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judiciary**

Abstract

The existence of conflict is evidence of the need for an institution to adjudicate and address matters related to conflict. In this regard, the Judiciary is the institution which was designed to handle clashes within our society. Politicians many of whom become Parliamentarians often have a primary responsibility to make laws for the good governance of society. Lawyers who are officers of the court and trained professionals in the knowledge and practice of law have a responsibility to their clients and courts. While each has a role to play for an orderly society to thrive there are times when either or all have conflict which potentially give rise to constitutional crises and/or societal predicaments. Having an understanding of the role that each play is a significant component to ensuring that there is proper behaviour in the execution of duties of politicians, lawyers and the judiciary in our world of conflict.

Key words: Conflict; Judiciary; Politicians and Lawyers

Introduction

Shepard (2014) suggests that the way judges and lawyers relate to each other has not been significantly examined. This article may be used to facilitate discussion and reflection on this particular area insofar as what are the conflicts that can arise between politicians and lawyers with the judiciary, why do they arise and so what? Further, there may be additional consideration to the prevention or management of conflict in a manner which does not spiral out of control in contentious matters.

According to Woodhouse (1996) there is an essential tension between judges and the government. She further suggests that Judges generally avoid ‘political controversy’ (p.423). However, there are times when it is not possible to avoid controversy. *In the matter of the Articles 15, 20, 21, 23 & 28 of the Constitution of the Commonwealth of the Bahamas* (2016/

PUB/con0016), Charles J., ruled that the Rule of Law and the Constitution supersede Parliamentary Privilege. This created political controversy at the time because there were public utterances by Parliamentarians that Parliament is supreme and that the Speaker of the House should consider holding the Honourable Justice in contempt of Parliament. In the big picture arguably this ruling by the Bahamas court was not controversial at all, however, because it differed from the views of the Politicians there was conflict. Fortunately, cooler heads prevailed in this case and the Politicians respected the decision of the court and the rule of law.

When there is a perception that there is judicial interference in the workings of parliament there is likely to be conflict with the politicians. If there is parliamentary interference in the workings of the judiciary there is also a high likelihood of conflict.

When there is an interpretation by the court of the constitution that is different to the legislator's intention there may be conflict. In a recent Cayman Islands case in the Grand Court involving same sex marriage which is presently before the Cayman Islands Court of Appeal, Chief Justice Smellie used his powers under the Constitution to rewrite the Marriage Law. He ordered that the clause in the law, specifying that marriage is reserved for heterosexual couples, be altered to state, "Marriage' means the union between two people as one another's spouses." The chief justice said it was the court's duty to intervene to modify laws that did not comply with the constitution, particularly in cases where the state had failed to act. The Premier of the Cayman Islands said that the Cayman Islands' constitution - which respects the right "to marry a person of the opposite sex" - was designed to reassure Christians that "marriage would retain its traditional definition as the union between a man and a woman." This is another example of where the executive and legislature conflict with the judiciary, however, in this particular instance, it is clear that the rule of law is respected by a politician who is the Premier and also a lawyer.

What?

There are instances where lawyers are in conflict with the judiciary. For example, when a lawyer is of the view that he or she cannot get a fair hearing before a particular judge due to accusations of bias which are unfounded. Mere suspicion versus having admissible evidence

is insufficient to assert bias or prejudice, however, lawyers may get into conflict with the judiciary with their opinion which fall within the suspicion category.

If we examine history, we are able to ascertain that the judiciary created situations of conflict of interest at times. While the UK Act of Settlement of 1701 provided that Judges were to be free of interference from the legislature and the King, there were exceptions. According to Smellie (2012), ‘Judges in some of the British Colonies were being used as tax collectors for the crown, expanding rather than reducing the crown’s fiscal authority and... were also judges in their own causes as tax collectors to pay themselves (p.2)’. Certainly this created conflict with the public at the time that this happened. However, we have evolved from this time period and approach to blatant conflict of interest to a more impartial and independent judiciary in 2019.

Does an impartial and independent judiciary suggest a role of being a referee void of conflict with politicians and lawyer? Is this even possible? Politicians will argue that the judiciary is to interpret and apply laws that mostly likely and clearly aligns with their intention. There should be no deviation from their intention. This particular point of contention is often the crux of the matter when politicians are in conflict with the judiciary.

There is a prevailing view that Parliament is Supreme. With this view that Parliamentary Sovereignty determines that the exercise of its power ought not to be questioned by any other branch of the government including the judiciary there is the creation of conflict.

Unlike the United Kingdom many Commonwealth Countries have a written constitution. Does having a constitutional court whose legal framework is specifically focused on examining the constitutionality of laws make a difference in minimizing conflict between Politicians and the Judiciary? This is another question that I do not propose to answer however, it would be interesting to hear the views of the audience.

While the courts interpret laws, if the intention of parliament is not aligned with that interpretation, parliament may make laws to ensure the correct intention is enacted.

Why?

In my experience in working with the executive branch of a government, I am reminded of something that a former Prime Minister once said with respect to the appointment process of

a Chief Justice. At worst, it is hoped that a Chief Justice would be neutral in a matter that involves the government. More importantly, at best it is anticipated that a Chief Justice would be favourable in a matter that involves the government.

The influence of politics affects the outcomes in tribunals (Bolleyer, von Nostitz and Bormann, 2017, p.24). While independence of the judiciary is paramount to engendering public confidence there may not be absolutes when it comes to this particular reality.

Waseem (2011) suggests that the conflict in Pakistan ‘between the executive and judiciary’ during former Chief Justice Choudhry tenure produced views that the system of democracy was about to fail. Given that the Commonwealth is based on democracy it is important that conflict, perceived conflict or the threat of conflict between the executive and judicial arms of government does not adversely affect fundamental rule of law to result in chaos.

Kawadza (2018) indicates that the clash between the executive and judiciary is as a result of the impact of judicial decisions and not based on the rationale by which rulings are made. Enweremadu (2011) argues that in Nigeria regardless of the outcome of court decisions the political directorate has learnt to accept the rulings of the court.

Why does conflict happen? I am going to apply the 5-Why method commonly used in the oil and gas industry for incident investigation in my approach to the why.

Is it ego and arrogance? The three branches of government usually believe that they have a claim to true power and/or knowledge if they are honest with themselves. Whether that is so can arguably be relative. However, I believe that conflict happens between politicians and lawyers with the judiciary because of human nature and arrogance. What is arrogance? It is that feeling of superiority over others.

Why are individuals in these positions of authority arrogant? It is because of their lack of respect for the rule of law.

Why is there a lack of respect for the rule of law? It is because they do not have a real understanding of the rule of law.

Why do they not have a real understanding of the rule of law? It is because they are consumed with power.

Why are they consumed with power? It is because they do not appreciate why they are here on this earth.

When there is no appreciation of why one is here on this earth, then there is no deeper understanding of how to improve access to justice because one is just an operational applicator and not a conceptual designer with a clear direction to fulfilment of purpose. Now what is all this simplified philosophical mumbo jumbo that I am proclaiming in this session?

It is basically that when human beings genuinely seek to achieve an outcome that is fair and just all parties and in this case politicians, lawyers and the judiciary who find themselves in a conflict will work toward achieving a meaningful and lasting solution to the dispute. This may be an idealist view. Should we not all be striving for idealism? Or maybe such a view is so far-fetched that it has no place in a discussion with regard to politicians and lawyers in conflict with the judiciary.

So What?

Have you ever entered your courtroom harbouring an attitude against a lawyer? Shepard (2014) states that most lawyers have had an experience of going to court where the judge appeared to have ‘an animus against a particular lawyer’ (p.231). It is this perceived conflict that may exist that many are totally unaware of or oblivious to. Shepard (2014) also suggest that ‘rarely do Judges make remarks on the record about lawyers’ (p.231).

In Papua New Guinea (PNG), “Lawyer gets into trouble with the Judge” (2018) contends that a lawyer was held in contempt of court for failing to properly represent a client. In another PNG matter, “Stop Wasting the Courts Time Lawyer Told” (2016), a Senior Magistrate said ‘Unless there is special reason to read all counts and make reference to them later, then let it be read, otherwise save the court’s time’. In another matter, “Judge Issues Warning Against Lawyers Filing Vexatious Lawsuits” (2019) Justice Dingake stated that, ‘Judicial time is a national resource’ and issued a stern warning to lawyers about filing vexatious lawsuits. These are three examples of conflicts between lawyers and the judge or magistrate but ultimately the judge or magistrate has the final say.

Are the preceding examples of conflict fair and reasonable? These are the types of conflicts that arise on a daily basis in many of your courts.

If there has been a tribunal in your jurisdiction for the removal a Chief Justice, there has likely been a conflict involving politicians with the judiciary.

In re Reference to Constitution section 19(1) by East Sepik Provincial Executive ([2011] PGSC 41) a decision by the PNG Supreme Court which was opposed by some Politicians resulted in a conflict which created a national crisis at the time. Fortunately, PNG has moved forward and the respect for rule of law has prevailed insofar that it can be said that PNG is a very stable democracy which like any other developing country continues to grow and evolve.

The American Philosopher Professor Ronald Dworkin suggests that the judiciary should be the entity that explains the standard and the parliament should be unfettered to enact the rule. Such a position assists with setting out how the powers of one group should be exercised in respect of each other.

Conclusion

Politicians, lawyers and judges impact our society in a positive way. Through creating laws that protect our most vulnerable in society, to representing clients who need legal representation or ensuring that there is appropriate compensation for a party that is aggrieved in a dispute these three groups of persons make a difference. From time to time there is destined to be conflict with politicians and lawyers with the judiciary. In spite of these conflicts which may arise, ensuring that public confidence is not eroded in the judiciary is paramount to support access to justice for all people.

People seek solutions daily from politicians, lawyers and the judiciary. What is interesting about this fact is that there is a general expectation that these three groups of people have the answers or are able to point persons in the right direction with respect to their problems or issues that they are bringing to them for guidance or assistance in resolving.

Just as ordinary people conflict with each other, politicians and lawyers conflict with the judiciary from time to time. Perhaps it may be time to consider whether the judiciary can be more proactive to mitigating against conflict with parliamentarians and lawyers.

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