

# Confronting judicial misconduct

Lynne Wrennall investigates misconduct and corruption.

***'Bent judges' have long assumed an entertaining place in popular culture, though 'black collar crime' has not been widely covered in academic scholarship. Given the central importance of judges in the justice system, it is surprising that judicial misconduct has not received more attention. Judicial misconduct is an important form of corruption with potentially serious sequelae. When judicial decision-making is corrupt, the office of judge is misused. Decisions are made to serve private interests, rather than the greater good.***

The judiciary is aware of, and expresses concern over, misconduct by judges. Several judges gave papers on fighting corruption in the judiciary at the Commonwealth Judicial Education Institute's *International Conference & Showcase on Judicial Reforms* and the *5th World Wide Common Law Judiciary Conference* was devoted to the topic. As Judge Spigelman (2003) acknowledged, 'there is no doubt that judicial corruption does exist in many jurisdictions and in some places is endemic'.

In the UK, the Office for Judicial Complaints (2009) received 1,339 complaints in the period 2008/2009. Of these, the Lord Chancellor and Lord Chief Justice took action in 89 cases, removing 25 judges and magistrates from office and 20 resigned from office whilst being investigated. The largest category of complaint was judicial decision-making and case management, but the main reason for removal from office was failure to fulfil judicial duty.

Judicial error is clearly connected to miscarriages of justice (Malleson, 1993, in Zander, 2007), but where

error crosses the line into misconduct requires analysis. UK legislation and regulations are more procedural than conceptual and so are not particularly helpful in understanding how to delineate misconduct, corruption and error. Corruption is a much broader concept than the simple acceptance of bribes. Under pending UK legislation on corruption, a corrupt act is defined as one that intentionally confers an unlawful advantage, but the principle of integrity, as formulated by the Nolan Commission (1997), is more nuanced. It requires that 'Holders of public office should not place themselves under any financial or other obligation to individuals or organisations that might influence them in the performance of their official duties'. However, office holders may be unaware that the influence is taking place. Through processes of rationalisation and neutralisation, actors may become blinded to their own motivations and intentions. The conferring of unlawful advantage through an unconscious slide under subtle influence is likely to be far more common than intentional agreement to be influenced and hence the avoidance of potential influence through conflicts of interest is likely to be critical in preventing misconduct.

Of the many historical cases of judicial misconduct that would benefit from further analysis, four examples stand out. Judicial misconduct is alleged to have facilitated the US child stealing racket in the 1930s and 1940s, in which the Tennessee Children's Home Society stole some 5,000 babies. Some died of neglect and the others were sold for profit. Years later, the now-grown survivor

children still struggle to find their families, often without success, because the records were falsified and in some cases, destroyed.

Another case study is 'Operation Clean Hands' in Italy, a massive anti-corruption operation driven by 'revolutionary judges' that uncovered a collusive strategy of hidden exchanges between members of the judiciary, politicians and entrepreneurs. Although the Italian judiciary enjoys a high degree of formal independence from parliament, extensive informal links have established a culture in which corrupt exchanges have flourished (della Porta, 2001). Commencing in 1992, 'Operation Clean Hands' consisted of more than 3,500 investigations into corruption. By 1993 one third of the Italian Parliament was facing corruption charges and hundreds of business owners had been arrested. The number of people sentenced for corruption increased from 159 in 1991, to 856 in 1996 (Istat, in della Porta, 2001). Judges who confronted the pervasive illegality achieved widespread public acclaim. 'Operation Clean Hands' generated passionate debate that revealed a broad based genuine concern about corruption and arguably produced seismic political consequences that continue into contemporary Italian politics. The history is especially interesting because it provides a case study in which judicial misconduct is confronted by judicial activism.

The women of Courtwatch provide a model for community activism to confront corruption on the bench (Ford, 2005). The judges had been taking bribes to award custody to the women's wealthy ex-husbands, in some cases forcing children to reside with child abusers. Applying the Jewish concept of *Tikkun Olam*, meaning repairing or healing the world, the women brought down the Houston Family Court judiciary in a determined, co-ordinated attack on judicial corruption.

More recently, US judges who were bribed to obtain contracts for private juvenile prisons, and to send 2,000 juveniles to these prisons, provide an interesting case study

demonstrating the serious influence that private profit can exert over the judiciary. As a result of these disclosures, the corrupting of public officials by private prison operators needs to be accounted into analyses of incarceration.

There are various institutional processes that, if implemented, are thought to promote judicial probity, such as impartial appointments processes, institutional independence, security of tenure, secure and appropriate remuneration, judicial education, and disciplinary procedures (Oxner, 2005). Numerous states have Judicial Misconduct Commissions or other similar regulatory bodies and whistleblower protections are also important. Transparency, accountability, and independence are the accepted principles.

In the UK, judicial misconduct is regulated by the Constitutional Reform Act 2005 and the Judicial Discipline (Prescribed Procedures) Regulations 2006 made under sections 115, 120, and 121 of the Act and the Judicial Discipline (Prescribed Procedures) (Amendment) Regulations 2008. The ability of litigants to appeal in the European jurisdiction, decisions that breach Human Rights, also provides some protection against judicial misconduct. The American Bar Association has provided a Model Code of Judicial Conduct containing five Canons, supported by commentary and guidance. It is the violation of one or more of these Canons that is officially constituted as judicial misconduct in the United States. Uniform procedural rules were introduced in 2008 to govern judicial misconduct, covering all federal judges in the United States.

It is not unusual for nation states to require politicians to publicly declare their financial interests. Similarly, local governments also have registers of interests that are made available to the public. Civil servants and local government employees must declare their interests. It is logical therefore, to expect judges to do likewise. In the United States, judges must declare their financial interests under the Ethics in Government Act of 1978

and the requirement cascades down through the American Bar Association's Judicial Code of Conduct.

South Africa engaged in an extensive public debate about the role of the judiciary during the last two decades and detailed arguments surrounding a register of judicial interests were given coverage. It may be argued that disclosure of financial interests by UK judges is unnecessary, since they are not permitted to engage in other forms of employment or to hold directorships in companies. However, such an objection would be naive, because UK judges are permitted to hold investments and property and to hold directorships in non-profit-making organisations, all of which may be highly lucrative and may conflict with impartiality.

Although registers may not deconstruct the more determined forms of corruption related to organised crime, they help to prevent ordinary judges from unconsciously sliding into the more mundane forms of corruption. Registers of financial interest, promote judicial independence while increasing transparency and accountability. They also help to reduce the opportunities for corruption because conflicts of interest are open to easy detection. Therefore this mechanism may be especially important in preventing judicial misconduct.

There are well-recognised principles for registers of interests that have been developed by the United Nations. Adapted to judges they would mandate that:

- The requisite information should be provided by the judge on appointment and updated within tight timeframes.
- The requisite information should apply to the judge and to his or her immediate family.
- There should be sanctions for failure to provide accurate information.
- The keeper of the register should be independent of the judiciary.
- The information should be able to be viewed freely by members of the public.
- Analysis should be encouraged

to ascertain whether there is a relationship between financial interests and decision-making.

Within the broader context of measures designed to promote judicial probity and address judicial misconduct, a register of judicial interests is an essential mechanism. Jurisdictions that do not compel judges to disclose their interests on a public register may be considered to be remiss in providing adequate protection against corruption arising from subtle and covert influence. ■

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