



Law Society
of Scotland



International
Conference of
Legal Regulators

Workshop B2: Regulating in uncomfortable spaces

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International Conference of Legal Regulators

Regulating in Uncomfortable Spaces

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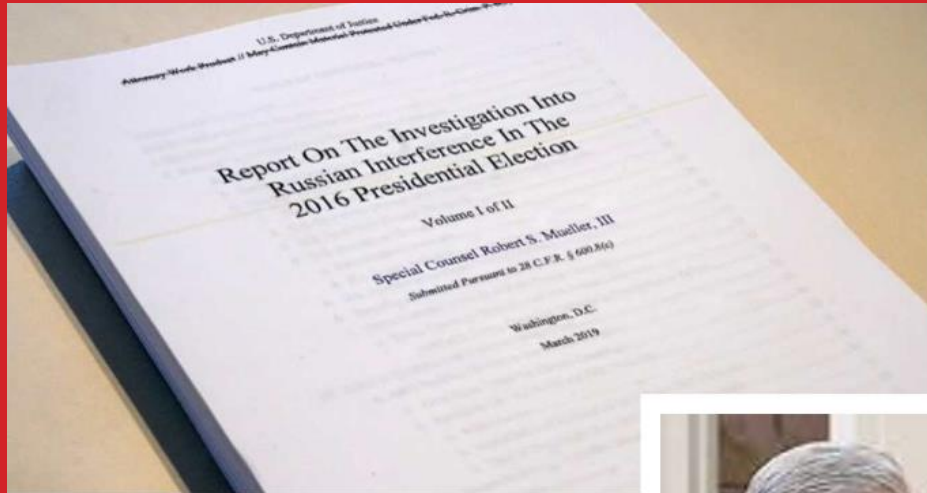
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Relevant Ethical Rules

- The Duty of Integrity
- The Duty of Confidentiality
- The Lawyer as Advocate
- The Duty to Encourage Respect for the Administration of Justice
- The Lawyer in Public Office
- Public Appearances and Public Statements





1. Prior to his appointment as U.S. Attorney General, William Barr wrote a memo criticizing the Mueller investigation into Russian interference in the 2016 U.S. Presidential Election. He asserted that a criminal statute prohibiting anyone from corruptly obstructing an official proceeding does not apply to a President's removal of an official (e.g., an FBI Director) or the use of his pardon power.

In March 2019, Special Counsel Mueller delivered his Report to now Attorney General Barr, who wrote to Congress that Mueller decided “not to draw a conclusion – one way or another – as to whether” the President engaged in obstruction of justice. He then asserted that Mueller’s decision not to reach a legal conclusion “leaves it to the Attorney General to determine whether the conduct described in the report constitutes a crime,” and that he and the Deputy Attorney “concluded that the evidence developed during the Special Counsel's investigation is not sufficient to establish that the President committed an obstruction-of-justice offense.”



The next day, Mueller communicated concerns Barr that his letter “did not fully capture the context, nature, and substance of this Office's work and conclusions.” He provided the introduction and executive summaries for his Report, with redactions, and requested they be made public “at this time,” because “[t]here is now public confusion about critical aspects of the results of our investigation.”

Barr declined to do so until the Report had been reviewed for redaction. That occurred 26 days after Barr’s letter to Congress. Prior to releasing the Report, Barr held a press conference and repeatedly said that Mueller found no *collusion* between the Trump campaign and the Russian government. The Report did not draw any conclusions regarding “collusion,” noting that “collusion is not a specific offense or theory of liability found in the United States Code, nor is it a term of art in federal criminal law.” The Report “applied the framework of conspiracy law, not the concept of ‘collusion.’”





2. Between 2002 and 2008, then Illinois Governor Rod Blagojevich attempted, among other criminal acts, to obtain campaign contributions and other benefits for himself and his wife in exchange for appointing a U.S. Senator to fill the vacancy left by President Barack Obama. Telephone calls between Blagojevich and others regarding details of this scheme were recorded by the FBI and included statements by Blagojevich that, “I’ve got this thing and it’s f--king golden. I’m not just giving it up for f--king nothing.”

In December 2008, Blagojevich was arrested and charged with conspiracy to commit mail fraud and wire fraud and solicitation of bribery. He was impeached and removed from office in January 2009 for abuses of power. In February 2010, a federal grand jury returned a superseding indictment charging him with 24 counts including racketeering, conspiracy, extortion, corrupt solicitation, and lying to the FBI. In August 2010, a jury found Blagojevich guilty of only one count with a mistrial on the other 23. The government retried him in June 2011. A jury found him guilty of 17 counts. After sentencing, Blagojevich instituted appeals of his conviction. Those appeals were exhausted in April 2018.





3. A Deputy State Attorney General with a visceral aversion to the smell of hard-boiled eggs was the subject of hard-boiled egg related practical jokes by colleagues over the years. On a day he was particularly stressed, his colleagues, in a room at the courthouse, ate hard-boiled eggs over his files and left additional eggs sitting in the file box. The Deputy A.G. entered the room and had the predicted reaction. Everyone laughed, including him.

In an act of “turnabout is fair play,” the he exited the room laughing, encountered the court’s chief of security, and convinced this bailiff to enter the room, gun drawn, and tell his colleagues to “keep the eggs away from his files.” The bailiff complied, not knowing that behind the door to the room was a detective who was only able to see the gun and hand come past the door. The detective could not see that the gun was held by the bailiff. He could not see the reaction of those in the room and did not hear “...keep your eggs out of his files.” He perceived a threat. Before he could pull his own weapon, he heard chuckling in the room and the door closed.



The detective contacted the court administrator, who advised a judge of the matter. A criminal investigation occurred. No charges were brought. An administrative order issued by the court about the incident was accidentally made public. The Deputy A.G. was suspended, demoted to an entry-level position with a big pay-cut, and placed on a performance review plan. He took full responsibility and accepted the consequences of his actions.





U.K. EXAMPLES

1. Lord Goldsmith

In 2005 complaints to the Bar Standards Board against Lord Goldsmith were made by the former overseas development secretary Clare Short, a group of MPs, a number of barristers and a father of a soldier killed in Iraq. These complaints concerned the advice Lord Goldsmith gave, in his capacity as the Attorney General, to the Prime Minister Tony Blair about a justification for the invasion of Iraq in 2003. In his submission he confirmed that the existing UN Resolutions permitted the UK's intervention. It later transpired that 10 days prior to that, he issued a significantly different advice concerning the same question, stating that the war in Iraq lacked a legal justification.

The complaints accused Lord Goldsmith of breaching a section of the bar's code of conduct, which states that a barrister must not "permit his absolute independence, integrity and freedom from external pressures to be compromised" or "compromise his professional standards in order to please his client, the court or a third party".



2. Lutfur Rahman

Lutfur Rahman was a family law solicitor with 20 years' experience when he was elected as a mayor of Tower Hamlet, London in 2010. In 2015 he was asked to vacate his mayoral position after an election court found him guilty of illegal and corrupt practices.





3. **Fiona Onasanya**

Fiona Onasanya was a Labour MP elected in 2017, following a career as a solicitor in a commercial property law. In 2018, she was jailed for perverting the course of justice by claiming that her former tenant was driving a car, when it was caught on the speeding camera. Inquiries revealed that Onasanya's former tenant was at that time at his parents' home in Russia and not behind Onasanya's car wheel. She served 28 days of a three-month prison sentence and continued to sit as an MP during her prison term.



NOVA
BARR





4. Lord Lester

Lord Lester is a barrister at Blackstone Chambers and a former member of the House of Lords. In November 2017 Jasvinder Sanghera, a human rights campaigner made a complaint to the House of Lords of sexual harassment against him. The House of Lords Committee for Privileges and Conduct investigated the complaint, and made a recommendation that Lord Lester be expelled from the House of Lords. They later amended their decision, recommending 4 years suspension. Lord Lester resigned from the House of Lords in December 2018.

Lord Lester notified the Bar Standards Board of the existence of the House of Lords proceedings.



N.S. EXAMPLES

Former AG for Canada said in a televised interview that ‘it’s against the law to smoke dope’. The comment was made shortly after the opposition party leader, now Prime Minister, declared his support for legalizing marijuana and admitted to smoking weed in the past. A complaint was filed by a member of the public alleging AG’s comments were inappropriate and partisan in nature.





Former Prime Minister accused the former Chief Justice of the Supreme Court of Canada of inappropriate conduct, when she made public her concerns about a potential Supreme Court appointee. AG for Canada (same one as above) expressed public support for the PM's comments. Complaints from the public were received against the AG on the basis of his inappropriate public criticism of the judiciary, contrary to the duty to encourage respect for the administration of justice.



A Federal Party Leader pled guilty to a charge of civil contempt following a peaceful public environmental protest thus contravening a Court Order. She subsequently made public comments about the event in the media. Three complaints were filed by the public, alleging that by virtue of her knowingly breaking the law, she engaged in conduct unbecoming and conduct which brought the administration of justice into disrepute.



Town Mayor and lawyer gave a radio interview, and commented about ongoing litigation between the town and the Provincial Government involving equalization payments to regions to support sustainability. The NS Court of Appeal had recently found against the Town's position. Mayor criticized the Judiciary's various decisions, saying that they are all 'tied to political parties and interests', just 'part of the establishment,' and the Town couldn't 'get a fair hearing' in NS. A complaint was filed by a member of the public active in politics alleging that the Mayor failed to uphold respect for the AOJ, and failed to treat the court with courtesy and respect.



Regulating in uncomfortable spaces- regulation of conduct of lawyers holding public offices: Zimbabwean Bar Association's Perspective



Rebecca Magorokosho-Musimwa- Law Society of Zimbabwe

Introduction

- The Law Society of Zimbabwe- Section 53 of the Legal Practitioners Act (Chapter 27:07)(see full paper)
- **Membership of the LSZ- registration- Private practice, rights –based NGOs holding Limited practising certificates, commerce or Corporate sector, Government ministries, independent commissions, development sector e.g. International NGOs.**
- Uncomfortable spaces – definition – (see full paper)
- Role of the Regulator - Section 3 of the full paper
- The LSZ's regulatory framework governing ethical and professional standards for its **members**-
 - i) **Legal Practitioners Act (Chapter 27:07)-Section 23** ,- pillar section in defining unprofessional, dishonourable and unworthy conduct. Further anchored by the Code of Conduct where there is an expansion of the prescribed acts or omissions from **16 to 53** , with an additional general provision that allows Council of the LSZ to prescribe any other conduct as acts of misconduct based on the nature of the act or omission
 - ii) **The Legal Practitioners General Regulations Statutory instrument 37 of 1999 as read with General Notice Number 45 of 2013- registration, practical legal training, trust accounts handling, deletion of members from the register**



The LSZ's regulatory framework-contd'

iii) The Law Society of Zimbabwe By-Laws Statutory instrument 314 of 1982- detailed regulatory processes-

iv) Legal Practitioners (Code of Conduct) By-laws, 2018 Statutory Instrument 37 of 2018- Broadened definition of misconduct by all members –including those in government

v) The Legal Practitioners Disciplinary Tribunal Regulations of 1981- Processes at the LPDT for all disciplinary cases referred by the LSZ Council

vi) Legal Practitioners (Council for Legal Education Rules) of 1992- qualification for registration of members as legal practitioners , conveyancers or Notary publics and rolling out of the professional examinations and certification of any exemptions



The LSZ's regulatory framework-contd

vii) Legal Practitioners (Designated Legal Qualifications) Notices – 1992


viii) Legal Practitioners (Exemption from Professional Examinations) (University of Zimbabwe) Notice 1994

ix) Legal Practitioners (Law Society Compensation Fund) Rules 1981- business of the Compensation Fund including compensation of clients prejudiced by members holding Trust Funds on their behalf

x) Law Society of Zimbabwe (Conveyancing Fees) By-Laws -2013- charging of conveyancing fees

xi) Council decisions-

xii) Regional and International Bar Associations best practices- IBA, SADCLA, IBA



Challenges encountered by the LSZ in regulating its members holding public offices

- **Pre –admission** - fit and proper person tests creating the basis for objecting to registration on the basis of previous acts and or omissions, or ;
- **Post –admission** - investigations based on contraventions of the stated regulatory standards (Act, Regulations, By-Laws, Council directives)
- **Statutory limitations**- e.g. statutory appointments that comes with prescribed appointment and disciplinary processes- **One of the Former Prosecutor Generals of Zimbabwe** – charges of criminal abuse of office as a public official, obstruction of justice- Tribunal Inquiry and discharge from duty but later cleared of the charges by the High Court.
- Other several complaints of a political nature. Some of the complaints not pursued to finality at that time due to argued Constitutional immunity whilst some still pending and therefore *subjudice*

Statutory limitations-contd'

- **Former Acting Prosecutor General** - convicted in one of the neighbouring countries for attempting to obstruct justice when he was still practising in the neighbouring country.
- **A sitting High Court Judge** - complaint involving allegations of farm illicitly acquired. The LSZ's disciplinary arm hamstrung on immunity grounds - Judicial Code of Conduct during their term of office.
- **Goodwills Masimirembwa- former Mining Development Corporation Chairperson**- de-registered in 1997 and sought re-admission in 2012. Held several other public offices together with executive positions in the ruling ZANU PF. Corruption allegations and the impact on his re-admission efforts.
- **Misconduct against public officials not reported directly to the LSZ**- Investigations by the LSZ upon receipt of a formal complaint or at own instance. Challenges in investigating where information about the public official's disciplinary proceedings is not shared with the LSZ

Challenges –contd'

- **Non-cooperation by the relevant Justice sector institutions- *one of the former PG case reported herein***- challenges in obtaining the report of the special tribunal constituted to investigate his conduct
- **The operating political environment-** members in influential political positions wielding political muscles to become ungovernable- ***The case of one (ZANU PF Legislator)*** - refusal to be subjected to compliance visits and convicted by Council for using racial and abusive language towards a fellow female lawyer. --Arrogance and intemperate language transferred to the professional life making the members ungovernable and litigious.
- **The operating political environment- *Munyaradzi Paul Mangwana***- former ZANU PF legislator and Constitution Parliamentary Committee (COPAC) Member- threats to cause attachments and executions of residents' properties for failing to pay municipal rates .



Challenges –contd'

- **Former High Court Judge Justice Benjamin Paradza**- Fugitive from justice, convicted by the High Court for corruption and perverting the course of justice and fled Zimbabwe in 2006. –Denied asylum in Britain before he settled in New Zealand.
 - Allegations by the former Judge of his alleged **persecution on political grounds**.
 - Letter of good standing declined- not in good standing
 - LSZ's efforts failed attempts to initiate and complete disciplinary proceedings against the former Judge due to jurisdictional challenges
- **Perceptions about the Law Society Governing body's political inclination**- Council perceived as heavily dominated by one political party depending on the tenure with some members of the profession feeling they are being persecuted on political grounds.
- **Access to information** –*One of the former PGS' Special Tribunal report-*

Challenges –contd'

- **Existence of the other policy frameworks governing the disciplinary proceedings against the members holding public office-** Public Service specific line ministerial code of conduct prescribing specific disciplinary proceedings.
- LSZ however not precluded from investigating the disciplinary conduct of the member concurrently **provided** information is available. Council's approach –holding on its own investigations pending the public institution's disciplinary outcome. **The case of a former Magistrate convicted of soliciting and accepting bribes – a former Magistrates convicted of soliciting and accepting a bribe during his tenure as a judicial officer .**
- **Existence of the other policy frameworks governing the disciplinary proceedings against the members holding public office-**In **two other similar cases** that were referred by Council to the Tribunal, the Respondents were **Public Prosecutors and were convicted of bribery during the course of their employment**. Sentenced each to a custodial sentence which they effectively served. Non-disclosure of the conviction upon registration. Cases ill pending before the Legal Practitioners Disciplinary Tribunal and the inquiry was completed with Judgment reserved in both cases.



Challenges –contd'

- ▶ **Limited information and details on the alleged misconducts and the misconceptions on the regulatory scope of the LSZ by members of the public and institutions-** What also complicated the three cases referred to above (*One former Magistrate and Two former Public Prosecutors with matters pending at the Tribunal*) in terms of the LSZ's regulatory powers is that, **misconduct by Lawyers in Government rarely seems to come to the notice of the Society through the usual means of a complaint by a member of the public.** It is often press reports that signal some possible misconduct, but those are not detailed or factually accurate enough to be of any real assistance beyond pointing to a possible misconduct.
- ▶ **Lack of awareness on the part of the members of the public that Lawyers in Government are subject to the same ethical standards** as are all other registered legal practitioners . There is a myth and misconception on the LSZ's regulatory mandate as limited to only practising lawyers.



Some more cases handled by the Society

- ***Complaint X against a Lawyer in Government-*** allegations that the lawyer in government gave wrong advice to the Minister which led to the complainant losing their land. Still pending
- ***Complaint X against a ZANU PF Member of Parliament-*** In this case, the Complainant alleged that the Respondent had failed to execute instructions and had eventually renounced agency without informing him. This is currently under investigation.
- ***In re LSZ v one of the former Prosecutor Generals of Zimbabwe-*** Alleged Respondent filed summons out of time thereby prejudicing the complainant. Matter had been held in abeyance owing the Constitutional immunity and investigations . Matter now continuing and pending before Council.



Some more cases handled by the Society

Complaints against a Commissioner, former MDC Member of Parliament and former Constitution Parliamentary Committee (COPAC) Member

- 4 complaints against one former Member of Parliament and former COPAC member.
- Allegations of fraudulent authentication of some documents (by her law firm), inflating a legal fees bill ,delays in effecting property transfer-
- Two of the complaints dismissed by Council for lack of substance, one resolved before getting to the Committee level.
- ***Complaints against one MDC Senator and former Constitution Parliamentary Committee (COPAC) Member***
- Six (6) complaints against one MDC Senator one involved failing to release title deeds on time, allegations of abuse of trust funds, fraudulently filing court processes, conflict of interest where the member was said to have represented both parties interchangeably, failure to represent the client effectively despite accepting instruction.



Some more cases handled by the Society

- **4 of these resolved** whilst the one involving failure to release title deeds upon demand is pending before Council. The other matter referred by Council to the LPDT for an inquiry upon which the LPDT was referred back to the LSZ Council for further investigations as the court rules that it had been prematurely been brought before the Tribunal.
- **See HH-306-18 / LPDT 05 /13**
- **Complaints against one MDC Executive-Three** complaints investigated against the above MDC Executive. **Two** of the complaints resolved before further investigations, **one** of the complaints involving allegations of the member issuing summons and collecting collection commission after the complainant had withdrawn instructions, the last case pending before Council
- **Complaint against one MDC Legislator-** One member who is currently attached to a local law firm as a Professional Assistant and who is also a Member of Parliament for the MDC Party was said to have posted on his twitter account information that had sexual connotations and unexpected of a member of the noble profession. Twitter account cloned



Key Considerations in dealing with the Complaints against members in public office

Key considerations in dealing with professional and ethical conduct of lawyers in this sector have been ;

- Office (position held or job function of the lawyer-politician at the time of the misconduct).
- forum or place where the misconduct occurred (e.g. within or outside the parameters of the office).
- Nature of the misconduct (e.g. civil or criminal) along with the prevailing respective interests of the political process, the judicial system and the bar in the discipline of lawyer-politicians who commit acts of misconduct within court proceedings or while serving in public office.
- The regulatory framework and whether or not the evidenced from the investigations will sustain the charges in view of the prescribed acts or omissions .
- **The guiding factor has been whether acts or omissions are at variance with the standards set with regards to the ethical and professional conduct of the lawyers**



Strategies that the LSZ has employed in ensuring its regulatory effectiveness in regulating lawyers holding public office

- Adhering to the **Statutory Regulatory compliance framework** in investigating alleged misconducts against its membership regardless of the political standing
- Remaining **apolitical and sticking to its statutory mandate** and adhering to its key objects as outlines in the statutory framework
- **Gazetting the Lawyers Code of Conduct-** Statutory Instrument 37 of 2018, broadened the **definition of misconduct** to take on board a variety of misconducts that had not previously been **codified** to include about **53 specific acts of misconduct**
- Developing the **Standard Operating Procedure (SOP) Manual-** specific investigative processes-curtailing processes.
- SOPs, in the absence of compelling statutory limitations, the LSZ has ensured timeous investigations against all members regardless of their political standing.



Strategies that the LSZ has employed in ensuring its regulatory effectiveness in regulating lawyers holding public office

- Developed its **sentencing Precedent Handbook to standardise sentencing patterns** and deal with **real or perceived selective application of the law** when enforcing its regulatory standards.
- The harmonisation of **Legal Practice Standards**- The Society periodically reviews its practice guidelines in responding to emerging business practices or countering any **rising misconduct within its members**.
- **Correcting misconceptions or publicising its regulatory mandate** through the media-e.g. curatorships, de-registered members, unlicensed members,
- Took the Initiative to request the justice sector to furnish information on disciplinary actions against registered members under their employ- used for pre-admission or post admission investigative purposes. Also all members from public institutions now required to furnish reverse clearance upon seeking to join private practice
- **Outsourcing legal counsel in highly politically sensitive matters .)**
- **CONCLUSION**-The challenge is a reality as highlighted in the cases above. Whilst adhering to its statutory and policy guiding frameworks, the LSZ also seeks to draw from best practices and hence the need to draw from the conference as well.



Checklist of Factors:

- ❖ Does the conduct:
 - Bring the administration of justice disrepute?
 - Harm the integrity and reputation of the legal profession?
 - Harm public confidence in the regulator?
 - Clearly contravene relevant ethical rules?
- ❖ Were any statements made 'fair comment' and in line with what the public would expect of a lawyer-politician? (particularly given the party they represent; e.g. Green Party vs. Republicans)
- ❖ Were the comments bona fide (made in good faith, even if inaccurate), civil and respectful (even if disagreeable)?



- ❖ Were the comments made in the course of the practice of law, or as part of a policy or political function?
- ❖ Did the public statements explicitly or implicitly trade on one's status as a lawyer? e.g. did the lawyer-politician use the word 'undertaking' when making a promise?
- ❖ Were any statements made protected by parliamentary privilege?
- ❖ Is there a unique threshold to apply? e.g. independence of prosecutorial discretion of AG, made in good faith, and during the exercise of an official function?



- ❖ What would a reasonable, appropriate and/or proportionate response be by a regulator?
 - allow voters to decide in the next election (as is now the case with our Canadian Prime Minister),
 - allow the courts to decide (whether in a civil or criminal proceeding), or at least await the outcome of a court decision, or
 - intervene in the public interest?
- ❖ Were the comments made to 'advance democratic discourse and societal debate on matters of importance to the public at large'?
- ❖ If the statements are made as part of a political function, should that impact the regulator's decision whether to act and if so, how?



QUESTIONS?