must be attuned to these factors and in some respects be guided by them, but in the final analysis, the judiciary must always provide society with an impartial and independent forum for the resolution of disputes.

¹R. v. *Beauregard*, [1986] 2 S.C.R. 56 at 69.

²Richard Scott, “Accountability and Independence”, (1996) 45 U.N.B.L.J. 27 at 29.