



## MANAGING JUDICIAL STRESS IN CHANGING NEW WORLD ORDER

### [PRESENTATION NOTES]

*“The Judge, even when he is free, is still not wholly free. He is not to innovate at his pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty and goodness. He is to draw his inspiration from consecrated principles.”*

*Benjamin Cardozo, The Nature of The Judicial Process (1921)*

Hon Chairperson,

### **1.0 Introduction**

- I have started my presentation by observation made by Hon. Justice Cardozo indicating that judicial work is inherently stressful.
- As to what does the word 'stress', I have explained it to mean 'pressure' or 'tension' exerted on a given object. And, 'judicial stress', therefore, to mean pressure or tension exerted upon the judicial officer in relation to his or her functioning as a judicial officer.
- Because my topic touches judicial function, I have found imperative to give a word on what is the judicial function - which simply means 'administration of justice through interpretation and application of law.
- The presentation is then carried out to see how stressful is the judicial function.

### **2.0 Judicial Stress Analysed**

#### **2.1 Inherent Stress Characterising Judicial Functions**

- Consider structural position a judge - legally, politically and socially - it is not an ordinary position - (i) consider how our societies perceive position of a judge; (ii) consider how other state leaders perceive position of a judge; (iii) consider professional relevancy of a judge; and (iv) consider also responsibility perception of the judge him or herself.

Judges use legal knowledge to make decisions based on their understanding of the law. This is not as easy as it may sound. The role of imparting justice impartially, objectively and fairly can be a challenging for many judges.

- Law school education trains lawyers to understand law, whether on paper or in an oral argument. Research shows that many lawyers have the personality to fit such a practice of law.

- However, not all lawyers possess the necessary judicial temperament to be a judge. Being a judge is an honorable position, but it also carries a major responsibility that requires a great deal of wisdom and integrity. By itself, the very consideration that judgeship is something so specious produces a lot of stress.

- In a study sponsored by the Supreme Court of Ohio Judicial College, the question was asked to new Ohio judges as to "What do you find stressful about your new position as a judge?" The following quotes were responses from different judges: "The shift from a position of advocacy to one that is impartial and unbiased"; "Living in the public 'fish bowl';" "Emphasis on being reasonable and prudent;" "Maintaining the judicial image;" "Insecurity of an elected position;" "Suppressing feelings and exemplifying judicial temperament;" "Making many decisions quickly, efficiently, and wisely every day;" "Sense of isolation, especially from my previous colleagues;" "Others expect me to be 'all knowing' and wise;" "Having to run for election;" and "Concerns about security for me and my family, at work and at home."

-It obvious that each of these answers signifies the existence of some element of 'stress' upon the incumbent judges, from the very beginning.

- Moreover, some judicial activities involve inherent elements of high drama and pressure both on advocates and judges alike; long and complex criminal trials nearing their conclusion; the final addresses to the assessors; and the judicial summing up, will present such circumstances.

- Judges make life-altering decisions on a daily basis. Remember one of those unique stresses required in the working of a judgeship: "Making many decisions quickly, efficiently, and wisely every day?" This can well be found to be stressful.

- The risks of judicial stress or sufferance may even go further - to endanger the life or security of a judge.

- A study on instances of risks to which judges are exposed has revealed that a defendant in one trial in Boston punched a juror, leading the judge to declare a mistrial. During the defendant's second trial, the defendant threatened to kill the jurors.

- Judges have been threatened, injured, or killed while on the job. Some judges have also experienced violence outside of the courtroom; for instance, in 2005, a man killed U.S. District Judge Joan Lefkow's husband and her mother as an act of retribution for her rulings.

- In New York barely avoided being shot when a former defendant fired a sawed off rifle in the courtroom.

- In Zanzibar, for example, there is the case of *DPP v. Hassan Shaaban Dodi and Japhet Mussa Maneno*<sup>1</sup> in which, believing that a witness then before the Court could produce conclusive evidence against them, the two accused persons sparingly disputed competence of the witness to testify. When the trial magistrate ruled out in favour of the witness's competence to testify, an accused person jumped at the magistrate, grabbed the court file and tore it in pieces.

## **2.2 Stress Based on Public Criticisms**

- Judicial decisions are always subject to criticism:

- some criticisms are quite unfounded. The majority of the public does not understand how the law works. People still often misunderstand the judicial process, especially when a judge's decision or opinion is not what they think it should be. This public misunderstanding invariably cause discomfort for the judge and even his/her family.

- There are also professional criticisms. I have given two examples (at pg 9):

-(i) For example, dissatisfied with the manner in which the higher judiciary in Tanzania tend to approach some legal issues, Professor Chris Maina Peter had this to explain:

"Sometimes their Lordships and Ladyships on the Bench are so removed from the real life and concrete situations, that one feels that they are not addressing issues of law and justice but applying and interpreting law in vacuum."

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<sup>1</sup> Regional Magistrate's Court, at Vuga, criminal Case No. 19 of 2015.

(ii) In another example, Hon. Justice Mihayo (rtd.) came up still reiterating the criticism that this adjudicatory paradigm by the highest judiciary in the country is a serious disappointment. In his own words stated that:

"The judgment of the court of Appeal in Mtikila II was, with respect, a serious let down. I have been reading the judgment over and over and every time I read it, I believe the Court of Appeal was not itself when it wrote. ... It is sad to imagine that this judgment will be left to stand. And I hope that it will stand alone as an example of a situation where the highest Court of this land failed its people."

- it is also quite common that some judicial decision are criticised in news papers.

All these incidents would quite stressful on the party of the judges concerned.

### **Stress Exerted to Judges' spouses and Children**

Some judges may never perceive they are stressed. They may be working under many deadlines with many things to accomplish in very little time. The tension can be readily observed or sufferance experienced by everyone around him or her. It is common experience, for example, spouses of judges are told to avoid certain issues because of ethical considerations. But experiences may go even worse. For instance, in 2005, a man killed U.S. District Judge Joan Lefkow's husband and mother as an act of retribution for her rulings.

These reactions indicate that the position of a judge brings a variety of changes to the lives of their spouse and family with, of course, some kind of stress if not suffering.

Children also reflect feelings about how their lives are altered when a parent becomes a judge.

One child said, “When dad was an attorney, we entertained informally. Now that he is a judge, he is a stuffed shirt, and entertainment is stiff and formal.”

### **Stress From Crushing Case Loads**

One may find it is very pleasant being a judge or a lawyer. However, mental health professionals say they are seeing a lot of anger and anxiety in judicial clients, being the apparent results of crushing case loads, the novel and complex legal issues and increasing media scrutiny.<sup>2</sup>

Judicial officers (judges, magistrates and some tribunal members) are subject to particular risks of stress, depression and pressure. This is so. However, some of them may deny that fact.<sup>3</sup>

#### **2.3.1 Stress Caused by Judicial Officers [i.e. Judicial Bullying Practices]**

Responding to the pressures exerted on them, some judicial officers become part of the problems. Some become bullies. Some misuse their power and create intolerable pressures for lawyers and others working in the law.

There are some examples in Tanzania, especially with experiences the country's Court of Appeal. The working of the Court of Appeal has been criticised for application of technicalities at the expense of justice.<sup>4</sup> This led one lawyer to observe that:

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<sup>2</sup> Editorial, "Judges at Risk" in National Law Journal, Vol. 18, No. 32, 8April 1995, A1

<sup>3</sup> Hon Michael Kirby AC, 'Judicial Stress and Judicial Bulling' in QUT Law Review, Volume 14, No.1, 2014

<sup>4</sup> Chris Maina Peter, "The Contribution of the Court of Appeal of Tanzania in the Maintenance and Safeguarding of Rule of Law and Human Rights" in Chris Maina Peter and Helen-Kijobisimba (eds.), *Law and Justice in Tanzania:*

The Court of Appeal is a Court that preoccupies itself, and it evidently does so with gusto and relish, with its own administrative and procedural rules. As if that were not bad enough, the Court is not predictable, reducing, in large measure, pursuit of an appeal into a game of chance, into a lottery.<sup>5</sup>

He added:

The technical hurdles are legion. It is no wonder that some of us have determined that it is easier to pursue a seat in Parliament than pursue a single appeal before the Court of Appeal of Tanzania.<sup>6</sup>

It is acknowledged that such occasions test the capacity both of lawyers and of judges to act with efficiency, courtesy, restraint and appropriate mutual respect.

Judges need to ensure that lawyers, especially advocates, in the testing circumstance of litigation, master their briefs, familiarize themselves with the applicable law, command the detail of the facts, reflect seriously on the structure and content of their arguments, obey the practice rules and help the court to reach a lawful and just conclusion. They need to test the propositions advanced by the advocates and to ask them tough questions. BUT all these must aim at meeting the end in litigations.

As remarked by Judge Learned Hand in the United States of America:

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*Quartern Century of the Court of Appeal*, Tanzania: Mkuki na Nyota Publishers for Legal and Human Rights Centre, 2007, p. 245.

<sup>5</sup> R.N. Ben Lobulu, "Litigating Tanzania's Bill of Rights", in Kivutha Kibwana (ed.), *Human Rights and Democracy in East Africa: The Constitutional Implication of the East African Cooperation*, Nairobi, Kampala and Dar es Salaam: East African Law Society, 1997, p. 129 at 138.

<sup>6</sup> *Ibid.*

Justice can be as readily destroyed by the flaccidity of the judge as by his tyranny; impartial trial needs a firm hand as much as constant determination to give each one his due.<sup>7</sup>

While holding the adversaries to a high standard and ensuring efficiency, there is no place for rudeness. The excuse that I have sometimes heard advanced is that appellate judges are cleverer and therefore entitled to demand brilliance from those appearing before them. Judicial bullying, in whatever form, should not be tolerated or excused on the footing that “it was ever thus.”<sup>8</sup>

However, it is essential to keep the problem in perspective. Under normal circumstances, the problem of judicial bullying in East Africa is not widespread. Most judges are aware of the need to keep their personalities in check when they are exercising public power. Nevertheless, the bullying practices need to be addressed seriously and given appropriate measures in response.

### **2.3.2 Response to Judicial Bulling Practices**

It is time that judges were added to the agenda of a national wellness forum; particularly if they are significantly a *cause* of unwellness in the administration of justice. It might also be time for the law to find appropriate responses. However, given that executive government and the media are often jealous of the independence of the judiciary and desirous of challenging it, it needs be emphasized that any response to instances of judicial bullying should not disproportionately inhibit the robust independence of, and candidly or frankly speaking by those who hold judicial office.

### **Stress on Court Assessors**

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<sup>7</sup> Justice Glenn Martin, Supreme Court of Queensland, “Overbearing Conduct in Court by Judges and Lawyers” unpublished, 9 February 2013, p. 22. See also in J Phillips, “Managing People in Court” unpublished 9 February 2013.

<sup>8</sup> J Phillips, “Managing People in Court”, *Ibid*.



A number of studies conducted on the stress that judges and jurors experience have determined that serving as an assessor can be difficult or stressful for a variety of reasons.<sup>9</sup> The most stressful elements of assessor's duty involved: trial complexity (e.g., difficulty in understanding the law or testimony), the decision-making process (e.g., having limited input), and disruption to daily life (e.g., long days in court). In cases involving “notorious” defendants, there can also be stress due to intense media scrutiny. Documented stress symptoms among assessors include anxiety, sleeplessness, headaches, hives, and high blood pressure.<sup>10</sup>

Although courts can do relatively little about some of these concerns (e.g. the nature of the crime or the necessity of reaching a verdict), others can be addressed by procedural reforms, such as allowing assessors to ask questions, modifying judge’s instructions, and providing more frequent breaks.

In general, what essentially needed is that judicial officers have to give full attention to stressful situations of assessors for the interest of justice.

### **3.0 Managing Judicial Stress**

In practice, incidents of judicial stress are situational. They practically happen at factual and social inclination. This means that, in managing specific incidents of judicial stress, we need to have appropriate measures - so specific - to remedy the situation. In general, there is no one size fits all theory in dealing with specific incidents of judicial stress.

However, the following are general considerations that might positively compromise in one way

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<sup>9</sup> Editorial, "Judges at Risk", *Op. Cit.*

<sup>10</sup> See also S R Anleu and K Mack, ‘The Work of the Australian Judiciary: public and Judicial Attitudes’ in Australian Institute of Judicial Administration, *Australian Courts: Servicing Democracy and Its Publics*, (AIJA, Melbourne, 2013) 149, 167.

or another with the judicial stress sentiments:

### **3.1 Need for Competent Judges on Legal**

The first approach to strengthening judiciary in all jurisdictions is that appointment of judges should be made in a merit. What then is a merit? The answer seems to be that legal academic qualifications and broad experience at the Bar or in academic life are those most routinely cited.

The aim being getting right figures to competently manage the judicial stress that is inherent in their duty.

Of necessity, the group from which judges are drawn will be legally educated, the intelligent and the respectable. In some jurisdictions, like Australia, judges are ordinarily drawn from members of the Bar with proven qualities to join the judgeship.

### **3.2 Need for Induction Training for New Judges**

Once judges of the above stated caliber are obtained, the starting point is to acquainting them with requisite capacity to properly deal with the area of specialization in which they are targeted to operate. The running of right induction training may well be found helpful to impart requisite expertise and orientation to the new judges and, hence, to minimise the extent of judicial stress at the professional level.

### **3.3 Need for Social Awareness**

As a problem behind each disputed issue before the court (together with the solution thereon) are well founded within the existing socio-legal frameworks, judges need sufficient social awareness. Knowledge of the community which the judge must serve is a fundamental requisite to allow judges wide range of dispensing justice and, as a result, help command the respect of the public.

### **3.4 The Need for Continuous Training for Judges**

Apart from the basic legal expertise, and also induction trainings, there is still the need for continuous judicial training. Furthermore, there is a need to judges who are assigned to determine a given category of cases, for example, human rights cases to be provided with integrated and systematic programme(s) of human rights studies alongside with other studies of law generally, including refresher courses and new developments in legislation and the common law.

### **3.5 Raising Public Awareness on Relevancy and Functions of Judicial Functions**

Just as properly put by the Tanzania Chief Justice, the awareness of legal rights and access to legal information remains an access-to-justice issue of major significance. Legal awareness is a first step in the journey to invoking the formal justice system.

In the same vein, it has well been recognised that the preconditions for effective constitutional and legal regime remains to be the existence of a constitutional and legal culture appropriate for ensuring that constitutional and legal rights are received, perceived and implemented in constructive ways.

### **3.6 The Concern for Constitutional and Legal Rights and Development**

It is undisputable that the ultimate aim of existence and enforcement of constitutional and legal is maintenance of peace and security amongst individuals in any society and thus to enable people's initiatives for their social development. It is advisable that, by application of constitutional and legal values and principles, development visions can be better analysed which, in turn, helps shape development strategies by addressing issues relating to exclusion, discrimination, inequality and weaknesses in accountability and other phenomena commonly

viewed as the root causes of poverty and other development problems. The main concern should be welfare of all the individuals and society, being the sole object of the constitutional and legal platforms.

### **3.7 Managing Judicial Stress in the Changing New World Order**

It is well appreciated that societies are not static. They constantly changing. The role of the lawyers, in general, and judges, in particular, is to keep the rules of law in harmony with the enlightened common sense of the society, when confronted with the eternal dilemma as to how to apply to ever changing conditions of society, and the settled principles of freedom.

Justice, like freedom, indeed needs constant vigilance. The sense of justice carries wide import and as the system expands, everyone is closely affected by the balance we strike between security and freedom. This means that, the sense of justice cannot be divorced from social climate and environment in which the institution exists particularly in a developing nation confronted with a wide range of problems affecting its people, the majority of whom live in penury, hardship and unacceptable living conditions having little knowledge of legal and constitutional literacy and quite a predominant section of the population steeped in illiteracy. How can the judiciary be immune to social climate and environment in which it is rooted?

In this regard, there is a statement of Justice Balakrishna appears to have summarised the point so precisely. He states that:

The society does not stand still; so also must not be the law. Both the society and the law have to move continually. Once this is recognised, then the task of the judge is to put on a higher plane. ...

In this new generation, the judicial function must acquire a creative quality of sublime reach and, inevitably, the judge must widen his ken, sharpen his talent, broaden his professional ken and quicken his social conscience. His tasks are heavy, his trust is sacred, his courage and character onerous and the great expectations from call for a new incarnation described best by Felix

Frankfurter: "A judge should be compounded of the faculties that are demanded of historian and the philosopher and the prophet. The last demand upon him-make some forecast of the consequences of his action-is perhaps the heaviest. To pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time, is the gift of imagination. It requires poetic sensibilities with which judges are rarely endowed and which their education does not normally develop. These judges must have something of creative artist in them; they must have antennae registering feeling and judgment beyond logical, let alone quantitative, proof". Our judges must realise their immense powers and sensitive obligation to keep abreast of advances of events, information, knowledge and wisdom. The measure of society's progress is justice.

#### **4.0 Concluding Remarks**

In my conclusion, let me point out one inherent aspect of judicial stress and urge that it is necessary for all discharging judicial functions to manage by embracing, rather than, avoiding or circumventing it.

As urged by Honourable Benjamin William Mkapa, then the President of United Republic of Tanzania, it is so essential for judicial officials at all levels that you should take time to reflect on the importance of continuing to strive maintaining a high level of public confidence in our justice system.

In essence, legitimacy of the judiciary is to be determined by members of a given society in assessing the role played by judges. Public confidence is attained when the vast majority of people accept judicial pronouncements to be just, equitable, legitimate and as an expression of their own moral values. In other words, when members of the society see justice to be done.<sup>11</sup>

The result of this paradigm of judicial activism is that the judiciary, the parliament, the executive and the citizens necessarily become travellers into the future that will be built on a common

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<sup>11</sup> *Ibid*, p. 57.

vision of a better world founded on shared moral values. It is the stage when judges squarely face the community and the world with a legitimate sense of inner contentment and a clear conscience. It is at this stage that judicial activism features as a new spirit of vitality, creativity and excitement in all right thinking individuals.<sup>12</sup>

I sincerely believe that our regional judicial bodies are capable and committed to attain at this stage, what needed then is that each judicial officer in the region properly plays his or her role.

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<sup>12</sup> *Ibid.*