

JUDGES CRAFT: THE ART AND PRACTICE OF JUDGING¹

"Each Judge in their individual Courtroom projects the face of the Judiciary, with the ability to demonstrate how well our government works, and how well the Judiciary functions in an ordered society. Being a Judge means "ACCEPTING THE RESPONSIBILITY TO REPRESENT THE JUSTICE SYSTEM AT YOUR VERY BEST – TO EXHIBIT PATIENCE, TOLERANCE AND UNDERSTANDING".² There is no science as to how to do this, only the art that trial Judges develop throughout their tenure from experience and collaborative learning with one's peers."³

INTRODUCTION

In recent years, Judges have been brought to the frontline of scrutiny and several comparisons have been made between Judges and other professions such as economics, theology, social sciences, arts, literature, and even sports.

This may be due to the fact that judgment is passed in every profession, and it could also be the decision to follow the ethical lines of such a profession in conflict with personal opinions that are allegedly well-informed. Undoubtedly, the in-depth analysis of comparing Judges to art poses untold difficulties.

The Britannica Dictionary defines Art as *"something that is created with imagination and skill and that is beautiful or that expresses important ideas or feelings; works created by artists: paintings, sculptures, etc., that are created to be beautiful or to express important ideas or feelings"*. It is also defined as:

"Skill acquired by experience, study or observation; an occupation requiring knowledge or skill; the conscious use of skill and creative imagination".⁴

Art is a diverse range of human activity and its resulting product that involves creative or imaginative talent generally expressive of technical proficiency, beauty, emotional power, and conceptual ideas. Giving a befitting definition is an arduous task as what constitutes its interpretation varies around the world.

¹ Hon Justice Amina Adamu Augie CFR, JSC (Rtd.)

² Joseph P. Nadeau – *What it means to be a Judge* – The Judges Journal 34, 35 (American Bar Association Judicial Division, Summer 2000)

³ Judge Neil Edward Axel, District Court of Maryland (Retired) – *The Art and Craft of Judging: More than just Calling Balls and Strikes* – The National Judicial College (October 18 2016)

⁴ Merriam-webster.com

According to Cambridge Dictionary, a Judge is a person, who has the knowledge to give an opinion about something or is able to decide if someone or something is good or bad, and “judging”, as defined in Merriam-Webster is: *“To form of an opinion through careful weighing of evidence and testing of premises; to form an estimate or evaluation of; to hold as an opinion; to sit in judgment on; or to determine or pronounce after inquiry and deliberation”.*

Socrates said - *“four things belong to a Judge: to listen courteously, to answer wisely, to consider soberly and to decide impartially”.* In practice, there is no formula or science to achieving these ends. But there is an art to the way in which Judges presides over their Courtroom. As Judge N. E. Axel put it:⁵

*“Exactly what a Judge should do cannot be fully described by specific formula. Historically, Judges sat back and enforced the strict rules of procedure and afforded Counsel on each side the leeway to present their cases. The conventional wisdom was that if the process was fair, then through the workings of the advocacy system, litigants with the assistance of their Counsel would present the necessary evidence and arguments, following strict rules of procedure that would then result in a just outcome - - - The focus on domestic violence, new social science and jurisprudential approaches to judging, including procedural fairness and problem solving Courts, have helped shape the 21st Century Judge to be more than just an arbiter of fact and laws, but now also a great communicator and spokesman for the Judiciary - - - How one perceives a system is critically important for the health and effectiveness of that system. The opportunity, day in and day out, to impress upon the citizens, whom we serve, what we do, how we do it, and why, is how we earn their trust in a branch of government that has precious little in the way of tangible power. **In fact, the only real power a Judiciary has is derived from the people it serves; it results from their trust and confidence in that Judiciary. If that trust and confidence evaporate, the system is endangered and, indeed, may be mortally wounded. The Court’s acceptance by the community is based on faith and trust – a faith and trust that we will judge and decide fairly, that we will treat all with respect and dignity, and that we will uphold our respected positions within our community. Confidence in what Judges do each day, or in any particular case, is less dependent upon whether the “right” decision was reached, but more on the process undertaken to reach that decision. It is in this process that the art and craft of judging lies”.***

⁵ Ibid - *The Art and Craft of Judging: More than just Calling Balls and Strikes* – The National Judicial College

JUDGING AS AN ART

Most times, the process of creating art begins with a creative impulse, a feature that grossly eludes a judicial procedure. For instance, a sculptor or musician may be displeased with a societal ill and impulsively sculpt a caricature or write billboard-worthy music to criticize such ill in society. Meanwhile, a Judge is not afforded such luxury of impulse, even when such a Judge has leanings towards activism, as such leanings must wait for a process to be initiated by a lawyer.

The judicial process is inherently rational and controlled. A Judge is as concerned as an artist in seeing justice done, but he will take a different route. Judging involves analysing presented facts of a case, selecting relevant rules, and applying the rules to every step of the procedure. Each step of the process involves a complex procedure of giving reasons for arriving at each conclusion, and the relation to each claim contained in the cause of action. This means that a single case may have a plethora of opinions, *obiters*, which though primarily to dispense justice, the conclusion reached may have differing results.

This underscores the artistic underlining of judging as against science, which is more methodological, and the results are predictable and universal. The art of judging extends to the perception of a Judge and his worldview. Jurists like Lord Denning and Oputa, JSC, have held controverted opinions that have stood through time, and they both have a simplistic approach to justice, a view which can be ascribed to their prior experience with pure science. Oputa, JSC, studied Economics before becoming a lawyer and Lord Denning studied Mathematics before becoming one. Thus, it can be said that a Judge's worldview is the brushstroke, which he paints on the canvas of justice, and with the hope to achieve justice that is celebrated as any work of art in a museum.

As Justice William H. Rehnquist⁶ noted in his “*Remarks on the Process of Judging*”⁷ – “Judges, whether at the trial or appellate level, are not fungible. Each of us brings to the Bench a mind imprinted with previous experience, and that experience undoubtedly influences, to a certain extent, how we go about the process of deciding cases”. Other distinguished jurists have remarked on the relationship between judging and art. In his book⁸ published in 1921 when he was a Judge of the New York Court of Appeals, Justice Benjamin Cardozo wrote about being troubled in his search for legal certainty, but as the years progressed, he came to accept the inevitability of uncertainty, and concluded:

“I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of the mind, the pangs of death and the pangs of birth, in which the principles that have served their day expire, and new principles are born”.

Similarly, the American Jurist and Judicial Philosopher, Learned Hand wrote:⁹
I like to think that the work of a Judge is an art - - It is what a poet does, it is what a sculptor does. He has some vague purposes and he has an indefinite number of what you might call frames of preference among which you must choose; for choose, he has to, and he does.”

Judges are not isolated from the realities of the times they find themselves in, and this is similar to artists. The rejection of the past to embrace a new future comes easier for an artist than a Judge. A Judge oftentimes must align himself with the provisions of the Constitution that is binding, and judicial precedents, while an artist has poetic or artistic license to try new things. But their decision is always a reflection of the times they find themselves in, and sound judicial decisions are like high-valued artwork that can be found in the best museums.

⁶ The 16th Chief Justice of the United States

⁷ Washington and Lee Law Review, Volume 49, Spring 1992, Number 2

⁸ *The Nature of the Judicial Process*

⁹ *The Speech of Justice* – Harvard Law Review (1916)

What is more, Judges and artists make factual judgments on whatever piece that they are working on. They ask questions like, what shall I include? How do I align my thought process with the art? How shall I present the facts on the canvas? How do I write what will convey the letter and spirit of the law?

Sometimes the law is unequivocal on a matter, needing little effort from a Judge. But where the letters of the law are not as clear on a particular issue, the Judge may turn to other decisions of Judges. The variety of interpretative theories presents a confusing palette on which a Judge may base his decision. It is as if pantheons of artists are behind a musician offering conflicting advice on the best approach to a musical note or lyrics. It may stimulate a creative-minded artist but the truth is that such a path may end in chaotic expression.

A Judge trying to marry the statutory provisions with judicial precedents, may be likened to a sculptor struggling to capture the essence of his subject, while adhering to the limitations of the chosen medium; the sculptor must consider the weight, texture, and potential of the material at hand. Similarly, the Judge must respect the established legal framework while recognizing the need for interpretation and adaptation in the light of evolving social realities.

This delicate dance between fidelity to law and innovation is a defining characteristic of the art of judging. Despite the artistic elements of judging, impartiality remains the cornerstone of the judicial process and Judges are not free to indulge in personal biases or creative impulses that might skew the interpretation of the law in cases at hand. Their artistic expression manifests in the meticulous crafting of legal reasoning, ensuring clarity, consistency, and a sense of fairness for all the Parties involved. This commitment to impartiality is what actually distinguishes the art of judging from other artistic endeavours.

THE PRACTICE OF JUDGING

The general principle in common law systems is that similar cases should be decided so as to give similar and predictable outcomes. The principle of judicial precedent is the mechanism by which that goal is attained, therefore, Judges in deciding cases brought before their Courts are generally required to abide by precedent and not deviate from same. However, there are certain situations, which calls for the Judge to be analytical and creative at the same time, using techniques like distinguishing of cases, to arrive at the justice of each one case.

As Justice Cardozo said, the process “*is not discovery but creation*”, and, there is no question that the written Judgment serves as the Judge's ultimate creation, a carefully constructed document that conveys the Court's decision, and the reasoning behind it. Thus, much like a poet or playwright, the Judge wields the power of words to shape meaning and establish legal precedent.

The choice of language, the flow of logic, and the clarity of expression, all contribute to the overall impact of the Judgment. A well-crafted Judgment can not only deliver justice in a specific case, but also set a valuable example for future legal interpretations. The landscape of law is a dynamic one that is constantly evolving in response to social, political, economic and technological advancements. Judges, like artists responding to new artistic movements, must adapt their approach to remain relevant and effective. This may involve re-interpreting existing statutes, considering the influence, effect or impact of emerging technologies, and acknowledging the changing needs of society. The ability to navigate this evolving legal terrain is a testament to the ongoing creativity and adaptability required of Judges, which no doubt, heightens the Court's acceptance by the community, based on faith and trust in the system.

CONCLUSION

Judging is an art that requires a deep understanding of the law, a commitment to fairness, and a capacity for critical analysis. It also demands a degree of creativity, and a willingness to engage with legal problems in a nuanced and thoughtful way. The Judge's role is not merely to apply the law mechanically, but to interpret it, to reason by analogy, and to distil a sense of justice from the often-complicated tapestry of human experience. Through this process, Judges contribute to the ongoing development of the legal system, ensuring that it remains a vital tool for upholding justice and maintaining a just society.

But this is an arduous task. The Political Scientist and Legal Scholar, Eugene Ehrlick, described the great public challenge that accompanies the life of a Judge when he pointed out that *“there is no guarantee of justice except the personality of the Judge - - The greatest task that can be given a man is to discharge justice”*.¹⁰ The great Judge Learned Hand also had this to say¹¹:

“A Judge’s life like any others, has in it much drudgery, senseless bickering, stupid obstinacies, all disguising and obstructing the only sane purpose, which can justify the whole endeavour. If that were all, his life would be mere irreconcilable extremes. But there is something else that make it – anyway to those creatures, who persist in it – a delectable calling. For when the case is all in and the turmoil stops and after he is left alone, things begin to take form. From his pen or in his head, slowly or swiftly, as his capacities admit, the pattern emerges, his pattern, the expression of what he has seen and what he has, therefore, made, the impress of his self upon the hitherto formless material of which he was once but a part and over which he has now become the master. That is a pleasure, which nobody, who has felt it, will be likely to underate”.

I leave you with these resonating words of Judge Hand. Thank you for listening.

Hon. Justice Amina Augie, CFR, JSC (Rtd.)

¹⁰ Quoted by Steven Platt, Founding and Managing Member of [The Platt Group, Inc.](#) in an Article - *A Pursuit of Justice: Examining the Intersection of Business, Law and Politics* - [October 10, 2006](#)

¹¹ Ibid