

JUDICIAL ETHICS AND INTELLECTUAL INTEGRITY[#]

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I have been told that all of you are the newly inducted Judicial Officers from across the country and therefore as I see you are all about to start a new journey, a new life, I would deliberately not call it a new career, as accepting a judicial office is the acceptance of a new way of life- judicial life! Welcome.

It is said that in the Continental Europe, say France or Germany, a person who gets the highest respect in society is a University Professor, most likely a Professor in Philosophy. But if you go to England, you will then notice a change, you will find that this place is reserved not for a “Professor”, but for a “Judge”. Since we in India also follow the Common Law System, our society also tends to give the same kind of respect to a Judge. Our society also looks upon its judges as role models, and it is for this reason that I say that what you have now entered is not just a new career, but a new way of life! It means that now you have a lot of responsibility. You will be on watch all the time, and therefore you have to be very careful, as to how you behave inside as well as outside your courtrooms!

What are then the qualities required from a Judge? What kind of judge is needed in a democratic society? Socrates speaks of four qualities in a Judge. A judge should listen patiently, should answer wisely, should consider soberly and should decide impartially.¹ If you come to think of it, these qualities mean nothing more or nothing less than what we understand today as “Judicial temperament”.

Judicial temperament is not just the ability of a Judge to place the law into the facts of the case before him. It is also the skill of a Judge to deal with the counsels in his courtroom. It is his ability to deal with the litigants and the witnesses. It is the patience by which a judge listens to

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both sides of the arguments, weighs the facts and the evidence before him and then comes to a conclusion. It is the quality in him which keeps his mind open, till the last argument has been made and only then come to a conclusion. A character in Henry Cecil's novelette "Settled out of Court", describes an ideal judge as follows:- "full of learning but not parading it, courteous, kind, firm with a mind of his own but ready to listen to other people's views before he comes to a conclusion."²

You as Judges will have to display these qualities every single working day of your life. It is for this reason that David Pannick in his critical yet immensely readable book called "Judges" says, "Judges do not have an easy job. They repeatedly do what the rest of us seek to avoid: make decisions. They carry out this function in public."³

Always remember that the unflinching confidence and the assured faith of a litigant on a judge is the very foundation on which rests our justice system. Justice John Marshal had famously said that the power of judiciary lies not in deciding cases, nor in imposing of sentences or in punishing for contempt but in the trust, confidence and faith of the common man. As a legal maxim goes, "the best guarantee of justice lies in the personality of a judge". Intellectual integrity for this reason is the core value of a judges' personality. It is the fundamental quality and virtue of a Judge. As someone has said, if you have intellectual integrity, it matters little if you do not have any other virtue. Conversely, if you do not have intellectual integrity then it matters little even if you have all the other virtues.

Intellectual integrity is not always the same as "intellectual honesty". Integrity at times is on a higher pedestal than even honesty. This I may explain by illustration, which may apparently have nothing to do with Courts but it is simply to drive home the essentials of this virtue. Imagine that you are sitting outside your house, which opens on a public street, or in a market. It is day time, when you suddenly see at a distance a man running for his life as he is being chased by a mob. Apparently it looks that there is a communal riot in your town. This unfortunate man somehow reaches you and falls before you and begs you to save his life from the mob. The mob is not yet in sight. So you ask the man to hide himself inside your house. You give him shelter. A few seconds later the mob, with men wielding swords and other arms, arrive at your door and

enquire about that man. Honesty demands that you tell the mob that the man they are looking for is hiding in your house. But you also know the consequences that will follow. What you do instead is that you point at a wrong direction, or you even show your ignorance, and tell them that you have not seen the man. The mob goes away. The life of a man is saved. What you have just done may technically be an act of dishonesty but in fact it is an act of great courage and integrity, which is even higher than honesty!

Intellectual integrity is also your ability to be true to your thinking. It is the consistency in the intellectual standards one applies to oneself, as one does to others. In other words it is the ability to practice what you preach.

It is also your honesty and courage to accept your mistake. A Judge must correct one's judgment at the first opportunity he gets. Now we all understand the limitations imposed by law on the powers of "review", but if you come across a case where there is an error apparent on the face of record, do not hesitate to correct it. A Judge must correct his mistake at the earliest. This applies to life as well as to work.

Intellectual integrity is also something you do regardless of whether you are being watched or not. I will tell you an incident. In 1925 U.S. Open Golf Championship were on. One of the clear favourites was the legendary golfer called Bobby Jones, who is an all time greats in the game of Golf. The ball is on the fairway, Bobby pulls out an iron from his bag and addresses the ball and then hits it. What happens is that the iron only just touches the ball and the ball therefore moves only slightly. It doesn't really move. In golf, this is a penalty. No one had watched Bobby Jones, yet he goes to the umpire and tells him to count a penalty. The result is that Bobby Jones loses the championship. Later people congratulate him for being honest. What Bobby Jones says is that thanking him for doing what he did is like thanking someone for not having robbed a Bank!⁴ He did that because that was the only thing to do.

Dissent as integrity

As law students and even as Judicial Officers you must have come across cases where a Judge has taken a different view than the majority. He dissents rather than follow the line of the majority. Mostly

the reason here is the intellectual integrity of the Judge who is not prepared to make any compromises. There have been many famous dissents as well as dissenting judges, I will cite only a few. The earliest, which comes to my mind is the example of Justice Syed Mehmood of Allahabad High Court. Justice Syed Mehmood was the son of Sir Syed Ahmed Khan. He was educated in England, and was a bar at law. Later he joined Judicial Services in the then North Western Provinces, and while he was a Civil Judge in district Raibareilly, he wrote a judgment which ultimately reached the Privy Council. It is said that his judgment greatly impressed the Law Lords of the Privy Council, and he was then elevated as a High Court Judge when he was only in his 30's. He was one of the first Indians to be elevated as a High Court Judge. First in 1882, when he officiated for few months but later he got his full appointment in the year 1887. Unfortunately he then had some differences with the then Chief Justice of Allahabad High Court, Justice John Edge and consequently resigned in the year 1893. But in that short tenure as a Judge, he gave some remarkable judgments. Many of them were dissents, which later become the opinion of the majority.

Imagine those days! The last quarter of 19th century when Justice Mehmood was the only Indian amongst the remaining English Judges. He kept his integrity and independence and had the courage to dissent when he deemed it right. The fact that in most of the cases Justice Mehmood was right is proved by the fact that in most cases it was his minority opinion which came to be followed.

The second example I have for you is of Justice K.K. Mathew, who was a Judge of Kerala High Court and later of the Supreme Court. While Justice Mathew was a Judge in Kerala High Court, a case was referred to a Full Bench, of which Justice Mathew was a member. It was a criminal contempt petition and the alleged contemner was Mr. E.M.S. Namboodripad, the former Chief Minister of Kerala and a very prominent leader of Communist Party of India (Marxist). E.M.S. (as Sri Namboodripad was popularly called) had criticized "judiciary" as an institution, calling it an instrument of oppression in the hands of the ruling class. This criticism one has to say was an articulation of the orthodox Marxist interpretation of law and justice. Nevertheless a contempt petition was filed. The majority opinion 2:1 decided that contempt had been

committed. Justice Mathew though while negating the philosophical foundation of *E.M.S.*, yet defended his right to have such an opinion. This dissent which Prof. Upendra Baxi calls “seminal”, cherishes the fundamental values of our Constitution and the freedom of speech and expression. As we know the majority view in *E.M.S.* case was also upheld by the Supreme Court, yet many years later now the view of the Apex Court is far liberal in these matters, in tune with the “dissent” of Justice Mathew.

Another great dissenter in my mind is Justice Louis Brandeis an Associate Judge of U.S. Supreme Court in the first half of the 20th Century. Justice Brandeis dissents, particularly on question of individual liberty and civil rights are too well known as he was the greatest champion of freedom and liberty, who firmly believed when he said that “the most important political office is that of the private citizen.” A later Supreme Court Judge, Justice William O. Douglas had this to say about Justice Brandeis. “Brandeis was a militant crusader for social justice whoever his opponent might be. He was dangerous not only because of his brilliance, his arithmetic, his courage; he was dangerous because he was incorruptible.”

But in my view the greatest dissents are best reserved for two great judges. The first example is from the U.S. Supreme Court at the turn of the 19th century. As we know that even though slavery had been abolished in 1865, yet in the different States in America particularly in the Southern states segregation laws were common place, known as the “Jim Crow laws”. All this off course was in clear violation of the 14th Amendment of U.S. Constitution by which all citizens were equal. Yet there were separate schools and hospitals for “colored” people, separate public transport, separate waiting rooms. Apartheid was in force. In 1896 these segregation laws were challenged by a non white American called Homer Adolph Plessy. The matter went to U.S. Supreme Court and the case is known as “*Plessy Vs Ferguson*” (1896). The U.S. Supreme Court by a margin of 8:1 ruled that segregation laws were not violative of the 14th Amendment, as the Court ingeniously devised a theory called “separate but equal”. Accordingly, the Supreme Court ruled that it is not unconstitutional to segregate colored people from white as long as the non whites are given the same and equal facilities. Therefore, the principle of “separate but equal”! There was, however, one lone voice of dissent in

the Supreme Court. This was of Justice John Marshall Harlan. True to his name, Justice Harlan in his strongly worded opinion stated as under:-

“The white race deems itself to be the dominant race in this country. And so it is in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.... If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of ‘equal’ accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.”

Sixty years later the same U.S. Supreme Court by an assertive and unanimous opinion demolished the theory of “Separate but equal”, and that remains arguably the most important judicial verdict in the history of the United States, “Brown Vs Board of Education (1954). Thus vindicating the opinion of Justice John Marshall Harlan.

Back home the most famous dissent will always go to Justice H.R. Khanna, Judge, Supreme Court of India, an opinion given by him in *ADM Jabalpur Vs Shivkant Shukla* [1976 (2) SCC 521], famously known as “The Habeas Corpus Case”. During the emergency between 1975-77 Maintenance of Internal Security Act (MISA) was in force and lot of Politician, Journalist, Social Workers were detained in various States, under

the preventive detention law. Most of the High Courts at that time were liberal in granting writ of Habeas Corpus, thereby releasing the detainees. The validity of the Preventive Detention Act was ultimately to be tested before a five member Constitutional Bench of the Hon'ble Apex Court of which Justice Khanna was a member. Arguments were heard and judgment was reserved and thereafter Justice Khanna writes in his memoir ("Neither Roses nor Thorns")⁵ that he went to Haridwar, which is about 5 hours drive from Delhi, and there at "Dam Kothi"*⁶, he kept thinking about the case till late into the night, when his wife comes to him and asks him what is wrong. Justice Khanna replies that nothing is wrong but he has just given a judgment which will cost him the office of the Chief Justice of India. The rest as we know is history.

The majority opinion in the Habeas Corpus Case held that in emergency and the consequential suspension of fundamental rights, including Right to Life under Article 21, no person had a *locus standi* to move a writ petition under Article 226 before the High Court for Habeas Corpus or any other writ challenges his detention. Justice Khanna in his lone dissent held that Article 21 is not the sole repository of Right of Life and Personal Liberty; as "the right of life and personal liberty is the most precious right of human beings in civilized societies governed by the rule of law".⁶ Consequently, "Even in the absence of Article 21 in the Constitution, the State has got no power to deprive a person of his life or personal liberty without the authority of law. That is the essential postulate and basic assumption of the rule of law in every civilized society."⁷

Justice Khanna firmly asserted his views and justified his views in the parting paragraph of his courageous dissent:

"Before I part with the case, I may observe that the consciousness that the view expressed by me is at variance with that of the majority of my learned brethren has not stood in the way of my expressing the same. I am aware of the desirability of unanimity, if possible. Unanimity obtained without sacrifice of conviction commends the decision to public confidence. Unanimity which is merely formal and which is recorded at the expense of strong conflicting views is not desirable in a court of

* Irrigation Rest House at Haridwar

last resort. As observed by Chief Justice Hughes, judges are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice. A dissent in a court of last resort, to use his words, is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”⁸

This journey which all of you have undertaken will only take you forward, if you take each step with honesty, courage and hard work. As you go in life you will realise that sometimes it is necessary to look towards your role models. Speaking of role models why go far as Justice Pant* is here today in our midst. It is not considered polite to praise seniors in their presence and therefore I would not say much, all that I would say is that the journey Justice Pant has undertaken should itself be a source of inspiration for all of us.

I would end by speaking about another role model for you. She is presently as Associate Judge of U.S. Supreme Court, Justice Sonia Sotomayor. Justice Sotomayor is the first Hispanic and the third woman to be appointed to the U.S. Supreme Court. As you know Justices in the U.S. Supreme Court are appointed for their life, and there are only nine justices in the U.S. Supreme Court, therefore, it is not even realistic for anyone to aspire to be a Judge of U.S. Supreme Court, let alone for someone with the background of Justice Sonia Sotomayor.

The mother tongue of Justice Sonia Sotomayor is not English. Her parents had migrated from Nicaragua. Her father was a mechanic and her mother was an untrained nurse. On top of it her father died when the child Sonia was around ten years of age. She was hence raised by a single mother. Again, at the age of nine, she was diagnosed as a case of Type - I diabetic. She survived the testing times and hardships of a juvenile diabetic. That she must have been gifted and intelligent cannot be in doubt, yet mostly by her hard work and an abiding faith in herself she completed

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her studies first at Princeton and then at Yale. Joined initially as the office of the District Attorney and later a judge in New York and ultimately in 2009 as a Judge in U.S. Supreme Court.

In the Epilogue to her inspirational memoir called “My Beloved World”,⁹ Justice Sotomayor writes:-

“With each of my own small, steady steps, I have seen myself grow stronger and equal to a challenge greater than the last. When, after six years on the district court, I was nominated to the Second Circuit Court of Appeals, and to the Supreme Court twelve years after that, the confirmation hearings would be, at each step, successively more difficult, the attacks more personal, the entire process faster, more brutally intense. But at each step, too, the numbers of family and community encircling me and coming to my defense would be exponentially greater.”

In her Preface to the book she gives reason as to why she must give an account for her journey, as “people who live in difficult circumstances need to know that happy endings are possible”.¹⁰ She then writes:

“I have ventured to write more intimately about my personal life than is customary for a member of the Supreme Court, and with that candor comes a measure of vulnerability. I will be judged as a human being by what readers find here. There are hazards to openness, but they seem minor compared with the possibility that some readers may find comfort, perhaps even inspiration, from a close examination of how an ordinary person, with strengths and weaknesses like anyone else, has managed an extraordinary journey.”¹¹

Aspirations and ambitions are not bad. In good measure they are healthy and keeps you moving, but always remember, true satisfaction is not in claiming “trophy”, but in getting a frank answer from yourself at the end of each day, answer that you were good, that you were honest and that you did your best in what was before you. Once again in Justice Sotomayor's own words..... “and after a time you may recognize that the proper measure of success is not how much you've closed the distance to some far-off goal but the quality of what you've done today”.¹²

References:

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