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Judgmental Judges

By: Alice Woolley

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Introduction

Judges exercise considerable power, and discharge a crucial public function. They identify, interpret and even create the rules that govern us. They decide what happened. And they determine the legal consequences of what happened.

But judges also exercise a defined and limited public function, and in doing so they are human, not superhuman. Judges determine and apply the law, but they do not decide questions of morality outside the law; they do not decide what it means to be a good person except as the law defines goodness. They do not – except in the specific ways the law asks them to – decide matters of public policy. Nor do they have any particular qualification to do those things. Judges know what happened only through the evidence in their courtroom. Even though some judges may be men or women of moral wisdom, there is no particular correlation between having that wisdom and holding judicial office. Judges have no democratic mandate to decide questions of public policy.

Yet obviously the lines between these things can be hard to draw. The law deals with – and decides – questions of morality. It deals with – and decides – questions of public policy. Deciding a case can require a judge to make a moral or policy determination. And even when it doesn't, sometimes only judges can see problems of policy or morality clearly, and may be uniquely positioned to raise awareness of problems that society ought to address.

So at what point, if any, does a judge's pronouncements on matters of morality or policy exceed his office? Does a judge have an ethical obligation to try and restrain his decision to the legal matter before him, addressing questions of morality or policy only as necessary for adjudicating the case? And can a judge commit misconduct if he exceeds his mandate in that respect?

These questions were raised for me by a March 13, 2017 written endorsement of a consent order by Justice Alex Pazaratz, in which he castigated the parties and Legal Aid Ontario for "squandering scarce judicial and community resources" (at para 26).

This post analyzes Justice Pazaratz's decision, identifying what I see as some serious problems with it, and using those problems to analyze whether and how judges ought to comment on issues of morality and policy.

In my view, a judge has an ethical duty to recognize the limits of his capacity and his office. He must recognize that what he sees in a courtroom is a moment in time, not the totality of a human's worth and experience. He should understand that his own life and experience – including the privilege and power of being a judge – may limit as much as enhance his capacity

for insight on matters of morality or policy. And he should especially understand that while being a judge gives you opportunity and power to say things and to judge people, that opportunity and power must be consistent with the judge's role. A judge may comment on matters of morality or policy, but unless those matters are raised by the case before him, he should explain that choice: justifying his comments as appropriate for his office, and as substantively merited in the circumstances. Further, a judge must not let his concern for matters of morality and policy interfere with his discharge of his judicial duties.

Judges who do not respect this line can commit misconduct. But because of the blurred line between law, policy and morality, the centrality of judicial independence, and the unique ability of judges to speak to certain moral and political issues, we must not label every *obiter* comment by a judge as misconduct. Indeed, we must recognize that sometimes such comments are important and useful. They should be labeled as misconduct only where they interfere with the judge's judicial role. Where, for example, they lead the judge to disregard the law, or to treat the parties with contempt.

In my view, Justice Pazaratz's judgment takes him very close to that line. His decision ignores the existence of a *bona fide* legal dispute between the parties. It suggests that he pressured the parties to abandon important legal interests. It fails to acknowledge any of the potential long-term consequences of the settlement he pushed the parties to enter into (consequences that for one of the parties were necessarily legally unwarranted). The decision assumes error by Legal Aid Ontario (LAO) with no stated evidentiary basis or recognition of LAO's relative expertise on the issue. And most significantly, the decision humiliates the parties – using their poverty, immigration status and dependence on Ontario Disability Support as a reason to see their case as unworthy of the court's consideration. Justice Pazaratz's single-minded focus on the policy failures of LAO, and the moral failures of the parties – a focus and position which he does not sufficiently justify – led him to abandon his judicial duty: adjudicating the parties' dispute.

I would strongly urge Justice Pazaratz and other like-minded judges to be careful when choosing to make judgments "alive and interesting" and to issue "sobering warnings" to the parties. Judges can do those things, but it creates the risk that they will exceed their judicial office, that they will forget to apply the law, and to treat the parties respectfully. No judicial pronouncement on morality or policy warrants the sacrifice of fair adjudication and the rule of law.

The Decision and Analysis

Justice Pazaratz's decision arose from a divorce application. The parties had no material legal issues other than that the wife wanted a restraining order issued against the husband, and the husband resisted the issuance of the order. She claimed he had committed domestic violence and had engaged in ongoing harassment of her (at para 11). He denied the domestic violence, and had previously been acquitted in criminal court. He also denied that he had harassed her (at para 12). The wife had proposed a settlement – that they each agree to an order to stay away from each other – but the husband refused (at para 21).

When the parties appeared before Justice Pazaratz he told them to go and discuss the matter to see if they could reach a "sensible resolution" and that "if they didn't come to their senses I would formally request that the Area Director of Legal Aid Ontario attend before me to justify the obscene expenditure of tax money on a simple case with such an obvious solution" (para 31). Perhaps unsurprisingly given that threat, the parties ultimately agreed to be subject to an order where they would not contact each other or come within 500 meters of each other (at para 32).

Justice Pazaratz's written endorsement of the order pulled no punches:

- "The next time anyone at Legal Aid Ontario tells you they're short of money, don't believe it. It can't possibly be true. Not if they're funding cases like this." (at para 1)

- "every now and then taxpayers ought to be told how their hard earned dollars are spent." (at para 3)

- "At the March 9, 2017 attendance, apart from paying for the lawyers, taxpayers also had to pay for the following government employees to be present in Courtroom #5 to deal with this matter… I have no idea how much the other players in the courtroom get paid. But as a Superior Court Judge I receive approximately $308,600.00 per year. So you can see that not even counting overhead charges and administrative staff in the building, every hour of court time is hugely expensive." (at paras 17-18)

- "Many taxpayers can't afford their own lawyers, and don't qualify for free assistance through Legal Aid. So they end up representing themselves in court. *Or facing financial reality and settling without going to court.*

  But when you pay no taxes and Legal Aid gives you a free lawyer, there's no incentive to be sensible. *Why worry about the cost when some unsuspecting taxpayer out there is footing the bill?*" [emphasis in original](at paras 19-20)

- "This is where common sense seems to have gone out the window" (at para 22)

- "Would a person who actually had to pay for a lawyer out of their own pocket ever fund this kind of dispute?" (at para 24)

- "Is it fair for people who have never paid any taxes to be so cavalier about how they spend other people's money?" (at para 27)

- "I am mindful of the fact that the subject matter herein is an allegation of domestic violence. We take that very seriously. But the risks and dynamics have to be measured in a practical and realistic manner:

  a. The Applicant wants the Respondent to stay away.
  b. The Respondent says he'll stay away.
  c. We as a community certainly want them to stay away from one another. It costs us a lot of money when they interact.
  d. How does *either* party suffer any prejudice if we make an order requiring *both* of them to do what they have already promised to do?
  e. Is this really the kind of debate that taxpayers should spent thousands of dollars funding?" [emphasis in original] (at para 28)

- "'*Giving appropriate resources to the case while taking account of the need to give resources to other cases.'* Isn't that what the average taxpayer driving by our courthouse would think/hope that we're doing? [emphasis in original] (at para 30)

- "I made a fuss. I told them to stop wasting money. So they settled.

  But why do we have a system in which so much tax money gets wasted, unless someone takes the time to make a fuss? (at paras 33-34)

Justice Pazaratz's decision has been favourably received in the media. The Toronto Sun noted, "Judgments by the literary and fearless Pazaratz are considered a must-read by family lawyers." The Toronto Star said, "In his latest sharply worded decision, a Hamilton judge known for his acerbic wit and creatively written judgments skewered a legal system that he says should have prevented a case from ever arriving at his courtroom door."

In my view, however, there are serious and significant problems with his decision.

Most importantly, Justice Pazaratz never acknowledges the material legal dispute presented to the Court for adjudication. There is a factual dispute: did the husband commit domestic violence? Did he harass his wife? And there is a legal dispute: should the wife be awarded a restraining order, i.e. does she meet the test of having reasonable grounds to fear for her safety?

If the husband committed domestic violence, or the wife had reasonable grounds to believe he would do so, then the wife ought to be granted a restraining order, and ought not be subject to a similar restriction herself. Conversely, if the husband presents no reasonable risk of domestic violence, he ought not to be subject to a restraining order. There is only one correct outcome here, and the question brought to the judge was: which is it? But Justice Pazaratz treated that question as *prima facie* unworthy of his consideration. To Justice Pazaratz, the fact that one of the parties proposed an extra-judicial settlement to the issue was enough to dispose of his need to adjudicate either the factual or legal issues before him.

Justice Pazaratz appears oblivious, however, to the fact that the proposed extra-judicial settlement required one party to sacrifice his or her legal rights. As a result of Justice Pazaratz's refusal to consider the merits, the husband had to agree to a no contact order premised on an allegation of domestic violence and harassment that he said was false. And the wife had to agree to be subject to a no contact order even when the facts as she alleged them legally entitled her to have a no contact order imposed on her husband with no similar condition imposed on her. In short, the result of his refusal to assess the merits is the *certainty* that one of the parties here has been pressured into sacrificing his or her legal rights to suit Justice Pazaratz's sense of what the economies of justice require.

Justice Pazaratz also does not reflect on the costs to the parties of being subject to an order – costs that may not be legally warranted. Both the husband and wife in this case are immigrants. Being subject to a no contact order might have legal implications for their immigration status – now or later. The husband and wife could be subject to other legal proceedings, and the fact of the no contact order could be prejudicial in those proceedings. If they apply later to belong to a trade or profession, their good character might be questioned. An employer or future romantic partner might act adversely if they learn of the no contact order. The husband in particular is now subject to the moral stigma of the inference that he committed domestic violence justifying a no contact order, a stigma which may be particularly problematic for him if he is an Iraqi Muslim, given the racist presumptions of some about Muslim men, sexism and violence. Those consequences could be justified if they were legally merited, or if the parties were prepared to voluntarily accept those risks to resolve their legal dispute. But they are not justified simply because a judge views their dispute as unworthy of his time and society's resources – especially

given that the arm of society charged with allocating those resources thought the parties deserved its help.

Indeed, Justice Pazaratz appears remarkably comfortable in assuming that because he could not see a reason for LAO to have provided counsel in this case, that no such reason could have existed. He does not appear to consider that since LAO gave different legal resources to each party, it must have done *some* assessment of what was appropriate in these specific circumstances. He does not appear to have considered that LAO may have been appropriately sensitive to the importance of ensuring access to legal services in domestic violence cases given the danger, stigma and power imbalances those cases involve. Perhaps I am unduly sensitive to administrative law deference, but I find it disturbing that a judge not only does not defer to LAO's determination that a person is financially and legally eligible for legal aid, and as to what type of legal aid is appropriate for that person, but instead assumes that determination was an unjustified misuse of public funds.

Perhaps the most disturbing aspect of Justice Pazaratz's decision is, however, his apparent contempt for the parties because they are poor, immigrants, receive Disability Support, and do not pay taxes. He does not contemplate the possibility that the parties may simply have wanted a determination of the factual and legal issues raised by the dispute between them. Yes, they had state assistance in pursuing that determination and yes, that makes them – at least in that respect – more fortunate than people who do not receive such assistance. But it does not mean that they did not have a *bona fide* interest in having a judicial determination of their legal claims.
Until they were unlucky enough to appear before Justice Pazaratz, the parties in this case may have felt grateful to live in a province where they could receive public assistance to protect their legal interests. But there does not seem any particular reason to believe that they felt that it was a good idea to pursue their legal interests simply because the government was willing to provide them that assistance. Being on legal aid does not prove that someone's legal claims were made in bad faith.

More fundamentally, it appalls me that any Canadian judge would view the inability to pay taxes – and being a disabled immigrant – as relevant to a party's right to seek justice. According to this decision, if you are poor and need legal aid you have a decreased right to access justice – a super-added duty to show your case is worthy of the court's consideration. If you do not pay taxes you should subject yourself to a court order that may have no factual basis. And, grotesquely, a poor person is responsible for taking into account the judge's top 1% salary in deciding whether his own rights are worth protecting.

Justice Pazaratz is undoubtedly correct that Canada has an access to justice problem. People cannot afford to pay lawyers, and suffer legal injuries as a result. But ensuring justice is unavailable to those a judge preemptively deems unworthy of his time and consideration is no solution to that problem.

Does Justice Pazaratz's decision constitute judicial misconduct? It certainly has some features of misconduct, most notably in his effective refusal to adjudicate the parties' case, and in the contempt with which he treated the poor, racialized and vulnerable parties who appeared before him. His focus on the policy failures of LAO, and on the moral failures of the parties – what he sees as their unreasonable refusal to settle – undermined his satisfaction of his judicial duties. He did not adjudicate. He treated the parties disrespectfully. And, in the end, he provided no evidence or rationale sufficient to justify his decision to do either of those things.

My inclination, however, is to view this decision as a mistake not misconduct. First, Justice Pazaratz's intentions appear to be honourable. He is concerned with fair and effective allocation of judicial time and resources, and with using his office to do good. Those are laudable and reasonable things with which a judge ought to be concerned. Second, the laudatory treatment of Justice Pazaratz's writing style, particularly in the media, may mean that he has had no occasion to reflect on the risks associated with offering these types of judgments. Third, and most importantly, I do not know what happened in court that day. I have read his decision, not the transcript. It may be that things were said or happened in court to give him justification and foundation for the conclusions and statements in his judgment. There may have been a better reason for castigating these parties and LAO than his decision indicates. It may be, in other words, that his reasons are poorly worded and poorly justified, but are not evidence of actual failure to act judicially.

This analysis also speaks, I think, to the general question posed at the beginning of this post – on when it is appropriate for judges to comment on matters of morals and policy. I would suggest this general rule: if a judge is going to comment on matters of morality or policy that do not need to be addressed to answer the legal issue before him, then he needs to justify doing so. He needs to explain why they are matters of appropriate comment for a judge, and why his conclusions are substantively merited in the circumstances. And – most importantly – he needs to ensure that doing so does not interfere with his discharge of his judicial office.

In short, I am pleading with Justice Pazaratz and other judges to be more restrained in their ambitions, and more careful in their reasons. To remember that it is enough to be a judge. To decide what happened. To analyze, identify and interpret the law. To apply the law to the facts. Doing those things means you are fulfilling an important social role, one with real consequences for the people before you and for society as a whole. It is a role you have a duty to fulfill, and that must not be sacrificed for unsubstantiated critiques of the government's policies or the parties' morals.

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