

THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT

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Are they applicable in the Melanesian and Polynesian islands of the Pacific?

The principles concerning the judicial code of conduct worked out by the Canadian Judicial Council remind us that Socrates counselled judges to hear courteously, answer wisely, consider soberly and to decide impartially.

They are a complement to this sober definition as they make it clear that these judicial virtues are all aspects of judicial diligence. It is appropriate to add to Socrates' list the virtue of acting expeditiously, but diligence is not primarily concerned with expedition. Diligence, in the broad sense, is concerned with carrying out judicial duties with skill, care and attention, as well as with reasonable promptness.

For centuries now, though under very different forms, hasn't such counsel been what each and everyone expected of judges, whether it be a retained justice system such as that which used to prevail back in the days of the European monarchies and, still in existence today, that of the customary law practiced at Wallis and Futuna, or a delegated one like that of most states and territories nowadays?

The modern world seems to be taking a new orientation and willing to provide for a body of rules aimed, through its exhaustiveness, at protecting each individual from the potential arbitrary of another one mightier than him and, thus, may sometimes do so to the detriment of rules governing some communities that, still to this day, have favoured the interest of the community as a group over that of the individual. There are many examples of such communities in the Pacific.

Can the principles of Bangalore in this context be a model of judicial ethics for this region of strong traditions?

At its first meeting held in Vienna in April 2000 on the invitation of the United Nations Centre for International Crime Prevention and in conjunction with the 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Judicial Group on Strengthening Judicial Integrity, (with Justice Michael Kirby of the High Court of Australia as rapporteur) recognized the need for a code against which the conduct of judicial officers may be measured. Accordingly, the

Judicial Group requested that codes of judicial conduct which had been adopted in some jurisdictions be analysed, and a report be prepared by the Co-ordinator of the judicial Integrity Programme, Dr. Nihal Jayawickrama, concerning a) the core considerations which recur in such codes; and b) the optional or additional considerations which occur in some, but not all, such codes and which may or may not be suitable for adoption in particular countries.

For our subject at hand, it is worth pointing out that only the following international codes and instruments:

- Declaration Principles of Judicial Independence issued by the Chief Justices of the Australian States and Territories, April 1997.
- Yandina Statement: Principles of Independence of the Judiciary in the Solomon Islands, November 2000.
- The Beijing Statements of Principles of the Independence of the Judiciary in the Lawasia Region, adopted by the 6th Conference of Chief Justices, August 1997 come from countries that are members of this conference, even though some of those which have been consulted from another source are currently applied in several states or territories, or practiced there out of inspiration from such models.

At its second meeting held in Bangalore in February 2001, the Judicial Group proceeding by way of examination of the draft placed before it, identified the core values, formulated the relevant principles, and agreed on the Bangalore Draft Code of Judicial Conduct. The Judicial Group recognized, however, that since the Bangalore Draft had been developed by judges drawn principally from common law countries, it was essential that it be scrutinized by judges of other legal traditions to enable it to assume the status of a duly authenticated international code of judicial conduct.

The revised Bangalore Draft was placed before a Round Table Meeting of Chief Justices (or their representatives) from the civil law system, held in the Peace Palace of The Hague, Netherlands, in November 2002.

The UN Special Rapporteur was in attendance. The "Bangalore Principles of Judicial Conduct" was the product of this meeting.

It is worth pointing out that between the draft that was completed at The Hague and the initial one in Vienna back in April 2000, a significant change of perspective has taken place. It has switched from the form of a code to a list of principles that are presented as examples of application of the values which were retained as the core values of judicial conduct.

1. The principles of Bangalore

Six values make up the core of the Bangalore principles. There isn't much to add to such values whose terms of Independence, Impartiality, Integrity, Courtesy, Equality, Competence and Diligence convey explicitly what any citizen expects of the conduct of a judge to whom he has given his trust.

However, it is necessary to analyze the proposed applications of these values in order to have an opinion about the nature of these principles and, beyond that, about their suitability to the constitutional systems of the Pacific Islands so profoundly pervaded with the respect for traditions which, seen through the eyes of their people as well as those of numerous observers, make up the main part of their cultural identity in this new millennium marked both by the globalization of values and the need for closely-knit communities, whether national or regional, to assert their specificities.

- 1.1 The first Bangalore draft worked out in February 2001 looked more like a code that had disciplinary aims, and that was conceived in order to fulfil the job of eliminating the corruption that could affect some of the members of the judicial professions;

The careful reading of the various applications that make explicit the principles rewritten in 2002, and after consulting with European judges and the European Council, has made it possible to bring to the fore a mixture of counsels whose form is insistent, close to being imperative, as well as various bans; consequently one is allowed to wonder whether this isn't yet despite it all, another restrictive instrument, more useful for disciplinary ends for providing elements of a code of ethics founded on respect for common values.

For all that, aren't the undeniable natures of the values retained and the numerous applications proposed something that can give shape to a model adapted to the Pacific?

- 1.2 The preamble of the Bangalore Principles serves as a reminder that they are intended to establish standards for ethical conduct of judges. They are designed to provide guidance and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.

As a result of such a conception of principles bound to existing rules, which cannot be substitutes to the latter ones and which only have a subsidiary nature, there is no need for

any clause to be inserted and prevent them from agreeing with the purpose of universality intended by their authors who worked them out by crossing the traditions of both magistracies, that of common law and that of civil law.

However, a careful look at these principles will show that there are issues that could call this universality into question.

1.3 Some examples

- A judge shall be independent in relation to society in general and in relation to the particular parties and to a dispute which the judge has to adjudicate.
- This principle which seems to suggest that a judge should be independent from the society he lives in contradicts that which wants the judge to “judge in the name of the people” (as in France) or to be the sovereign’s delegate. It does partake of the idea that a judge should reach a decision “in all conscience”. However, can he really keep himself from referring to the society to which he belongs?
- The Advisory Council of European Judges informed a committee of ministers from the European Council in 2002 of its opinion about “the principles and rules that govern the conduct of judges? By reminding them that it did not recommend that the judges be isolated from the social context in which he lives: ensuring the smooth running of justice implies that judges be in phase with reality.”
- Likewise, the Guide to Judicial Conduct worked out by the AIJA for the Council of Chief Justices of Australia and approved by the same council states that “Judges are entitled to exercise the rights and freedoms available to all citizens. It is in the public interest that judges participate in the life and affairs of the community, so that they remain in touch with the community”.
- These counsels seem all the more necessary for the carrying out of judicial duties in the Pacific: if the judges are natives to the island where they fulfil their duties, the island nature of such an environment makes the isolation of the judge from his social context a totally illusive issue; if they come from another country, they should on the contrary immerse themselves in the local context in order to better understand all the specificities and, as it is said in application 3-2, do it so that the behaviour and conduct of a judge must reaffirm the people’s faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

- Subject to the proper performance of judicial duties, a judge may serve as a member of an official body, or other government commission, committee or advisory, if such membership is not inconsistent with the perceived impartiality and political neutrality of the judge.

The principle seems hardly compatible with the jurisprudence of the European Court of Human Rights taken in application of article 6-1 of the ECHR pertaining to impartial court. This leads one to consider that in such a case a judge may be perceived by a reasonable individual on trial as one lacking a priori impartiality, as a result of his participation in a government agency which would have put forward a rule of expressed an opinion regarding an issue that might be touched upon by the judge during the trial.

On the other hand, it is not unlikely that, with some reservations that will be mentioned further on, this application may seem totally acceptable to many Pacific islanders.

Lastly article 6-4: "A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms."

Though this may be regarded as a legitimate aspect of the judge's duty of competence, and therefore his training as a judge, this could clash with the constitutions of the Pacific island nations which confer a constitutional value to customs that sometimes have little to do with the very individualistic nature of the Universal Declaration of Human Rights.

These brief examples suggest that the principles of Bangalore should be looked at from two standpoints, from that of the universal principles very closely linked to the Declaration of Human Rights, but also from that of being principles which, though they are used as a code of conduct guide, remain nonetheless, because of their detailed and restrictive nature, a source of potential disciplinary process.

In Canada, the Canadian Judicial Council has worked out a brochure entitled "Ethical principles for judges" which indicates that the purpose of this document is to provide ethical guidance for federally appointed judges.

It is stated that the statements, principles and commentaries described the very high standards toward which all judges strive. They are principles of reason to be applied in light of all of the relevant circumstances and consistently with the requirements of judicial independence and the law. Setting out the very best in these statements, principles and commentaries does not preclude reasonable disagreements about their application or imply that departures from them warrant disapproval.

It is a reminder that the statements, principles and commentaries are advisory in nature. Their goals are to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role. They are not and shall not be used as a code or a list of prohibited behaviours. They do not set out standards defining judicial misconduct.

Nothing in these statements, principles and commentaries can, or is intended to limit or restrict judicial independence in any manner. To do so would be to deny the very thing this document seeks to further: the rights of everyone to equal and impartial justice administered by fair and independent judges.

2. Another perspective

The Canadian approach brings to the fore the issue of clearly separating the judicial code of conduct and the disciplinary process.

2.1 In France, to this day, there exists no prescriptive document pertaining to judicial conduct. Judges who take up their posts take the following oath: "I solemnly swear to fulfil my duties to the best of my knowledge, to religiously keep the deliberations a secret and, in all circumstances, to conduct myself in a dignified way and as a loyal magistrate".

Decree 58-1270 of 22 December 1958 implementing the organic law relative to the status of judges comprises, in addition to the oath, three other provisions specifying their duties:

- Article 10 which states the following: judges shall not indulge in any political deliberation whatsoever. Any manifestation of hostility to the principle or to the form of the government of the republic is prohibited to judges, as well as any politically related demonstration that would not be compatible with their duty to preserve the secrecy required by their profession. Judges shall not participate in any action aimed at stopping or hindering the smooth running of the courts of law.
- Article 43 which defines a disciplinary fault: any failure to meet the duties of honour, consideration or dignity pertaining to his station as a judge shall constitute a disciplinary fault.
- Article 79, paragraph 1 states that honorary judges shall be held to the duty of preserving the secrecy required by their profession.

This situation may have a historical explanation due to the conception that Napoleon had of codifications as he was watching over the drafting of the civil code. He suggested that it was better to lay down simple principles and wait for the complexity of daily life to seek a solution.

This is what led to French Magistrates' Council to validate on October 6th, 2005 a collection of the disciplinary decisions taken by themselves and by the French Council of State since 1959. This important collection makes up basically what may be regarded as the judge code of good conduct.

- 2.2 This solution, which in an odd sort of way makes France, in this particular field, a country that has worked out its own code of conduct based on previous experiences while other systems using Common law have provided themselves with guides or nearly codified principles, couldn't it be the beginnings of a proposition for a model in the Pacific?

In this regard, I will take the example of customary justice as it is still carried out today in the islands of Wallis and Futuna. There, the customary chiefs have been holding concurrently their duties as chiefs and those of members of the deliberative councils, which have kept the judiciary duties. Until a very recent time, the trust the people had in their chiefs made their roles as judges an issue that had never been disputed: the kingdoms were ruled according to the ancient rule, which was that all justice comes from the king who, himself, holds it from God.

As long as they had the people's trust, there was no need for a written translation of a code of conduct since the chiefs obviously possessed the values recalled by the principles of Bangalore.

The intrusion of the western way of life, the use of a currency and trade has brought about new attitudes that have worn down the chiefs' credibility and their ability to make decisions, some of which were unexpected and suspected to have originated from a generous gift from one of the litigants.

Just as it was before the French Revolution which, in part, broke out after some people on trial had complained and asked to be set free from the equity of parliaments, the Wallisians and the Futunians too have lost the trust that has brought about a request for the kind of changes that may restore it, which may not require that the customary law contention be transferred to the common law judge.

As a conclusion to this very brief analysis of the principles of Bangalore, of its strengths and weaknesses, the one thing that stays in my mind is that the trust of the people in their judges is, beyond any other consideration, a fundamental element to the smooth running of any society and its judicial system.

The principles of Bangalore appear to be too detailed, too restrictive and at times hard to apply to small ethnic entities that are still so profoundly attached to their very vivid traditions.

For those Pacific islands that have kept alive a significant part for their traditions, including giving them a constitutional value, as in some islands of Polynesia and Melanesia, which outrank the individualistic rules of the Human rights, particularly when these presented a threat to the values and culture of their countries, the use of the values of the principles of Bangalore and of some its selected applications could then constitute a useful model which would be integrated to an original and proclaimed ethnic identity context.