

JUDICIAL ACCOUTABILITY: THE JUSTICE SYSTEM AT 50; AGING OR AILING

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Prepared by: Ms Meridian Kohler
Deputy Director of Public Prosecutions

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JUDICIAL ACCOUNTABILITY¹

In building our justice system, greater interest must be shown in judicial accountability. This article considers the need to develop mechanism(s) of accountability. There is a need to develop a code of judicial conduct, for institutionalized formal training for those wishing to enter the judiciary and for continued legal training. Inherent in the accountability is the need for a right of appeal to be given to the prosecution. There is also a concomitant need to reduce the incidence of retrial which arises solely from judge based errors. The first section places the judiciary in its historical, constitutional and theoretical context. The second section will examine the present mechanism (s) and the positive and negatives of same (Judicial review, appeals). The last section will examine the different mechanisms extant in other jurisdictions as well as to propose a best model peculiar to this Jurisdiction and perhaps of wider applicability to the Caribbean.²

PART 1- INTRODUCTION

¹ I am grateful to Melisha Walters-Gordon, Kerry-ann Wilson(students of NMLS), and Jeremy Taylor (ODPP) for all the help rendered in researching and writing this paper, and am further indebted to a judge of the Supreme Court of Jamaica, a leading UK barrister and a Chief prosecutor in Ontario Canada for their reviews and helpful comments. All errors are mine.

² Though reference to the judiciary is usually limited to mean judges of the Supreme Court and Court of Appeal, the principles highlighted here should be applied in guiding the conduct of the resident magistracy whose members, as the paper argues infra, should be made a part of the judiciary.

- 1.0 ***“What about the judge who misconducts himself, whether in court or outside it. It must be right that he should be called to account. Judges are rightly expected to conduct court proceedings with courtesy and to do nothing that throws doubt on their impartiality. Out of court they must be careful to do nothing that would bring the judiciary into disrepute. So far as misconduct is concerned, it is clearly desirable that the judiciary should be subject to disciplinary review.”³***

(Lord Phillips President of the Supreme Court of England and Wales and the Most senior member of the Privy Council February 8th, 2011)

1.1 It is recognized that an attempt to treat with this subject area occasions a number of considerations. Firstly when I began writing this paper I realized that not being a member of the judiciary, I was at a disadvantage. I could not tell whether there already existed some informal system(s) of accountability that I was not aware of. As I lamented what I thought had placed me in an invidious position it dawned on me why inter alia, this paper is relevant. Because even if indeed there does exist any such system, in the absence of readily accessible evidence in writing of it, it remains largely unknown and out of the conscience of the public whose reliance on it as a basis for undergirding their faith in the system is nil.

1.2 Secondly, it is with some trepidation that I approach the topic. I think how the learned jurist Hugh Small approached the subject of judicial accountability whilst he himself was a judge and addressing his colleagues perhaps puts it best.

“During the course of preparing this paper, I have reflected on several occasions on the exact scope of the undertaking to which I committed myself. I have wondered if I have entered on holy ground. I have pondered whether the title of this address is likely to have caused apprehension among members of the judiciary. I have considered how easier it would be to speak on the subject ‘Executive and Legislative Power and Accountability’. In that instance everyone would expect to hear something about the awesome power of the two branches of the Government that are directly concerned with the exercise of political power. Everybody would anticipate a discourse on how the Public at large and the law can circumscribe abuses of power and hold politicians and public servants accountable within the boundaries of democratic and constitutional governance. But Judicial Power and Accountability, what exactly are we talking about? How are we to hold robed and bewigged authority to account? Are we speaking about the same people for whom all stand when they enter a

³ Judicial Independence & Accountability: A View from the Supreme Court: Lecture delivered by Lord Phillips at UCL Constitution Unit, launch of Research Project on The Politics of Judicial Independence, 8 February 2011, at p 20.

room to do their work? Yes indeed we are and though I cannot pray silence, I ask you to bear with me as I tiptoe through this unfamiliar terrain.”⁴

- 1.3 Thirdly, apart from the trepidation that naturally arises there is also the fact that the judiciary of Jamaica has an enviable record in policing themselves. In a country, rife with issues of great concern, it can hardly be said that accountability of judiciary appears to be a first call on our attention. It being unassailable that, with little exception, our members comport themselves within the desired expectations. Nonetheless one cannot look at an overhaul of the justice system or the country going forward after 50 years without pointing out the need for something absence of which at present, stands contrary to international practice and furthermore as a preventative measure, is less expensive than a cure.

In fact, the statement by the then Lord Chief Justice of Wales when speaking of the judiciary of England and Wales, is equally applicable to Jamaica.

“We are justifiably proud of our existing standards of judicial conduct. .”⁵

But the Lord Chief Justice went on to say, *“However, the recent adoption of written codes of conduct throughout the world and the endorsement of principles by the UN Human Rights Commission at Geneva in April 2003, have indicated that a written Guide for England and Wales would now be desirable and in accord with international practice.”⁶*

This observation also, we believe, is concomitantly applicable in the Jamaican context.

Lord Phillips noted in relation to the appointments of judges in England before 2005, the system was unable to withstand criticisms of political or other improper influence as, while there was no proof of either, it was not apparent that this was the case, as they were carried out by a process that lacked transparency.⁷ This criticism it is submitted is applicable not only to the system of appointments in particular, but the issue of judicial accountability in general. The areas in which judicial accountability needs to be enhanced are fundamental to the efficacious functioning of the Jamaican judicial system.

⁴ Small, Hugh, The Honourable, Judge of the Supreme Court of the Commonwealth of Barbados, ‘Judicial Power and Accountability’, paper delivered at a Continuing Legal Education Seminar, October 21, 2000. WILJ 25 (1) & 2, 2000, p 19. His Lordship as he then was, thirteen years ago concluded that the time was ripe for Jamaica to embark on the course of creating a code of judicial conduct.

⁵ Guide to Judicial Conduct 2006 at p iii (statement by the Chairman of the judicial Council, Lord Chief Justice of England and Wales.) http://www.judicial-ethics.umontreal.ca/en/codes%20enonces%20deonto/documents/Guide_to_Judicial_Conduct_-ENGLAND_AND_WALES_2006.pdf

⁶ Guide to Judicial Conduct 2006, supra...p.iii.

⁷ See speech Lord Phillips, Judicial Independence & Accountability, supra 3.

1.4 Fourthly, it may very well be that there are judges who hold the view, like Lord Donaldson, a former master of the Rolls of the United Kingdom and Wales that “ [T]he essence of my job is that I am responsible to the law and to my conscience and to no one else.”⁸⁹

Justice McLachlin in expounding on this point told a story in relation to the eminent jurist from the United States Learned Hand. The Learned Law Lord is said to have once told his law clerk,

“Sonny to whom am I responsible? No one can fire me. No one can dock my pay. Even those nine bozos in Washington, who sometimes reverse me, can’t make me decide as they wish. Everyone should be responsible to someone. To whom am I responsible?” Turning to his shelves of law reports, he said. *“To Those books...That’s to whom I’m responsible.”*

From, inter alia, these comments, she deduced *“One gets a sense, from reading these historical (and great may I add) judges’ comments that they took it for granted that they were above scrutiny. But in today’s world where judges play an important and expanded role, any notion that judges are above scrutiny has lost currency.”*¹⁰ There is much merit in the observations of Justice McLachlin. Judges indeed play an increasingly important role as not only are they the third arm of government, they also preside over the actions of the other two, the legislative and executive. The growth of constitutional applications and judicial review are direct evidence of this. As holders of an ‘enforceable monopoly over judicial power’¹¹ it is correct that the judiciary should be called upon to account.

1.5 Fifthly, a further justification for this paper may also rest in the fact that members of the judiciary are from diverse backgrounds. This background is not just in relation to social class but also in relation to professional practice. Some have moved up the ranks serving in courts, mentored by former and present members of the judiciary and getting a greater opportunity to observe others in the role that they have now come to assume. Others are pulled from private or other practice and come to the judiciary with a different perspective. Either pathway, may be argued to be the better way. However at the end of the day, it speaks to a need to have everyone on the same platform. Furthermore, both males and females members of the judiciary, appear to assume this responsibility at

⁸ Lords Hansard, November 11, 2004. Column 1088 as quoted in ‘Remarks of the Right Honourable Beverley McLachlin, P.C. Presented at the Law and Parliament Conference Ottawa, November 2, 2006.

file:///C:/Users/Owner/AppData/Local/Temp/Temp2_Judicial%20Accountability%20from%20John.zip/Supreme%20Court%20of%20Canada%20-%20Speech%20by%20Beverley%20McLachlin%20-%20November%202,%202006.htm

⁹ Lord Hope of Craighead KT, ‘What Happens when Judge Speaks Out?’ Deputy President of Supreme Court of the United Kingdom Holdsworth Club President Address, 19 February 2010.

¹⁰ Speech of Justice McLachlin, supra.

¹¹ See Geyh, Charles G. “Judicial Independence, Judicial Accountability and the Role of Constitutional Norms in Congressional Regulations of the Court” Indiana Law Journal [Vol. 78:153] at p 160.

a younger age than in days of old. It means therefore that that their experience base is less. Homogeneity in all aspects of professionalism for each and every member is a stronger guarantee of homogeneity in the quality of justice offered by the system.¹² A defined code of conduct along with a mechanism for its application is a big step in that direction.

- 1.6 A sixth consideration is that the issue of enhancing judicial accountability arose as early as 1973. In 1973 the Federal Judicial Conference of the United States adopted a Code of Judicial Conduct.¹³ Of importance, in 1988 a Code of Ethics attributed to Mr. Justice Thomas of Australia, was penned regarding the Australian judiciary.¹⁴ The Canadian Judicial Council followed nine years after with the production of a set of ethical principles to guide the Canadian judiciary.¹⁵ In 1998, Australia followed suit with a guide published for the Council of Chief Justices of Australia.¹⁶ The Bangalore Principles of Judicial Conduct were agreed upon in 2003 by a large swathe of Commonwealth countries further buttressed by United Nations recognition of the principles. England and Wales followed suit in 2004 and Scotland in 2009. It is now almost a decade after Bangalore: surely the time has come.
- 1.7 A call for judicial accountability should not be misconstrued as an assertion that judges are running wild. It is well recognized that a cornerstone of the Jamaican judiciary is their collective integrity. The public resiles much faith in them. One finding of the Taskforce Report is that *“the greatest strength of the Jamaican justice system is the widespread confidence and belief in the integrity and commitment of the judiciary.”*¹⁷ This is due in no small part to the conduct of judges. This paper recognises our judges willingness to regulate and the fact that they are regulating themselves. Three anecdotes illustrating the behaviour we have come to expect from our judges better illustrate the point.

¹² For example Jamaica’s politico-judicial history is not characterized by the tug of war that history evidences between the politicians and the Supreme Court in the United States. However future planning must be informed by issues that potentially can arise and not solely those that have already arisen. See Geyh, Charles G. *supra*, at p 158.

¹³ The Jamaican Justice System Reform Taskforce, Final Report 2007(JJSRTF Report), para 31. The report further noted that this general perception is validated by the fact that there has only been one charge of judicial corruption in a generation and that charge led to a successful conviction.

¹⁴ See *Judicial Ethics in Australia* (2nd ed, 1997)

¹⁵ Canadian Judicial Council *Ethical Principles for Judges* (1998).

¹⁶ Council of Chief Justices of Australia, *Guide to Judicial Conduct* (2002)

¹⁷ The JJSRTF Report,*supra*, para 31.

Dato Param tells of a “case in the sixties when a lay litigant having lost her case threw her books at the three judges of the Court of Appeal of England & Wales. The books flew past the head of the presiding Judge, Lord Denning. All Lord Denning did was direct the usher to lead her out of the Court. She exclaimed, “I am surprised that your Lordships are so calm under fire.”¹⁸

An anecdote from the writer’s experience may well be inserted here. *When I was still very young counsel at the office of the DPP and with little experience in the conduct of appeals, I was sent to the Court of Appeal to represent the office. The court was full and defence counsel in the matter was having a hard time before the three law lords. I on the other hand smiled with glee, as I ticked off all the issues that were raised and their Lordships, through volleys of questions destroyed; the questions were much in keeping with my own arguments. When their Lordships called on me to respond I was somewhat puzzled as I felt I had gauged from the questions anything I had to say would now be gratuitous. I rose and matter of factly told the Court just what I thought; I had nothing useful to add since they had already said all that I was going to say. The three judges looked at each other. Lord President Ian Forte as he then was began to speak. He politely and in a somewhat avuncular fashion explained to me how the Court functions, that the panel had not made any decision and why, once called upon I was required to make my arguments. What could easily have brought about a tongue lashing by another court, turned into a learning exercise for young counsel and left my self-esteem intact.*

1.8 The last anecdote is a story from Botswana which makes the same point but in a humorous fashion.

“There is a story about two young magistrates, long ago, in a remote part of the Bechuanaland Protectorate, as it then was. They went out one weekend for a spot of illegal hunting and were caught by the police. They decided to deal with this as discreetly as possible. So they went into court on a Saturday morning, with no one else around. Jones sat on the Bench. Smith was in the dock. He pleaded guilty and was fined £5. Jones then announced that the court would adjourn briefly and reconvene reconstituted.

They came back, now with Smith on the Bench and Jones in the dock. He pleaded guilty. His friend and colleague looked very stern. “Mr. Jones”, he said, “I am compelled to regard this matter in a very serious light. The crime of poaching is becoming ever more prevalent in

¹⁸ ¹⁸ Dato Param Cumaraswamy, (former UN Special Rapporteur on the Independence of Judges and Lawyers) “Tension Between Judicial Independence and Judicial Accountability” Text of a speech presented to the International Centre for Ethnic Studies – Sri Lanka on 17 October 2003. <http://www.article2.org/mainfile.php/0205/104/> Param further commented that “The conduct of Lord Denning in those circumstances demonstrated [the] highest judicial integrity and compassion.”

*this jurisdiction. Indeed this is the second case we have heard in this court this very morning. A deterrent sentence is called for. You are fined £50.”*¹⁹

- 1.9 Therefore it is submitted that the call for greater accountability is rather a recognition that the time has come where greater accountability is required of all those that serve in the public domain, the judiciary being no exception. Coupled with their increasingly expanding role, an ever audacious media, a public who with greater access to knowledge by virtue of technology have grown more enquiring, the growing trend in the adoption of international best practices and the wide acceptance of same by many of Jamaica’s counterparts, there is no good reason to continue to exclude Jamaica from this category. The issue of judicial independence which will be addressed at length infra, is not such a reason. According to Kramer as quoted in Geyh, *“finding the right mix between independence and accountability surely is not easy but complexity is not the same as contradiction,”* resounds as commonsensical.²⁰
- 1.10 An examination of the issue of judicial accountability calls for an examination of a number of issues. The paper will firstly place the role of the judiciary in its, historical, constitutional, theoretical and practical context. Thereafter the paper will examine what is meant by judicial accountability and judicial independence and how these two principles interact. Thirdly the paper will go on to consider the extant mechanisms of accountability that exist in the Jamaican judiciary. A focal point of the paper, addressed at this juncture, will be the areas in which judicial accountability can be enhanced. The paper will then proceed to examine, using a table format and brief summaries, some best practices in achieving enhanced judicial accountability as well as a mechanism for disciplinary review. The paper will then conclude by suggesting criteria that should be included in any model(s) that Jamaica should adopt.

¹⁹ McNally, ‘Judicial Accountability’ Paper delivered at Chief Justice’s Conference: Kasane Botswana, 7 August, 2009. <http://ebookbrowse.com/mcnally-judicial-accountability-pdf-d46259790>, paras 19-20.

²⁰ Geyh, Charles G, supra p 160.

PART 2- PLACING THE JUDICIARY IN CONTEXT

HISTORICAL CONTEXT

2.0 The Jamaican judiciary represents a set of professionals that sit at the apex of the society with broad responsibility for the administration of justice in Jamaica. At present there are some thirty six judges between the Court of Appeal and the Supreme Court.²¹ However this number is expected to expand as part of the Justice reform program that Jamaica is undergoing.²² The judiciary is one of the three arms of government. Hilaire Barnett, puts it thus *“the judiciary is that branch of the state which adjudicates upon conflicts between state institutions, between state and individual and between individuals.”*²³ The importance of the judiciary harkens back to time of long ago. The judiciary in Jamaica and much of the Caribbean are relics of the British rule as exemplified not least by the wigs and gowns.²⁴ An understanding of the role and function of the judiciary today²⁵ requires a kaleidoscopic assessment of the transcript of its past as it pertains to both Britain and Jamaica.

POWER IN THE HANDS OF THE KING

2.1 Judges were not a fixture at the inception. During the 5th and 6th century Britain was taken over by the Anglos and Saxons who formed small kingdoms. This was known as the Anglo Saxon period. The Normans conquered the Anglo Saxons in the great Norman Conquest of December 25, 1066, which heralded the crowning of William I King of England.²⁶ This led to the rise of feudalism, the key feature of

²¹ This number does not include the masters in chambers of which there are two nor the registrars of either courts. The number is roughly evenly divided between the genders.

²² See moj.gov.jm for further information regarding the reform of the justice system in general and the judiciary in particular.

²³ Bennett, H, Constitutional & Administrative Law, 9th Edition, p 75.

²⁴ Coincidentally, the Judges of the Court of Appeal abandoned the wearing of wigs on December 21st, 2011. It is believed that the judges of the Supreme Court will soon follow suit. <http://jamaica-gleaner.com/gleaner/20111221/lead/lead92.html>

²⁵ At present there are some judges of the Supreme Court and... of the Appeal Court. Sections 97(2) and 103 (1) of the Constitution as well as the Section 5 of the Judicature Supreme Act and section 3 Judicature (Appellate Court Act speaks to the numbers provided for in law. As provided for by the law, these numbers will continue to change in attempt to match the growth of the work the Courts face.

²⁶ <http://www.eoilangreo.net/herminio/culture/hastings2.htm>

which was the vesting of ownership of land in the Crown, who in return for taxes, labour and military service leased the land to the inhabitants. So how did the concept of the judge come about?

Ownership of land in the Crown meant the responsibility for settling disputes was moved from self-regulation by kin-groups to the Crown. Power was given to nobles and feudal lords with right of appeal to the King. Feudalism was a system of local government and local justice. The right to jurisdiction before the King was tied to the right to property. During this period justice was in the hands of the King, as owner of all land, to be dispensed at his pleasure. The accuser and accused were imprisoned until the matter was heard thereby subjecting the plaintiff to the same treatment as the accused.²⁷

INTERFERENCE WITH THE JUDICIARY BY THE KING

2.2 During this phase of the development of the judiciary there was a struggle to remove control of the judiciary from the Crown.²⁸ It took a civil war and much agitation from the people. King James and a number of his successors would dismiss judges who did not rule as they wished or dared to question his influence over them. The judges felt obliged to apply the law according to the King's direction for fear of being dismissed. James II went as far as to remove twelve judges and appoint new ones who would enable him to achieve his aim to undermine the Church of England and re-establish the supremacy of Rome. Lord Arthur Denning in *"The Road to Justice"*²⁹ recounted that there was one judge at the time, Sir Edward Coke who stood up to the King in assertion of the independence of the judges. In the particular instance of 'The *Case of Commendams*',³⁰ Coke resolutely refused to wait on the King's direction before arriving at a decision. As a way of explanation for his decision, he stated, "[o]bedience to His Majesty's command to stay proceedings would have been a delay of justice, contrary to the law, and contrary to oaths of the judges." *The judges had been asked, "[w]hen the King believes his interest is concerned and requires the judges to attend to him for their advice, ought they not to stay proceedings till His Majesty has consulted them?"* All the judges except Coke said yes. Coke was dismissed in 1616 for his stance. Lord Denning described the judges of those days as *"servile judges who did what they were told."* This stranglehold on judicial discretion was fundamentally incompatible with

²⁷ <http://www.middle-ages.org.uk/feudal-justice.htm>

²⁸ In relation to the interference with the judiciary by the King see *Prohibitions del Roy* 77 ER 1342.

²⁹ Denning, Alfred and Thompson, Baron, Alfred, 'The Road Justice' Wm S. Hein Published 1955. P 10-11

³⁰ 1616, Hobart 140

independence of the judiciary. The end result of the struggle was that an independent judiciary emerged to temper and limit the power of the Crown and the resultant establishment of a judicial system suitable for exportation to British colonies.

EXPORTATION OF THE BRITISH JUDICIAL SYSTEM TO JAMAICA

2.3 In 1655 as a part of Oliver Cromwell's Western Design to project English power into the Americas, the island of Jamaica was forcefully wrested away from the Kingdom of Spain.³¹ During the course of settlement and rule the English settlers established courts and a system of law to replicate that which was in England. With these laws came the rights and obligations conferred upon Englishmen by **Magna Carta (1215)**, **The Petition of Right (1628)** and later on **The Habeas Corpus Act (1679)**, **The Bill of Rights (1688)** and the **Act of Settlement (1701)**.

John Taylor³² who in 1687 spent some months in Jamaica wrote of the establishment of a Grand Court of Judicature and a Court of Chancery which was to have its seat at St. Jago de la Vega and be held four times a year.

2.4 In Jamaica the judges were a member of that class accountable to its members for the preservation and protection of an oppressive social order based on race and status. Goveia noted that the British constitutional system which had placed great store and value on property and property rights left the power of the master over his property, the slave, virtually unlimited, even in some cases as to life and limb. For this convention to apply it had to be made clear that the slave was property and subject to police regulations. The experience of Jamaica and the English speaking Caribbean is that police regulation lay at the very heart of the slave system and that without them the system became impossible to maintain. English respect for the liberty of the subject was thus restricted by the erection of a slave system, and had to be so restricted to keep the slave system in being.³³

³¹ See Codlin, Raphael, 'Historical Foundations of Jamaican Law' Canoe Press, 2003 for an enlightening discussion as to whether Jamaica was settled or conquered by the English.

³² Buisseret, David, 'Jamaica in 1687. The Taylor Manuscript at the National Library of Jamaica.

³³ Goveia *The West Indian Slave Laws of the Eighteenth Century* in *Caribbean Slavery in the Atlantic World* by Hilary McD Beckles and Verene Shepherd (Eds)

2.5 Before the 1830s (that is before Emancipation) the entire court system concerned only whites and free coloureds who for the most part only represented little more than ten percent (10%) of the entire population of the island.³⁴ Slave involvement with ordinary courts occurred only in their capacity as property, victims or exhibits.³⁵ Slaves were tried in slave courts entirely separate and distinct from the ordinary court system. In the slave courts there existed special forms of trial and a limited validity of evidence. For felonies and capital crimes slaves were tried without a jury.³⁶

In the parish of St. Thomas on the eve of the Morant Bay Rebellion, Don Robotham³⁷ noted:-

“Thus, as the economic crisis deepened and the planters sought every means to preserve their incomes by the harshest exploitation of the people, the judiciary became a vital link in the whole chain of oppression binding the people.... Thus it was no accident that the issue which sparked the revolt occurred at a Court House, nor that this institution became the focus for the anger of the people on those fateful October days.”

2.6 Even after emancipation when the freed people were to enjoy rights which had been the sole preserve of whites and free coloureds, the judicial authorities continued to see themselves as curators and custodians of an ancient regime.³⁸ The irony is that the slaves placed a great and high value on the rule of law and the institution of the Court especially with the legal systems commitments to equality before the law, fairness and justice. A Jamaican apprentice in Williamsfield, Manchester articulated the feeling of many freed people in Jamaica that access to justice was an attribute of citizenship and that the law was the foundation of a free society. He told two visiting American abolitionists:-

*We could never live widout de law; we must have some law when we free. In other countries where dey are free don't dey have de law? Wouldn't dey shoot one another if dey didn't have law.*³⁹

PRESENT DAY JUDICIARY IN JAMAICA

³⁴ Dalby, Jonathan, ' Crime and Punishment In Jamaica' 1756 -1856

³⁵ Dalby, Jonathan, ' Crime and Punishment In Jamaica 1756 -1856

³⁶ Goveia *The West Indian Slave Laws of the Eighteenth Century* in Caribbean Slavery in the Atlantic World by Hilary McD Beckles and Verene Shepherd (Eds)

³⁷ "The Notorious Riot". The Socio-Economic and Political Bases of Paul Bogle's Revolt. ISER UWI. 1981

³⁸ See Paton, Diane 'No Bond but the Law. Punishment, Race and Gender in Jamaican State Formation 1781 -1870

³⁹ Marshall, Woodville *"We be wise to many more tings". Black Hopes and Expectations of Emancipation.. Caribbean Freedom* by Hilary McD Beckles and Verene Shepherd (Eds).

2.7 Small speaks of the decline in prestige of the judiciary in Jamaica in the following terms, *“Judicial power also relates to the social influence that the office of judge has in our society. It is true that the judiciary does not occupy the pride of place that it enjoyed in colonial times or in the early days of our Independence. This perhaps has more to do with the polarization in the society that has been associated with a general lack of deference for authority and the general breakdown in the machinery of the State. Whatever is the cause we are still a society in which judges are able to exert significant social influence. There is still the opportunity for the power and influence of judicial office to affect issues affecting the personal lives of these office holders.”*

2.8 Nonetheless there are calls from various groups, heads of state and regions to reform the judiciary in keeping with a modern world. In the words of Rafael Angel Calderon Fournier in *‘Shaping Modern Judicial Systems in Latin America’*; *“The reform of the judicial systems looms large in the task of building modern, fully functioning, just societies. Our nations need to find ways to administer justice effectively and efficiently. Modern economies require modern judicial systems, which can be developed only in concert with, and with the aid of, the entire (sic) region’s governments and the international organizations....”*⁴⁰

In Jamaica, the Taskforce found that *“ [l]ike all public institutions, the justice system is also subject to heightened demands for greater real accountability. There is increased pressure to impose on the judiciary management efficiencies, performance indicators and standardisation that have been part of the reform of other branches of government but which judges have to reconcile with their abiding duties of professional autonomy and constitutional independence.”*⁴¹

JUDICIARY: CONSTITUTIONAL AND LEGISLATIVE CONTEXT

2.9 During the reign of Henry II there was a significant variety of legislative documents. They were called by various names including constitutions.⁴² However Magna Carta was described by Lord Denning as *“the greatest constitutional document of all times – the foundation of the freedom of the individual against the arbitrary authority of the despot.”* In a 2005 speech, Lord Woolf described it as *“first of a series of instruments that now are recognised as having a special constitutional status.”*⁴³ It can be asserted then that the Magna Carta was the first semblance of a constitution in Britain. Furthermore, Magna Carta, in placing the role of the citizen against that of the Crown sought to correct the imbalance between the two.

⁴⁰ Justice and Development in Latin America and the Caribbean, Seminar, Washington, D.C., 1993 , published by the Inter-American Development Bank. <http://www.worldcat.org/title/justice-and-development-in-latin-america-and-the-caribbean-san-jose-costa-rica-february-4-6-1993/oclc/31034389>

⁴¹ See The JSJTR Report, supra, para. 44.

⁴² Smith & Keenans English Law, 12th Edition 1998, (Financial Times/Prentice Hall),p205.

⁴³ http://en.wikipedia.org/wiki/Magna_Carta

According to W.S. Holdsworth, Magna Carta profoundly influenced the development of constitutional law. The Magna Carta, apart from establishing the rights of the citizen, aimed to remove the concentration of power from the Crown and to force governance by laws which had been established before the Norman Conquest. Professor Holdsworth aptly referred to the Magna Carta as *“closing the period during which the law was developed by the power of the Crown alone; and it begins the period which in Edward I’s reign, will end in the establishment of a Parliament, which will limit the power of the Crown, and share the making of the laws.”*⁴⁴ This of course led to the creation of the House of Lords, Privy Council, the Exchequer, the courts of common law and the itinerant justices.

- 2.10 It is however accepted that Britain as it stands today has an unwritten constitution. What Jamaica now has is “the export version of the British constitution.”⁴⁵ A bipartisan committee was set up to draft the constitution. The people of Jamaica were consulted through a referendum and public forums after which the draft was taken to London for approval and formal enactment. This was done with a few changes to the draft. Berthan Macaulay Q.C., described it as *“but a model of the constitutions which were handed down to the British ex-colonies.”*⁴⁶

CONSTITUTION OF JAMAICA

- 2.11 The Jamaica Constitution,⁴⁷ operative since August 6 1962 extrapolates many of the Westminster model ideals into its Chapter VII, sections 97- 113, the chapter that deals with the judicature. Part 1 and 2 of Chapter VII of the 1962 Constitution, establishes the judiciary as an independent third branch of government. It provides for security of tenure for judges, assists in achieving independence of the judges and fosters the separation of powers. Section 98 of the Constitution provides for the appointment of the Chief Justice by the Governor-General upon the recommendation of the Prime Minister after consultation with the Leader of the Opposition. However section 98(2) provides that the Puisne Judges of the Court are to be appointed by the Governor-General acting on the advice of the Judicial Service Commission. This paper would submit that the appointment of the Chief Justice should also reflect the input of the Commission. This is because it would reduce any possible criticism of politicization of the office. The Constitution of Jamaica by virtue of

⁴⁴ Holdsworth W.S. ‘ Sources and Literature of English Law ‘ Clarendon Press, 1925., p63.

⁴⁵ Fiadjoe,A.K. ‘The Westminster Transplant in the Commonwealth Countries-Some Pertinent Issues’ WILJ, vol, 1990, p44.

⁴⁶ Macaulay, Berthan, ‘Caribbean Constitutions-Trinity, Not Separation of Powers-The Jamaican Example’ WILJ Vol 2, 1987, p25.

⁴⁷ Jamaica (Constitution) Order in Council, 1962, made 23rd July 1962, (Laid before Parliament 24th July 1962 and completely into effect immediately before the 6th of August 1962.)

section 100(1), states that a Judge of the Supreme Court holds office until he or she has attained the age of seventy years.⁴⁸ Section 100(4)⁴⁹ provides that “a judge may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehavior...” As will be discussed infra, the constitution does not indicate what amounts to “misbehaviour” and would therefore appear to leave it to the discretion of the Prime Minister and the tribunal set up to investigate and determine. Nonetheless, it would appear that the exercise of the power would be reserved to “the worst of the worst” cases to borrow the words of the Privy Council in *Trimmingham v R*.⁵⁰

THEORETICAL AND PRACTICAL CONTEXT

2.12 This section seeks to examine the separation of powers doctrine and how the vesting of budgetary and administrative control of the judiciary as well as the growth of judicial review and constitutional applications impact upon separation of powers among the three arms of government.

*“The essence of the doctrine is that there **should** (my emphasis) be, ideally, a clear demarcation of functions between the legislature, executive and judiciary in order that none should have excessive power and that there should be in place a system of checks and balances between the institutions.”*⁵¹ Aristotle from as early as 384-322 B.C. recognised the existence of three separate roles. In his authorship of *“The Politics”*, he proclaimed the first role as the deliberative, the second, the officials and the third, the judicial element. The first traces of the fruition of separation was towards the end of the reign of Henry III after a group of barons led by Simon de Montfort, who were disgruntled with Henry’s autocratic style and negligence of Magna Carta, coerced Henry to sign the Provisions of Oxford 1258.⁵² This led to the establishment of the Parliament by the end of reign of Edward I, the son of Henry III. Parliament would limit the power of the Crown and share the making of the laws. The conundrum which caused disquiet in the people was the abuse of

⁴⁸ Section 106 (1) makes identical provisions for judges of the Court of Appeal.

⁴⁹ Section 106(4) makes identical provisions for judges of the Court of Appeal.

⁵⁰ [2009] UKPC 25. See also *Therrien v Canada (Minister of Justice) and Another* [2001] 2 SCR 3 at para. 147.

⁵¹ Barnett ,Hilaire, ‘Constitutional & Administrative Law’, 6th Edition, (Routledge).

⁵² <http://gwydir.demon.co.uk/jo/history/henry3.htm>

power by the King even though there was a Parliament. This led to the civil war⁵³ against the King and Parliament to restrain the excesses of the King and truly establish the separation of the two. The English philosopher John Locke (1632-1704) also asserted the need for separation of power between the three main branches of government as there were inherent risks of corruption if this was not done. Baron de Montesquieu followed suit in his' *The Spirit of Laws (1748)*' where he recognized the threefold arrangement in the English government as being essential.

- 2.13 The purest separation of powers is where power is diffused between the executive, legislature and judiciary with no overlaps between personnel or function. The executive formulates and executes policies. The legislature is the Queen in parliament responsible for law making. The judiciary implements and adjudicates on the law. It is agreed that this division of power *should* prevent absolutism and act as a check and balance. Therefore in theory separation of powers is a strict separation without overlaps. However, H. Barnett posits that such an arrangement would create a system that is *"unworkable, particularly under a constitution dominated by the sovereignty of parliament."* A complete separation could lead to *"legal and constitutional deadlock"*.⁵⁴ She indicates that what is more ideal is that there is sufficient interplay between each institution of the state and refers to this as the contemporary doctrine.
- 2.14 The Independence of the judiciary was encrypted with the passing of the Act of Settlement 1701 now section 12 of The Judicature Act, 1925.⁵⁵ There was however diverging views as to the interpretation of the Settlement Act. On one interpretation it is thought only both houses of parliament can dismiss a judge for misbehaviour while the other is that the executive could still remove a judge for misconduct. Lord Denning said in confirmation of the first view that *"I am glad to say that the leaders in both Houses of Parliament have now accepted the view that the Executive have no power to dismiss a judge in any circumstances. Only Parliament can do it with the assent of the Queen."* However as will be discussed infra, the judiciary is not truly independent, in the sense that it is circumscribed by the Executive/Legislature that controls their budget, appointment, jurisdiction, structure, size, administration and rulemaking, they may be removed from office, their decisions may be reversed, and they may be refused higher appointment as a form of punishment.⁵⁶
- 2.15 Jamaica's Westminster model constitution gives, in the form of the prime minister and opposition power and influence in the appointment and dismissal of judges. Section 98(1) provides for the appointment of the chief justice by the governor general on recommendation of the prime minister after consultation with the Leader of the opposition.

⁵³ Cf. Glorious Revolution of 1688 which led to the abdication of James II and the promulgation of the English Bill of Rights by the Parliament 1689.
http://www.bbc.co.uk/history/british/civil_war_revolution/glorious_revolution_01.shtml

⁵⁴ supra

⁵⁵ supra

⁵⁶ Geyh Charles, G, , supra p 160.

However the Prime Minister as member of the executive is able to suspend and dismiss the Chief Justice or President of the Court of Appeal. Furthermore even though power is vested in the Chief Justice and President of the Court of Appeal to suspend other judges, this is done on recommendation of the Prime Minister.

- 2.16 On the other hand, while the legislature makes law, the judiciary is said to interpret it. However the obfuscation of the separation doctrine is not manifested only by the executive and legislative arms. The judiciary has an extremely powerful function to play by acting as watchdogs over the other two. The judiciary may declare acts of parliament as unconstitutional rendering such legislation null and void or by virtue of judicial review, order public bodies to act or not to act contrary to the wishes of those bodies.⁵⁷ Judicial review can be described as the process by which the courts control the exercise of government power.

*“If a public body, as defined in law, makes an error of law, the courts-through the process of judicial review- will intervene to ensure that the body in question reconsiders a matter and acts in a procedurally correct manner.”*⁵⁸ **C.C.S.U. v Minister of State for Civil Service (1985)** is the locus classicus establishing the grounds for judicial review as subsumed under three heads, namely, illegality, irrationality and procedural impropriety. The Civil Procedure Rules⁵⁹ of Jamaica, which is patterned off the English equivalent, confer similar broad powers and responsibilities on the judiciary by virtue of its Part 56. In *R V IDT Ex parte J Wray and Nephew Ltd*, Sykes J, noted that *“[m]odern governance has embraced the idea of judicial review and it is now an integral part of governance and accountability structures. Part 56 has recognized this reality.”*⁶⁰

- 2.17 The growth of matters which the court has to deal with in persons seeking constitutional redress is another area of the work of the judiciary that highlights the overseer role the judiciary plays in patrolling the powers of the other two arms of government. The growth in human rights law plays no small part in accelerating the capacity of the constitutional court. The late constitutional amendment to the Jamaican constitution which has resulted in a new Charter of Fundamental Rights and Freedom⁶¹, even yet, may preside over an increase

⁵⁷ Of course there is nothing preventing the legislature from overruling a decision of the court by legislation.

⁵⁸ Barnett, H. *supra*, at p 719.

⁵⁹ Supreme Court of Jamaica Civil Procedure Rules 2002.

⁶⁰ Claim No. 2009 HCV 04798, delivered Oct 23rd 2009, para. 45 This concerned a decision of the Industrial Dispute Tribunal (IDT) to reinstate workers at Jamaica Wray and Nephew. See other cases such as Shirley Tyndall et al v Justice Boyd Carey et al, Claim No. 2010 HCV 00474 on the question of bias of the commissioners to include former Appellate Judge of Jamaica and chairman of the Commission, Justice Boyd Carey, of the FINSAC Commission of Enquiry.

⁶¹ The Charter received its assent on 7th of April and took effect on the 8th of April, 2011. It repealed Chapter III of the Constitution.

in these actions. Cases such as **Donald Phipps v R**⁶² and **Nation and Wright**⁶³ are some of the latest cases alleging breach of constitutional rights.

2.18 What can be deduced from the above analysis is that judicial review is one of the most obvious breaches of the separation of powers doctrine, but at the same time it acts as a check and balance which is posited should be in place in order that the system of governance is workable. Further the range of matters addressed by the constitutional court buttresses this view. In commenting on the American equivalent where the judiciary is also able to override the will of the executive and the legislative, Gehy states, *“The standard explanation for this state of affairs is that the judicial independence the Constitution gives to the third branch is counterbalanced by the powers the Constitution delegates to the first branch to promote judicial accountability.”*⁶⁴

PART 3- JUDICIAL INDEPENDENCE

3.0 *“Judicial independence in terms of the purpose it serves [is] to facilitate impartial decision making and preserve the integrity of the judiciary as a separate branch of government.”*⁶⁵

A very important point was made by Param in these terms, *“the judicial committee of the Privy Council has reminded us [that] the independence of the judiciary is not for office holders but for the population at large.”*⁶⁶ Furthermore, *“It is not the confidence or perceptions of the judges that matters. The right to an independent tribunal is the right of the consumers of justice. It is the protective right of all human rights. It is neither a right nor a privilege of the judges. This must be made clear to judges. I have often heard judges asserting that they are independent and impartial. It is how the public perceives their performance and conduct that matters. Judges must remember that public confidence in the system is the ultimate safeguard of their independence.”*⁶⁷

⁶² Donald Phipps v Regina [2010] JMCA Crim 48, para 112 .

⁶³ Claim No 2010 HCV 5201 and Wright Claim No HCV 5202, judgment 15th July, 2010. Both these cases precede the enactment of the Charter of Rights

⁶⁴ Gehy, Charles, G, supra,p160.

⁶⁵ Gehy, Charles, G, supra p160.

⁶⁶ The Task Force Report, supra, para 155.

⁶⁷ Dato Param, supra .

- 3.1 The point being made is that independence is entrusted to the judiciary to be used for the benefit of the population.⁶⁸ It is not something for the judges. Furthermore members of the judiciary, as trustees of this principle, may seek to abuse it. Dato Param addressed this point fulsomely. *“The guarantee of judicial independence is for the benefit of the judged, not the judges. There have been cases where judges are said to have abused this independence, sometimes as a shield against investigations of judicial misconduct, including investigations of corruption. Judges know that they cannot easily be removed, cannot be sued for their conduct or words uttered in the adjudicative process, and that their salaries cannot be reduced. The common complaint is regarding the kind of terse and curt language some judges use against parties, witnesses, counsel, and even against others not in court. In some countries such conduct has triggered a public furor through the media, drawing the executive, supported by the public, to seek greater accountability from the judiciary.”*⁶⁹
- 3.2 The former UN Rapporteur on the Judicial Independence of Judges and lawyers, has noted that Judicial independence allows judges *“so that they can dispense justice without fear or favour, in accordance with the facts, evidence and law presented to them.”*⁷⁰ What is more when one looks at the Constitution it sets out discrete determinants of independence. The Constitution⁷¹ makes provision for appointment, tenure and salaries of judges. On a similar note, the Task Force Report states that *“judicial independence is generally understood to have three components (i) security of tenure (that is a judge cannot simply be fired because someone in Government or someone who is in a position to influence Government doesn’t like the decision he or she is making); (ii) financial security and, (iii) administrative independence.”*⁷²

We will examine these three elements independently.

1) SECURITY OF TENURE

⁶⁸ See Wilson, J.O. ‘ A book for Judges’ (1980) at page 54-55 states that the rule of law and the independence of the judiciary depend primarily upon public confidence. Lapses and questionable conduct by judges tend to erode that confidence. It is only by maintaining high standards of conduct will the judiciary continue to warrant the public confidence on which deference to judicial rulings depends, and be able to exercise its own independence in its judgments and rulings.

⁶⁹ Dato Param, supra under the section headed “Abuse of Judicial Independence”.

⁷⁰ See Dato Param, supra..

⁷¹ See The Jamaican Constitution (Order in Council) 1962 Section 100-109.

⁷² JJRTF, The Task Force Report, supra para 156.

3.3 Tenure in Jamaica as in England and other commonwealth countries, is guaranteed “*quamdiu se bene gesserint*” ; “*as long as he shall behave himself*”.⁷³ Section 106(1) and section 104 () of the Constitution guarantee tenure to a judge who “*shall hold office until he attains the age of seventy years.*” That period is guaranteed unless the judge resigns or is removed from office.

Section 100(4) of the Constitution provides that “*A Judge of the Supreme Court may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of subsection (5) of this section.*”⁷⁴

However the issue of life tenure, recognised as a necessary pillar of judicial independence, was not always embraced by all. While America was still in the process of determining the structure of its judiciary, the issue of life tenure was stridently criticized by American Senators anti to its application to federal judges in the following manner “[*W*]hen you put a man into an office with life tenure, ...[*y*ou]put him on a sort of pedestal above the rest of the people,” *The Senator later observed, “he then thinks that leisure is the first element of his new position. You may take the hardest-working lawyer in this country and make a Federal [sic] judge of him and he will quit...[h]e will immediately become a dilettante.*”⁷⁵ On the other hand the modern approach to tenure is aptly summed up by McLachlin, “*this principle lies at the heart of both judicial independence and judicial accountability.*”⁷⁶

APPOINTMENT

3.4 Though reference is made to the qualification of judges in the Constitution, the qualification for judges of the Supreme Court and Court of Appeal is governed by section 6 of the Judicature Supreme Court Act⁷⁷ and section 4 of the Judicature Appellate Jurisdiction Act.⁷⁸ In effect judges of the Supreme Court must be attorneys of a minimum of ten years practice. Jamaica, which has had a Judicial Services Commission since 1962, which is instrumental in the appointment process for judges, has managed to set itself apart from countries

⁷³ Act of Settlement 1701.

⁷⁴ Section 106(4) of the Constitution of Jamaica makes a similar provision regarding judges of the Court of Appeal.

⁷⁵ See Geyh, Charles G., supra pg 199. “Senator Call noted that “a court holding power by life tenure” is separated from the sympathies and feelings which animate the great body of the country” and take their color and tone from the political party in control of the Government. Senator Morgan went a step further: {When you put [a judge] in for a life position and nobody scrutinises his acts” he argued, “how can we expect a man of that sort not to drift off in a line of his own convictions or his friendships or his enmities?”

⁷⁶ Justice McLachlin’s speech, supra.

⁷⁷ The Judicature Supreme Court Act, 1st January, 1880.

⁷⁸ The Judicature (Appellate Jurisdiction) Act, 5th day of August 1962.

such as Pakistan and India and who in the absence of an independent Commission for appointment of members of the judiciary are still wrestling to get the right fit. The presence of a judicial service commission should ensure that *“judicial appointments are perceived to be made independently and transparently, based on merit and without improper considerations, political or otherwise.”*⁷⁹ In fact England and Wales only established a commission by virtue of the Constitutional Reform Act of 2005 after cries of absence of transparency in the appointment process.⁸⁰ Nonetheless, the finding of the JJSRTF Task Force report places a damper on the commission’s existence. The report states that;

“The current system for the appointment of judges at all levels of the judiciary is inadequate and insufficiently transparent. Some have raised concerns that the appointment process is politicized, although the general view is that the appointments are of very high calibre.

*Another concern is that there is a tendency to focus on recruitment from the public bar, although this is more of an issue for appointments as Resident Magistrates and only indirectly to the Supreme Court. The main problem is that the consultation and review process is very informal and is in need of more openness.”*⁸¹

3.5 The Report makes the further point that, *“while there is no evidence of political interference in the appointment of judges, the lack of transparency in the process is unsatisfactory in that it is structured so as to pose a real risk that such interference could occur.”*⁸² The Report then went on to outline seven basic principles which provide the foundation on which other countries have legislated for systems in keeping with worldwide best practices. One of the points under recommendation 4.14 the JJSRTF Report is that *“Independent Judicial Appointments Committees or Commissions with a broader membership than the current Judicial Services Commission should be established to solicit, receive and review applications, interview candidates and references and make recommendations to those vested with the constitutional authority to make appointments.”*

3.6 From the above, it is submitted that in Jamaica, the judicial services commission acts as a necessary but not a sufficient condition for the transparency of the appointment process. It suggests that we should reform our approach as suggested by the report and informed by the seven salient principles used in the best model approach. Furthermore specific criteria which an applicant should meet to be a judge should be adumbrated so that not only will the public know what to expect of the judiciary, but potential applicants will also be aware of the skill set they are expected to carry to the job. The United Kingdom now uses the follow main criteria in its selection process for

⁷⁹ Dato Param, supra.

⁸⁰ See speech of Lord Phillips ,Judicial Independence & Accountability: supra , at p3. Similar Commissions were also established in Scotland and Northern Ireland.

⁸¹ JSJRTF, The Task Force Report, supra para 162.

⁸² JSJRTF, The Task Force Report, supra, para 160.

members of the judiciary; (1) Knowledge and experience of the law (2) Intellectual ability and interest in the law, with a significant capacity for analysing and exploring legal problems creatively and flexibly, (3) Clarity of thought and expression, reflected particularly in written work, and (4) an ability to work under pressure and to produce work with reasonable expedition.⁸³

2) FINANCIAL SECURITY

3.7 Section 101 of the Constitution provides; “(1) *The Judges of the Supreme Court shall receive such emoluments and be subject to such other terms and conditions of service as may from time to time be prescribed by or under any law: Provided that the emoluments and terms and conditions of service of such a Judge, other than allowances that are not taken into account in computing pensions, shall not be altered to his disadvantage during his continuance in office.*⁸⁴

(2) The salaries for the time being payable to the Judges of the Supreme Court under this Constitution shall be charged on and paid out of the Consolidated Fund.”

Apart from the fact that a judge’s salary is decided by the executive, this provision offers judges a number of safeguards; the salary is a first call on the revenue of the country, a judge’s salary cannot be reduced; upon retirement judges receive a salary in keeping with that of their counterparts who are still on the bench. In reality a judge’s salary is high in comparison to many salaries in the public sector. However, a judge does not make as much as a successful private practitioner. Nevertheless, this is offset by the security of her position, varied work, high status post, and a comfortable pension.

3) ADMINISTRATIVE INDEPENDENCE

3.8 Control of financial administration is regarded as an important indicator of true independence of the judiciary. This point has been reiterated by Chief Justices from as far as Africa to Trinidad and Tobago. According to the Chief Justice of Zimbabwe, “*an executive which controlled the budget could twist the arm of the judiciary if it did not behave to its liking*” and Chief Justice Ivor Archie of the Caribbean Republic of Trinidad & Tobago noted that an “*independent and effective court administration needed to make the separation of powers and judicial independence a reality as effective court administration provides the judiciary with the necessary device to protect judicial*

⁸³Please see Section 25-31 and schedule 8 of the Constitutional Reform Act of 2005 of the UK as well as a package prepared and handed out to applicants available at http://www.supremecourt.gov.uk/docs/justices_ip_2011_07.pdf

⁸⁴ The Constitution at section 107, makes similar provision for the Judges of the Appeal Court.

*independence.*⁸⁵ Lord Phillips observed in relation to the Supreme Court of England that for it to be truly institutionally independent, it needs to conduct its own administrative affairs as well as have funding arrangements that removes or reduces reliance on any minister to provide same.⁸⁶ As early as 1998 The Latimer House Guidelines *infra*, had advocated that the judiciary manage its own budget. However the heads of government refused to sign it until that paragraph was removed.⁸⁷

3.9 The JJSRTF Report based on the shortcomings they encountered in the court administration, recommended that there be instituted “*the role of an independent Court Administrator with lead responsibility and accountability for the administrative functions of the courts be recognised and supported.*”⁸⁸ Based on this recommendation a Court Management Service (CMS)⁸⁹ has been implemented in Jamaica, since 2009. The mandate of the CMS is “... *to restructure the institutional framework through which administrative services are provided to the Courts and further strengthen judicial independence. The agency’s establishment is designed to enable the Judiciary and the Courts to have greater input in budgetary decisions and execution of activities surrounding the operations of the Courts.*”⁹⁰ The establishment of CMS is an important step in addressing the issues adumbrated by the Task Force Report. As the website explains the principal executive officer reports directly to the head of the judiciary, the Chief Justice. It remains to be seen whether the CMS will accomplish the desired level of independence the judiciary should have in this important respect.

THE RESIDENT MAGISTRACY AS PART OF THE JUDICIARY⁹¹

3.10 In Jamaica the principles of judicial independence and certainly the three most stereotypical markers of this; appointments, security of tenure⁹² and security of judicial salaries do not apply to the magistracy.⁹³ The disadvantageous position of Resident Magistrates belie the importance of their role because not only are the majority of cases disposed of at this level, the matters over which resident magistrates preside have grown both in complexity and volume. Certainly in carrying out their functions as well as their general comportment there

⁸⁵ See Speech of Lord Hope of Craighead, *supra*, page, 16.

⁸⁶ Speech of Lord Phillips, *Judicial Independence & Accountability*, *supra* pgs 2-12.

⁸⁷ See speech of Lord Hope of Craighead, *supra* page, 14.

⁸⁸ See paras 108 -and particularly Part 4, Recommendation 4.9

⁸⁹ See <http://supremecourt.gov.jm/cms>

⁹⁰ See CMS website, *supra*.

⁹¹ See section 112 of the Constitution of Jamaica.

⁹² JJSRTF .The TaskForce Report did note that there appeared to be general recognition and support for security of tenure to be granted. *Supra*, para. 179

⁹³ Other markers of judicial independence include ‘entrenched provisions’ for promotions, discipline and immunity to insulate judges.

are many similar expectations as of the judiciary from this group. The disparities between these two groups among others, have met challenges in the Canadian Supreme Court (1997), the Court of Appeal of Scotland (1999), the Supreme Court of Bangladesh (2000) and the Constitutional Court of South Africa (2002).⁹⁴

3.11 This is indeed an area to which Jamaica must consider how best to address this inequality.⁹⁵ South Africa has a Magistrate Services Commission to match their Judicial Service Commission for the judges. JJSTF note that the procedure by which Resident Magistrates are appointed lack the safeguards to guarantee non- interference noting as well as the fact that the Governor General has power to remove and exercise disciplinary control over magistrates. In *Hinds v The Queen* from Jamaica, the Privy Council identified the fact that “[t]here is nothing in the Constitution to protect the lower judiciary against Parliament passing ordinary laws (a) abolishing their office (b) reducing their salaries while they are in office or (c) providing that their appointments to judicial office shall be only for a short fixed term of years.” Lord Diplock then went on to say.... “[t]he distinction between the higher judiciary and the lower judiciary is that the former are given a greater degree of security of tenure than the latter.”⁹⁶

PART 4 RELATIONSHIP BETWEEN JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY

⁹⁴ See Dato Param, supra. “Canada: Reference re. Remuneration of Judges of the Provincial Court of Prince Edward Islands and Others (1997) Vol. 150 DLR (4th) Series, p 577, Scotland: Starrs and Chalmers vs. Procurator Fiscal (PF Linlithgow) (1999) SCCR 1052; (2000) SLT 42; Bangladesh: Govt of Bangladesh & Others vs Md. Masdan Hossain & Others (Supreme Court of Bangladesh) 52 DLR (AD) 82; South Africa: Van Rooyen & Others vs The stae and Others (CCT 21/01). In the Bangladesh case, the government applied for review of the judgment by Civil Appeal No.189 of 2000, but the application was dismissed.” See fnote 1 of Article for quoted case references.

⁹⁵ Dato Param , supra.

⁹⁶ [1976] 2 WLR 366 at pg 377-380.

- 4.0 The question which not infrequently arises is whether the principle of judicial accountability is contrary to the principle of judicial independence. The former UN Rapporteur, Dato Para answers it, properly, in the negative. “..[J]udicial Accountability is not inimical to judicial independence. Though judicial accountability is not the same as accountability of the executive or legislative branches of the government, yet judicial accountability without impinging on judicial independence will enhance respect for judicial integrity.”⁹⁷

The South African PIMS institutes also weigh in on the question.

*“If construed properly, the notion of “judicial accountability” should not be seen in uncomfortable tension to “judicial independence.” Rather, the combination of judicial independence and judicial accountability should foster public confidence in the courts - provided that accountability mechanisms are embedded in the judiciary and satisfy the appropriate standards for judicial autonomy, respect the separation of powers framework, and are transparent and publicly known.”*⁹⁸

Justice McLachlan while agreeing that the two have a symbiotic relationship, however cautions that, *“Judicial accountability must not interfere with the actual or perceived independence of the individual judge making a particular decision. In this important sense, independence and accountability are not opposed but work towards the same goal: To ensure that justice is rendered according to the law”*.

and

*“[t]he underlying principle of democracy that power should not go uncontrolled is furthered by an accountable, independent judiciary. Ultimately no one can be accountable without this. The need for public confidence in the independence and impartiality of the courts dictates the form that judicial accountability takes. This is the essential link between judicial independence and judicial accountability. Any system of accountability for judges must take judicial independence as a necessary condition.”*⁹⁹

- 4.1 Judicial Independence and accountability not only addresses the relationship between the judiciary and the rest of us but also that as between members of the judiciary itself, particularly the role of chief justices and presidents who are positioned at the apex of

⁹⁷ Dato Param, supra.

⁹⁸ Judicial accountability Mechanisms: A product of the political information and monitoring services (PIMS) at the institute for democracy in South Africa (IDASA), March 2007. http://www.deontologie-judiciaire.umontreal.ca/fr/textes%20int/documents/Judicial_Accountability_SOUTH_AFRICA.pdf.

⁹⁹ Speech of Justice McLachlin, supra.

the courts. In the absence of written standards by which to govern their behaviour there may well be allegations of interference in decision making processes as well as unfairness regarding further appointments and fixing of panels in particular matters. Any such act obviously has repercussions on the individual independence and accountability of judges as well as, as an institution. On this point Dato Param avers "*Of late position of chief justices or presidents of apex courts has come under criticism in some countries. Complaints have been largely regarding abuse of power and interference with adjudicative processes of junior judges, particularly those awaiting recommendations from the chief justice for promotions and so on. Chief Justice and presidents are generally given the power to empanel sittings of the appellate courts. In such cases there have been allegations of 'fixing' in selective appeals.*"¹⁰⁰ This of course has strong reverberative effect on the justice system as the office of the Chief Justice as indeed that of the President of the Court of Appeal " is the embodiment and reflection of the independence, impartiality and integrity of the judiciary in any democracy, it is therefore imperative that only those who can command that respect be appointed."¹⁰¹ This paper therefore submits that the aim of Jamaica must be to create systems and mechanisms that accomplish the dual aim of enhancing the accountability of the judiciary while at the same time ensuring that it is not at the expense of judicial independence.

JUDICIAL ACCOUNTABILITY

4.2 There can be no doubt that what is required of the judiciary far supersedes that required from other groups. A call to higher office is a call to higher standard of behaviour at all levels. In the early days, judicial accountability, when it was usually talked about was only in terms of "*responsibility to the law as set out in legal precedent.*"¹⁰² Today however, judicial accountability looks at accountability on three levels; the personal conduct level, the individual decision-making level and institutional or collective accountability level.¹⁰³ The personal conduct level is the 'simplest level of accountability'. It addresses the general conduct of judges in their personal life. It proscribes behaviour common to drunkards, high profile misbehaviours, fraudsters and such the like. On the other hand decisional accountability addresses the aspect of holding each judge responsible for the decisions she makes in the discharge of her functions. Indeed Judges must do their work without fear or favour rendering 'impartial judgments based on law'. However decisional independence does not mean 'judicial freedom to decide cases whimsically or arbitrarily, on the basis of personal preferences or antipathies. Judges must also be willing to have their decision 'vetted': that is the decision is firstly made in and/ or becomes public, further it is subject to appeal as well as to criticisms. Lastly collective accountability addresses a duty owed by all members of the judiciary to the public at large. It means that they must carry out their duties with a collective show of integrity, impartiality and dignity

¹⁰⁰ See Dato Param, supra, who makes specific references to cases out of India by way of illustration.

¹⁰¹ Dato Param supra.

¹⁰² Speech of McLachlin, supra.

¹⁰³ The division of accountability and the discussion of its constituents parts is based on McNally, supra.

buttressed by a duty to explain their conduct when necessary. According to McNally, *“Institutional accountability is, in the final analysis, the duty to explain to the public how the judicial system is essential to the preservation of the Rule of Law; the duty to demonstrate to the public that the system works efficiently and in a “consumer friendly” way; and the duty to satisfy the public that there is a disciplinary mechanism in place to deal with errant judges.”*¹⁰⁴

Concomitantly McLachlin states, *“At the institutional level, judicial accountability must support, in fact and in perception, the ability of courts to deal with matters in a timely way, using procedures that are transparent and fair, which serve the ends of justice and which provide reasonable access to the courts.”*¹⁰⁵ Another fellow Judge, Gonthier J, adds *“The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens.”*¹⁰⁶

This paper will now examine the extant mechanisms of accountability; judicial oath, sanction of removal, open court processes, peer and public review of decisions and presumption of constitutionality as well as their shortcomings. It will then go on to consider other methods of accountability that can be adopted.

THE EXTANT MECHANISMS OF JUDICIAL ACCOUNTABILITY

4.3 Despite the call for greater accountability by this paper, it acknowledges that already there exists certain built in mechanisms of accountability in the judicial system. McLachlin J, listed four built in mechanisms of accountability for judges that exist in the Canadian system. They are similarly present in Jamaica's;¹⁰⁷ (1) the sanction of removal, (2) the built-in accountability of our open court processes; (3) public and peer review;(4) judicial oath and (5) the principle of deference as a protection against uncontrolled judicial power or presumption of constitutionality.¹⁰⁸ Despite the presence of these devices however the Jamaican justice reform TaskForce Report makes the point that,

¹⁰⁴ McNally, supra, para 27.

¹⁰⁵ Speech of McLachlin, supra.

¹⁰⁶ Therrien v Canada (Ministry of Justice) and Anr [2001] 2 SCR 3, a summary of the standard of behaviour to be expected from a judge given by Gonthier J.

¹⁰⁷ JSJRTF, The Task Force Report, supra, para 159, Accountability is built into our judicial system. Traditionally, it is seen to be fully provided for in the common law system by having judges functioning in open courts: hearing both sides of the question in dispute: providing written reasons for their decisions; and subject to review by higher courts. This institutional scrutiny is supplemented in practice by other (formal and informal) mechanisms used for 'checking' judges, including peer pressure, the moral and administrative authority of the chief judge in each jurisdiction, Parliament, the media, appellate courts, the legal profession and the writings of academic commentators.”

¹⁰⁸ See Speech of Justice McLachlin, supra.

“criticisms have been made that these accountability mechanisms are inadequate in today’s world.”¹⁰⁹ The paper will consider each of them in turn.

I. THE JUDICIAL OATH

- 4.4 The Judicial oath unites all judges in a common promise and bond. It places all judges on a homogenous ground in respect of their obligations in performing their function. Not only it is binding on their consciences but it is taken publicly before God and man and provides the public with a measure by which to judge the judges with.

Section 9 of the Oaths Act of Jamaica reads,

“The oath in this Part referred to as the judicial oath shall be in the form following, that is to say-

I..... do swear that I will be faithful and bear true allegiance to Jamaica, that I will uphold and defend the Constitution of Jamaica and that I will administer justice to all persons alike in accordance with the laws and usages of Jamaica without fear or favour, affection or ill will. So help me God.”¹¹⁰

- 4.5 The oath obliges the judges to “do right to all manner of people after the law and usages of Jamaica without fear or favour, affection or ill will.” In effect the judges’ actions are restricted by the oath; she has taken a binding obligation not to act contrary to its tenets. The provision of the oath regarding the absence of “fear, favour, affection or ill-will” is inter-alia not only preserving judicial independence but acting as a circumscription to freedom of expression. “...[T]he proper exercise of judicial office necessarily circumscribes the freedom of expression open to those who do not have to ensure that they are seen to be acting without fear or favour, affection or ill-will.”¹¹¹ Of the oath Small queries “Is the obligation to uphold the usages of Jamaica wide enough to include the maintenance of the highest traditions of the judiciary? And if it is, should, should we strengthen it by establishing a Judicial Code of Conduct?”¹¹² This paper submits that the answer to the latter question is a resounding yes. The terms used in the oath are (understandably) brief and vague and what’s

¹⁰⁹ JSJRTF, The Task Force Report, supra, para 160.

¹¹⁰ See section 102 of and the First Schedule to the Constitution of Jamaica. See also The Oaths Act of 1889 of Jamaica.

¹¹¹ Hearing on the Report of The Chief Justice of Gibraltar ‘Referral under Section 4 of the Judicial Committee Act 1833’. [2009] UKPC 43, Privy Council No.0016 of 2009. para 32.

¹¹² Small, Hugh, supra, p23.

more without interpretational guidance. Therefore while the oath does act as a mechanism of accountability this paper further submits that a code of ethics would provide the necessary explication and interpretation of the oath.

II. THE SANCTION OF REMOVAL

- 4.6 Sections 100(4) - 4) of the Jamaican Constitution establish the mechanism for the removal of a Supreme Court or a Court of Appeal judge from office. A judge can be removed for “*inability to discharge the function of his office, whether arising from infirmity of body or mind or any other cause or for misbehavior.*”¹¹³ In both cases the process is triggered by the Prime Minister who after consultation with the Chief Justice or the President of the Court of Appeal, makes representations to the Governor -General concerning the alleged conduct of the judge¹¹⁴. At the second stage the Governor-General appoints a tribunal constituted of a minority of three persons, a chairman and at least two other members. In choosing the members of the Committee the Governor- General acts on the advice of the President of the Court of Appeal in the case of any judge, but if it is the President that is implicated the Governor-General will choose the members on the advice of the Prime Minister. The members of the Committee are chosen from present or past judges ‘*of a court having unlimited jurisdiction in civil matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court.*’
- 4.7 At the third stage, the tribunal having ‘carried out investigations’ into the matter, it sends a report along with a recommendation to the Governor-General advising whether he should request that the question of the removal of the judge should be referred by Her Majesty to the Judicial Committee. The Governor-General must act in keeping with the advice.¹¹⁵ The fourth stage mandates the Governor - General to seek the advice of The Queen. Section 100(5) of the Constitution further stipulates that that question of the removal must, at the request of the Governor –General be “*referred to Her Majesty to the Judicial Committee of Her Majesty's Privy Council under section 4 of the Judicial Committee Act, 1833, or any other enactment enabling Her Majesty in that behalf, and the Judicial Committee has advised Her Majesty that the Judge ought to be removed from office for inability as aforesaid or for misbehavior.*” In effect a judge can only be removed if The Queen so instructs.

¹¹³ Hugh Small, *supra*, grappled with the question of whether misbehaviour as used in the Jamaican and CJJ provisions are any different from Misconduct as used in the Canadian provision. While positing that the latter may be arguably wider than the former, he felt no distinction should be drawn between the two. Cf. Chief Justice of Gibraltar, *supra* paras 15-16, 202-205., *Lawrence v Attorney General of Grenada* [2007] UKPC 18; [2007] 1 WLR 1474.

¹¹⁴ Jamaica’s provision is similar in this regard to many countries in the commonwealth for example Gibraltar . See The Gibraltar Constitution Order 2006 sc 64.

¹¹⁵ See section 100 (6)(b) , (c) and (8)(a) of the Constitution of Jamaica. The power to remove Resident Magistrates etc, also rests with the Governor General Acting on the advice of the Judicial Services Commission. However the power of removal and exercise of disciplinary control Is not restricted to misbehavior. This evidences a distinction between the treatment meted out between these two groups which would require reconsideration in any new scheme of reform.

4.8 Though it should be said that the conduct of a judge does not have to amount to a criminal offence to attract the sanction of dismissal, the sanction of removal, is a sanction for misbehavior that amounts to the worse of the worse; it is a sanction of last resort. Proof of this lies in the fact there is no evidence in Jamaica's history of a judge being removed from office by this procedure. However the question has arisen in other jurisdiction, even in that of our immediate neighbours, Trinidad and Tobago¹¹⁶ and the Cayman Islands.¹¹⁷

4.9 However, the point made by PIMS regarding the lacuna in the existence of removal as the only punishment for judges redounds with commonsense and is one from which Jamaica suffers. The point is that the only provision is for removal yet there is the potential of misconduct that warrants punishment or consequences but which certainly does not meet the threshold for removal.¹¹⁸

As PIMS matter of factly stated “[t]here is a wide range of conduct by judicial officers which can properly be regarded as inappropriate, to which a sanction such as removal from office cannot conceivably be applied.”

Lord Bingham also weighed in and put it thus “Constitutional machinery for the removal of a judge who is proved guilty of serious misconduct or incapacity will often be inappropriate, and for that reason ineffective, in the case of the judge who is simply rude, repeatedly guilty of unjustifiable discrimination, keeping inappropriate company, sleeping on the bench, given to indulgence in alcohol, lateness and chronic delay in the provision of reasons.”¹¹⁹

He then went on to identify the pivotal vertebra in the backbone of the problem, “The problem that the judiciary, and the community, face in such cases of judicial default is a difficult one. How can the independence of the institution be safeguarded without tolerating a performance of highly skilled and important public function, which falls short of the appropriate standard? The danger of a too easy and intrusive system of discipline for judges is that judges will be made constant targets by disgruntled litigants, professional rivals, media editorialist who thirst for simple (and generally more punitive) solutions to every problem, and politicians or others on the make.”¹²⁰

¹¹⁶ [(2007) 1 WLR 780]: [(2006) UKPC 57] Hearing on the Report of the Tribunal to the Republic of Trinidad and Tobago-Justice Satnarine Sharma Levers (Chief Justice of the island of Trinidad and Tobago , Referral under Section 4 of the Judicial Committee Act 1833, “The Satnarine Sharma case”.

¹¹⁷ PCA No 0092 of 2009 [2010] UKPC 24, Hearing on the Report of the Tribunal to the Governor of the Cayman Islands-Madam Justice Levers (Judge of the Court of the Cayman Islands , Referral under Section 4 of the Judicial Committee Act 1833 “The Priya Levers case”

¹¹⁸ Section 177 of the South African Constitution makes provision only for removal of Judges; on the basis that the judge suffers from incapacity, is grossly incompetent, or guilty of gross misconduct.

¹¹⁹ Bingham, Tom, ‘The Business of Judging’ Oxford University Press 2000 at page 53

¹²⁰ Bingham, Tom, ‘The Business of Judging’ Oxford University Press 2000 at page 53. See also Hugh small supra, pg25.

4.10 In answering that question this paper submits that those solutions already exist in other countries. One of the good things that arises from the fact that Jamaica oftentimes is late in enacting legislation that comport with international best standards, is that it is put in a position to examine the merit and flaws of others and be able to sidestep the latter.¹²¹ This case is no different. The wide availability of these mechanisms throughout the world as addressed infra, will ensure that the delicate balance between judicial accountability and independence is maintained.

III. OPEN COURT PROCESSES

4.11 Judicial proceedings with few exceptions are public. Ancillary to this is that there is a requirement that judges do not render a verdict/decision until they have heard all the parties. Furthermore it is commonly practiced that the decisions made are evidenced by reasons in writing which by and large are available for general consumption and scrutiny. All three of these requirements are strong guarantees of accountability.

In his insightful paper on judicial accountability, the learned Justice Murray Gleeson from Australia underscored the point regarding the importance of public hearings when he observed that “[p]eople who live in a community where justice is administered in public may easily overlook the fact that there are many places where that is not so. So much decision-making, including governmental decision making, takes place in private that the public need to be reminded of how unusual the judicial process is in this respect.”¹²²

4.12 Having acknowledged these pluses, it must be further pointed out that open court processes has a limited effect. Especially in Jamaica, the audience directly reached is limited to those present at the hearings, reading the judgments and must be buttressed by knowledge of what is the proper model of judicial behaviour. Furthermore publicity is a necessary but not a sufficient deterrent to guarantee accountability. By virtue of the Gun Court Act and the Sexual Offences Act, both of which constitute the acts from which a majority of major crimes in Jamaica are charged, trials of which are held in camera and only limited reporting is allowed by the media in relation to them. What is more, as any practitioner of law in the Jamaican courts can attest, public viewing does not prevent some judges from misbehaving, and on a point of observation a greater audience seem to spur on others!

¹²¹ See for example The Trafficking in Persons Act 2007, or The Child Care and Protection Act 2004 of Jamaica.

¹²²The Hon. Murray Gleeson AC,, “Judicial Accountability”, [1995] 2 Judicial Review 117 at 123.

IV. PEER AND PUBLIC REVIEW OF DECISIONS

- 4.13 There are a number of ways in which peer review functions. Judicial decisions except for those at the summit of the judicial system are subject to review.¹²³ The device of Appellate review readily comes to mind. A review system aims to guarantee that judicial decisions are combed for soundness and to ensure that they deliver justice in the context of the case. Where the decision fails to do, it is quashed. In Jamaica the highest appellate court remains the Privy Council.¹²⁴ Though it sits at the pinnacle and is therefore final, it is capable of and has reversed itself. The appellate system guarantees not only the likelihood of bad decisions being reversed but also ensure that judges, in making their determinations seek to maintain a certain standard know that the decision may be subject to minute examination and reversal.
- 4.14 Furthermore the Court of Appeal that is resident in Jamaica also provides review for both the lower and higher judiciary. Whenever a case does not meet the legal standards for the conviction to be upheld, it cannot stand. At times, arguably where warranted, the Court may choose to ‘reprimand’ the judge in the body of the judgment however the shortcoming in this method of accountability is that the judge in question is not called upon to account at all. It is also possible that the judge may never read the judgment or even choose to follow the advice contained in it with impunity. Another way in which peer review functions is in relation to comments, critiques and consideration by judges of the judicial opinions of their brothers and sisters. As McLachlin J, posited “*peer review by other judges occurs as a natural feature of the development of the common law: any court may consider and comment on any relevant judicial decision in the course of arriving at a conclusion in the case at hand. Judges generally value the good opinion of their peers and are sensitive to the disapproval of their colleagues.*”¹²⁵
- 4.15 What is more is that peer review as an accountability mechanism is not confined solely to the task of members of the judiciary. Rather it extends to include lawyers and legal academics. Also on a contributory, though somewhat different type of review, this accountability mechanism also recognizes the influence of the court of public opinion. The media in Jamaica, as evidenced by newspaper articles footnoted herein¹²⁶ have been intrepid in taking aim, whether unfairly or not at the judiciary. It can therefore be seen that the method

¹²³ The following aphorism attributed to Robert. Jackson , Associate Judge of the Supreme Court of the United States of America 1941-1954 throws a humourous but accurate light on this aspect; “ We are not final because we are infallible, we are infallible because we are final.”

¹²⁴ The fact of seat of the final appellate court in this context raises the argument of course of the degree of accountability of this august body to Jamaica in the sense that a final appellate body should be to the country from which it springs.

¹²⁵ Speech of Justice McLachlin, supra.

¹²⁶ See stories such as : Judge clears air on 11year old murder case; jamaica-gleaner.com/gleaner/20111211/news/news91.html; shame on the justice system for giving rapist 12 years; <http://jamaica-gleaner.com/gleaner/20111108/letters/letters1.html>; JFJ upset over suspended sentence given:

of peer review does contribute in no small way to judicial accountability. However a significant shortcoming exists that must be examined here and which limits the efficacy of peer review as a mechanism of accountability; the absence of a right of appeal by the Director of Public Prosecutions.

THE RIGHT OF APPEAL TO THE DIRECTOR OF PUBLIC PROSECUTION

4.16 Lord Williams of Moystn,¹²⁷ aptly places the issue of a right of appeal for the crown in its correct contextual foundation.

“My concern is simply this: that there is an imbalance in the system. If a judge decides to stay a prosecution on the ground of abuse of process, or to direct the jury to acquit a defendant, or to make a ruling concerning the admissibility of evidence which has the effect of depriving the prosecution of a crucial plank in its case - ought not the prosecution to be able to test that decision on appeal? If it cannot, are we not allowing in fact a system in which judges are unaccountable to the appeal courts as to a crucial aspect of their responsibilities...?”

In the absence of a right of appeal by the DPP, judges, like doctors can ‘bury their mistakes’ in the coffin of acquittal. As it stands the law in Jamaica on the right of appeal follows the common law approach, where the crown/prosecution is denied the right of appeal. At present the Prosecution has right of appeal in only two limited circumstances. The first instance is provided by Section 35 Judicature (Appellate) Jurisdiction Act which reads in part;

*“...the decision involves a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought,”*¹²⁸

www.jamaicaobserver.com/.../121835_JFJ-upset-over-suspended-sen... Killer gets light sentence as “birthday gift”
www.jamaicaobserver.com/.../153501_Killer-gets-light-sentence-as--

¹²⁷ “Unfinished Business – Work Still to be Done” , Tom Sargant Memorial Lecture delivered by Lord Williams when he was then Attorney General of the United Kingdom. 1999 (**find link on internet**) The statement went on to say “*at the very time that we are providing them with greater powers through the implementation of the Human Rights Act?*” This aspect of the observation is arguable applicable in the Jamaican context also by virtue of our new Charter of Fundamental Freedoms

¹²⁸ Act of the 5th August 1962. The section reads in full; “*The Director of Public Prosecutions, the prosecutor or the defendant may, with the leave of the Court appeal to Her Majesty in Council from any decision of the Court given by virtue of the provisions of Part IV, V or VI where in the opinion of the Court, the decision*

In the second instance, section 10 of the amendment to the Bail Act¹²⁹ recently confers on the Crown right of appeal to the Crown against the grant of bail.

The Law Commission Report of the UK¹³⁰ on discussing an adequate right of appeal being given to the Crown had this to say on the subject,

“The absence of a right of appeal, on a point of law, against a verdict for one side only is an anomaly within our system, which otherwise provides the loser in litigation, whether claimant or defendant, with the facility of a higher court giving a second opinion on questions of law. Extending the availability of a prosecution right of appeal would provide such a facility and would avoid placing the final responsibility for aborting the trial upon the first instance trial judge.”

- 4.17 The Crown Prosecution Service (CPS) further pointed out: *“Although the right would be rarely exercised, the occasions on which it would be used would be significant – affecting the conduct of important cases or the decision of important points of law. The very existence of the right will, we believe, improve the quality of judicial rulings at trials and thereby keep its use to a minimum.”*

Jamaica would not be peculiar in taking this step. It would actually be adopting a best practice already followed in other jurisdictions. In the Commonwealth Caribbean alone, Belize, Canada, the Cayman Islands, St. Kitts-Nevis and Trinidad and Tobago already have provisions.¹³¹

The provision in Trinidad & Tobago is a case in point. It reads:

“(1)Section 63 notwithstanding, the Director of Public Prosecutions may appeal to the Court of Appeal –

involves a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought, to Her Majesty in Council.”

¹²⁹ The Act of 29th of December, 2000.

¹³⁰ The Law Commission (LAW COM No 267) Double Jeopardy and Prosecution Appeals ; Report on two references under section 3(1)(e) of the Law Commissions Act 1965 at p 99 [7.11].

¹³¹ Note must be made of the fact that the legislation accomplishing this task has already faced and surmounted constitutional challenge in both Canada (Regina v Morgentaler [1988] 1SCR 30 and State v Brad Boyce (PCA 51/2004 11/1/2006). The Privy Council rejected the argument that the provision offended against due process and the right of the accused person to be acquitted by a jury of his peers.

*(a) against a judgment or verdict of acquittal of a trial court in proceedings by indictment when the judgment or verdict is the result of a decision by the trial judge to uphold a no case submission or withdraw the case from the jury on any ground of appeal that the decision of the trial judge is erroneous in point of law.*¹³²

4.18 As can be gleaned by the above comments, two consistent threads running through them is that the right of appeal should exist for the Crown and further that it enhances judicial accountability. The submissions by the Honourable Minister of Justice as she then was Dorothy Lightbourne on the issue of right of appeal is proof that the giving of a right of appeal to the Crown has already been in the contemplation of a Parliament to accord this right to the Crown. This paper submits that this is the correct thing to do. There is however appropriate consternation that the grounds on which the giving of the right as was being contemplated is too narrow.

4.19 This paper further submits that the said right should be given in the instances of;

- [1] Submission upheld by the trial judge that there is a defect in depositions, the committal of the accused for trial, or indictment or information;
- [2] A submission upheld by the trial judge that there is no case for the accused person to answer;
- [3] Where material evidence sought to be adduced by the prosecution has been erroneously excluded at the trial by the tribunal;
- [4] That there was a substantial misdirection by the trial judge on a question of law or facts or on a mixed question of law and fact in the course of his summation or findings of fact;
- [5] That there was a material irregularity in the course of the trial
- [6] That the verdict is unreasonable and perverse and against the weight of the evidence
- [7] That there has been a substantial miscarriage of justice resulting in an acquittal due to the commission of an administration of justice offence;
- [8] That there is new and compelling evidence against the acquitted person in relation to the offence of which he was acquitted that was not adduced and available at the time of trial.

¹³² See The Supreme Court of Judicature Act as amended by Chap 4:01 of the Administration of Justice (Miscellaneous Provisions) Act 1966, Part IIIB ss 65E to 65Q.

[9] Against sentence where the sentence handed down by the Court is one which it lacked jurisdiction to make, the sentence is manifestly inadequate or it is wrong in principle.

4. 20 Furthermore it should be recognized that for the right of appeal to have real efficacy it must be available on appeal from decisions made not only at the Supreme Court but at the resident magistrate's level. Concomitant to the right of appeal is also the right to have granted to the prosecution the right to state a case to the Privy Council or the Court of Appeal on meritorious points of law. While not disturbing the outcome of a case, it would help to shed light on particular areas of the law and prevent a perpetuation of issues that require resolution of questions that would enhance the administration of justice.¹³³

PRESUMPTION OF CONSTITUTIONALITY

(THE PRINCIPLE OF DEFERENCE AS A PROTECTION AGAINST UNCONTROLLED JUDICIAL POWER)

4.21 The judiciary, as the third arm of the state occupies the pedestal along with the legislature and the executive. However that doesn't mean that they are equal. Parliament is made up of the executive and the legislature and is supreme. The doctrine of parliamentary supremacy includes the necessary constitutional subordination of judges to Parliament.¹³⁴ This is even clearer against the backdrop that Parliament can overturn any decision by the judiciary by way of legislation. When a citizen, a private person, alleges a public breach of his or her right, the Court is required to make a determination in a situation where the State and the citizen are at loggerheads. Judges are mindful to weigh the competing demands of both groups. In effect, *"the judiciary's primary role in relation to the interpretation of statutes is to give effect to the latest expression of the will of Parliament."*¹³⁵

In describing the application of this principle in Canada, McLachlin J stated;

"When a citizen claims that the state has violated his or her constitutional rights, the courts must referee the dispute, but they do so with all necessary deference to legislative and executive expertise in weighing competing demands on the public purse, and competing perspectives on public policy. In deciding difficult social issues, the courts act with deference to the decisions of the legislative branch. The

¹³³ These provisions are based on legislation enacted in varying Caribbean territories to include St. Kitts and Nevis. Trinidad and Tobago and the Cayman Islands.

¹³⁴ H.Barnett, Constitutional and Administrative Law, 9th edition, page 82.

¹³⁵ Vauxhall Estates Ltd v Liverpool Corporation (1932); Ellen Street Estates Ltd v Minister of Health (1934) as footnoted in H.Barnett, supra p82.

degree of deference varies with the nature of the question and the nature of the power at stake. Deference, however, is not unlimited. It does not mean simply rubber stamping laws. If a law is unconstitutional, it is the duty of the courts to say so."

This view of Justice McLachlin is not unlike the effect brought about by the principle of the presumption of constitutionality in this jurisdiction.

- 4.22 **Mootoo v Attorney-General of Trinidad and Tobago**¹³⁶ is authority for the principle that the constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional, and the burden on a party seeking to prove invalidity is a heavy one.¹³⁷ However the principle is rebuttable.

The test for the presumption of constitutionality was also addressed by the Court in Mootoo. "Their Lordships were content to apply the test laid down by this Board in *Attorney-General v Antigua Times Ltd* ((1975) 21 WIR 560, [1975] 3 All ER 81, [1976] AC 16, [1975] 3 WLR 232, PC) ((1976) 21 WIR at p 574) in these terms:

'Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required. This presumption will be rebutted if the statutory provisions in question are, to use the words of Louisy J "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power but constitutes in substance and effect, the direct execution of a different and forbidden power".'

- 4.23 In **Donald Phipps v R**¹³⁸ the Court in considering the constitutionality of the Interception of Communications Act (ICA) underlined that in

¹³⁶ [1979 1 WLR 1334, 1338-1339.

¹³⁷Cf. Gender Equality and Judging in the OECS and wider Commonwealth Caribbean, Report prepared for UN Women and the Judicial Education Institute of the Eastern Caribbean Supreme Court, by Consultant Tracy Robinson.6/5/2011 [1 The more recent *de Freitas v Permanent Secretary*¹³⁷ has put this earlier approach of using the presumption of constitutionality as a burden of proof in doubt. There the Privy Council on an appeal from Antigua and Barbuda ruled that the applicant is responsible for establishing a prima facie breach of a right. The burden then shifts to the state or respondent to prove that the infringement is justified, for example that it is reasonably required for a legitimate state goal. If the respondent succeeds, then the burden shifts back to the application[sic] to say that the measure is nevertheless not reasonably justifiable in a democratic society. This is eminently good sense since it is the respondent who is in the best position to explain the justification for the breach. Asking an applicant to prove that the breach was not justified or that state actors acted in bad faith imposes an unreasonably high burden and will diminish dramatically the impact and effectiveness of the bills of rights. 979] 1 WLR 1334, 1338-1339.

¹³⁸ Cited Donald Phipps v Regina [2010] JMCA Crim 48, para 112

rebutting the presumption of validity the test would be whether the impugned provision was a measure reasonably justified in our democratic society. The Court of Appeal in **Phipps** also relied on **Hinds et al v R and DPP v Jackson** (1975) 24 WIR 326, 340, in which Lord Diplock (relying on the old test in section 22 of chapter 3 of the Constitution) said:

“In considering the constitutionality of the provisions of s 13 (1) of the Act, a court should start with the presumption that the circumstances existing in Jamaica are such that hearings in camera are reasonably required in the interests of “public safety, public order or the protection of the private lives of person concerned in the proceedings.” The presumption is rebuttable. Parliament cannot evade a constitutional restriction by a colourable device: Ladore v Bennett ([1939] AC 468) ([1939] AC at p 482). But in order to rebut the presumption their Lordships would have to be satisfied that no reasonable member of the Parliament who understood correctly the meaning of the relevant provisions of the Constitution could have supposed that hearings in camera were reasonably required for the protection of any of the interests referred to; or in other words, that Parliament in so declaring was either acting in bad faith or had misinterpreted the provisions of sc 20(4) of the Constitution under which it purported to act.”¹³⁹

4.24 It is submitted therefore that in Jamaican courts the principle of the presumption of constitutionality holds the judiciary accountable to honour laws created by the legislative unless any alleged breach of constitutionality reaches the threshold to displace the presumption. Justice McLachlin further went on to note, “[d]eference is not the only mechanism courts use to mediate the public-private divide. Judges consciously balance individual interests against the interest of the public at large, when rights are at issue. Judges are actively aware of the difficulty legislators and members of the executive branches of government face in crafting solutions to the complex and vital problems they are called upon to mediate. And they are sensitive to the prerogative and responsibility of choice. The question judges have repeatedly stated, is not whether the government plan or procedure is the best or optimal solution from the perspective of the law, but whether it is within a wider range of reasonable options having regard to the particular problem the legislature or executive is attempting to address.”

CONCLUSION ON EXTANT MECHANISMS

4.25 As can be seen despite the extant mechanisms of accountability of the judicial oath, the multi-faceted public process of court matters, peer review and the principle of presumption of constitutionality, there are still aspects of judicial performance that are inadequately accounted for. Furthermore though there are these extant mechanisms, which are not unique to Jamaica, other countries have moved

¹³⁹ Cited Donald Phipps v Regina [2010] JMCA Crim 48, para 110

on to adopt further and arguably more vigorous mechanisms. In the absence of stronger mechanisms of accountability are there issues in this jurisdiction that arise and are ignored to the detriment of the judicial system, the public and ultimately the country as a whole? This paper answers that question in the affirmative. It will now move on to consider these aspects.

PART 5- OTHER FACETS OF JUDICIAL ACCOUNTABILITY

5.0 Judges from all over the world readily acknowledge the judicial failings of themselves and their colleagues in respect to judicial accountability. As a matter of fact a great body of material on the subject has been composed by them. A look at the following comments illustrates the point. A good starting point in examining the areas in which we would wish judges to be more accountable is perhaps contained in the statement of no lesser than, Lord Bingham.¹⁴⁰

“It is a judge’s professional duty to do what he reasonably can to equip himself to discharge his judicial duties with a high degree of competence.”

“ Plainly this requires the judge to take reasonable steps to maintain and enhance the judge’s knowledge and skills necessary for the proper performance of judicial duties, to devote the judge’s professional activity to judicial duties and not to engage in conduct incompatible with the diligent discharge of such duties.”¹⁴¹

5.1 When interviewed on the need for greater accountability among the Indian judiciary in 1996, the Former Chief Justice of India, Chief Justice Verma asseverated, *“It’s long overdue. With the increase in judicial activism, there has been a corresponding increase in the need for judicial accountability. There is a perception that the people are doubting whether some of us in the higher judiciary satisfy the required standards of conduct. Since we are the ones laying down the rules of behaviour for everyone else, we have to show that the*

¹⁴⁰ Lord Bingham of Cornhill in his 1993 lecture to the Society of Public Teachers of Law, entitled *Judicial Ethics*:

¹⁴¹ See Guide to Judicial Conduct UK (Aug 2011), supra.

*standard of our behaviour is at least as high as the highest by which we judge the others. We have to earn that moral authority and justify the faith the people have placed in us. One way of doing this is by codifying judicial ethics and adhering to them.*¹⁴²

5.2 Small echoes five of the more relevant characteristics adumbrated by Lord Bingham. Namely a judge should;

- (i) [...] stand down where the judge has previously decided a case against a particular party or rejected evidence of a particular mater witness.
- (ii) Not to make disparaging comments about parties while trying a case.
- (iii) To deliver reserved judgments expeditiously and
- (iv) To do nothing to obstruct an arguable appeal, whether by making findings of facts more conclusive than the evidence warrants in the expectation that the appellate court will be unable to interfere or by passing an unduly lenient sentence in the hope of deferring an appeal.
- (v) Plainly improper for a judge to court publicity or seek acclaim of newspapers headlines.¹⁴³

Inherent in these characteristics are two things; there are advisory rules of conduct judges should be privy to and seek zealously to adhere to and further that they are breached by judges.

It is somewhat difficult to treat with elements of judicial accountability under discrete headings because of the degree of overlap between the facets. However for clarity of argument, a modest attempt will be made to do so.

ETHICAL COMPORMENT AS AN ELEMENT OF JUDICIAL ACCOUNTABILITY

5.3 Judges must constantly regulate things said both on and off the bench. Unfortunately there will be things said that should not have been said at all. Some regrettable utterances can be categorized as a casual or careless, others are as a result of a calculated choice or course of conduct.¹⁴⁴ The range of restraints endemic to the higher office of the judiciary must be constantly operating on the minds of its members.

¹⁴² See Dato Param, supra.

¹⁴³ See Small, Hugh, supra. p 31. He further notes that number 'v'. was extracted from Chief Justice Hale's personal guidance devised for himself in the 1660's.

¹⁴⁴ Lord Hope of Craighead KT, 'What Happens when Judge Speaks Out?' Deputy President of Supreme Court of the United Kingdom Holdsworth Club President Address, 19 February 2010, at p 5.

Dato Param during his rapporteurship on the Independence of Judges and Lawyers of the UN Human Rights Committee expressed the view that not only do judges have an obligation to behave courteously in court but also their failure to do so has an inimical effect on the judiciary as a whole.

“It must be stressed that the constitutional role of judges is to decide on disputes before them fairly and to deliver their judgments in accordance with the law and the evidence presented before them. It is not their role to make disparaging remarks about parties and witnesses appearing before them or to send signals to society at large in intimidating and threatening terms, thereby undermining other basic freedoms like the freedom of expression. Another source of concern is the manner in which contempt of court powers are used to instill fear. When judges resort to such conduct, they lose their judicial decorum and eventually their guarantees of judicial independence. They open the door to public criticism of their conduct and bring disrepute to their institution that can lead to a loss of confidence in the system of justice in general. Respect for the judiciary cannot be extracted by invoking coercive powers, except in extreme cases. The judiciary must earn respect by its performance and conduct.”¹⁴⁵

- 5.4 While Param illustrate how not to behave, Justice Paul Harrison who was exemplary in his demonstration of these qualities as a puisne judge and as President of the Court of Appeal (retired) explicates on how a judge should comport himself.

“Ideally, the judge in Court must be the neutral arbiter – understood in cricketing terms like the umpire, unbiased, fair, unflappable and firm... Any elevation of counsel above the level of importance of the parties is misguided. I dare say, such elevation of the judge despite the increased level of his seating, is unwise. There should be no “stars” in this system....It is the duty of the judge to oversee the process. He has a duty to preserve the climate of a just, fair, compassionate but firm court in an atmosphere already charged with the expectancy of a battle....”¹⁴⁶

- 5.5 History is replete with stories of judges whose behaviour in court fell below the desired standards. Here the paper recounts a number of anecdotes that are instructive in this regard.¹⁴⁷

A Superior Court Judge of Quebec eventually resigned after facing disciplinary proceedings which held him unfit for office for remarks unsuitable to the office of a judge, was sentencing a woman found guilty of second degree murder of her husband. In the course of the

¹⁴⁵ See Dato Param, supra.

¹⁴⁶ Harrison, Paul, President of the Court of Appeal (retired), “Confrontation in Court”, 1997. (unpublished), at pp 1,3-4.

¹⁴⁷ The following book is a recommended reader for what not to do as a judge ; Pannick, David, QC, ‘I Have to Move My Car’ Tales of Unpersuasive Advocates and Injudicious Judges’, Hart Publishing Oxford and Portland ,Oregon 2008. Available at Blackstones Bookstore, Duke Street, Kingston.

proceedings the judge not only made disparaging remarks to the jury but made further ‘insensitive’ remarks about women and Jews. The Judge stated:

“When women ascend the scale of virtues, they reach higher than men [but] when they decide to degrade themselves, they sink to depths to which even the vilest man could not sink...” and; *“Even Nazis did not eliminate millions of Jews in a painful or bloody manner; they died in the gas chamber without suffering.”*¹⁴⁸

In the case of *Moreau-Berube v New Brunswick (Judicial Council)* again out of Canada, *“a judge of the New Brunswick Provincial Court was removed for derogatory comments about the residents of a particular district, while presiding over a sentence hearing. The majority of the disciplinary panel found her comments incorrect, useless, insensitive, insulting, derogatory, aggressive and inappropriate. That they were made by a judge made them even more inappropriate and aggressive. The Supreme Court of Canada upheld the finding.”*¹⁴⁹

In South Africa, a judge in sentencing a 54 year old man for raping his 15 year old daughter, gave him seven years imprisonment stating that while raping his daughter was *“morally reprehensible”* the act was *‘confined’* to his daughter and therefore he did not pose a threat to society. This, despite that the law providing for a minimum of life imprisonment unless there are mitigating circumstances. This unleashed a furor from society in general and women’s rights groups in particular.¹⁵⁰

The case of Priya Levers being from the Cayman Islands is of special significance because it is so close to home.¹⁵¹ Madame Justice Priya Levers was removed from the office of judge of the Grand Court of Cayman on the ground of misbehavior both on and off the bench. This misbehavior was comprised of inter alia, comments critical of her fellow judges, demonstrating bias, racism and contempt to persons before the court and attempting to procure acquittal of a defendant by improper means.

The case of George Meerabux¹⁵² from Belize is another regional example. Mr. Meerabux was a former judge of the Supreme Court of Belize. He was removed from office by the Governor-General on the advice of the Belize Advisory Council in 2001. This decision was

¹⁴⁸ “The Bienvanne Inquiry”, Canadian Judicial Council Annual Report 1996-97, p. 30, as quoted in Dato Param, supra.

¹⁴⁹ “Soon after the judge made those comments she apologized to the residents in open court during the proceedings on an unrelated matter. The apology did not mitigate the damage.” Quoted from Dato Param, supra.

¹⁵⁰ See Dato Param, supra.

¹⁵¹ “The Priya Levers case” supra. Though the Board arrived at their decision based on the cumulative evidence of misconduct they did note that her demonstration of bias and contempt alone (ironically to Jamaicans) would be sufficient to justify her removal.

¹⁵² Privy Council Appeal No.9 of 2003.

upheld by the Privy Council. His removal was on the basis of misbehavior occasioned by him using his office corruptly for private gain and allowing his integrity to be called in question as well as demeaning his office by engaging in immoral and reprehensible conduct.

- 5.6 Small recounts the following Jamaican story as an example of a misuse of a judge's right and power to control the court over which (s)he presides, *"JAMBAR News of July 1995 carried a report of an undefended Divorce petition hearing at which the judge called the Respondent to join the wife Petitioner in the witness box. The judge had the Respondent sworn and then questioned both of them in the witness box. When he was satisfied he granted the Petitioner the decree she prayed."*

The Honourable Justice Harrison also recounts a tale that aptly belongs in this section.

"I am told of a case where, as the cross-examination of a witness was about to commence, cross-examining counsel stood and thrust back his jacket. The witness in the box stepped forward and braced himself on the rail in front of him at which the late trial judge remarked "Eh Eh, unoo ready fe one another, now."

The previous examples all denote a standard of behaviour less than faithful to the higher calling of the judiciary, some amounted to serious misconduct which attracted dismissal, and others attracted a lesser sanction for which there is no formal provision or procedure to address in Jamaica.

BETTER USE AND ACCOUNT OF JUDICIAL TIME¹⁵³ -

"Justice delayed is justice denied"¹⁵⁴

- 5.7 In Trinidad & Tobago, The McKay Report observed that there *"should be a Practice Direction to regulate the time between the end of trial and the delivery of judgment. It also recommends that from 2001 onwards the report of the judiciary at the opening of the law terms should contain a list of cases in which judgment has been reserved for more than six months with a note that the general public cannot be expected to make a fair assessment of the quality of judgments, but they certainly can of their promptitude."*¹⁵⁵

The above quotation highlights the fact that a Judge's work ethic shouldn't be governed mostly or solely by his or her conscience, drive, ambition or any such individualistic device. This is because there will be judges who work unstintingly, even slavishly and produce results that far outstrip that of their peers. Whereas there will be others who, labouring under the same conditions achieve results that are not

¹⁵³ Small, Hugh, supra, pages 34-35.

¹⁵⁴ Legal maxim attributed to William E. Gladstone, British Statesman and Prime Minister, 1868-1894.

¹⁵⁵ Small, Hugh, supra, p35.

in keeping with desired goals. In today's era there is much talk about the creating and setting of goals in the judicial system as well as the administering of criteria to gauge the productivity of judges.¹⁵⁶ Of course the Jamaican judiciary labours under its own peculiar handicaps and these should be taken in mind in any goal setting. However they should not preclude Jamaica from requiring of its judges to attain a certain standard in their work, inter alia, in the timely delivery, quality and quantity. One of the questions frequently asked by one puisne judge of the Jamaican judiciary is what is the cost of a high court case/trial? If this question is answered on the facile level, then it may be answered bearing in mind only the actual monetary cost to the litigants. Such an analysis ignore important factors such as the length of time the case has been before the court, the employees of the court who handle the file and the cost of use of the physical plant. If the case is done outside the Home Circuit, the cost of travelling and accommodating court staff. It becomes quite an expensive undertaking. When its conclusion is delayed whether, before, during or after trial or whilst waiting on a written judgement in the case of a civil trial, it becomes even more expensive.

5.8 A further consideration also is the expense to the country when a justice system grinds so slowly as to frustrate the citizenry to the point of losing faith in it. The fact that judges preside over a court also means they preside over every aspect of its function; the efficient usage of time as well as the wastage of time, general efficiency of the court as well as deficiency in its performance, proper display of court decorum by officers of the court, as well as absences or breakdown in such decorum; and proper use of resources to enhance or compliment the ability to try matters or the squandering of those resources. Holding judges accountable for the use of judicial time is a necessary step in improving the quality of justice that is offered in this jurisdiction.¹⁵⁷

JUDICIAL EDUCATION AS A DIMENSION OF JUDICIAL ACCOUNTABILITY

5.9 *“Until quite recently judges were largely left to themselves to decide how to regulate their conduct. They resisted the idea that they were in need of guidance, just as they resisted the idea that they should be trained once they were in office.”¹⁵⁸*

Param expressed with great clarity the reason for judicial education and it is quoted here in full.

“Another dimension of judicial accountability is judicial education. Often judges feel that they are appointed for their learning and therefore do not require further education while holding judicial office. This is a fallacy. Continued legal education for judges should be provided not only to keep them abreast of developments in the law and practice both domestically and internationally but also for them

¹⁵⁶ Colbran, Stephen ‘The Limits of Judicial Accountability: the role of Judicial Performance Evaluation’ Legal Ethics 2003, 6(1), 55-72.

¹⁵⁷ See an example of legislation passed to enforce the expeditious writing of judgments in Guyana; ‘Time Limit for Judicial Decisions Act’ passed in 2009.

¹⁵⁸ Speech of Lord Hope of Craighead KT, supra, p. 5.

to receive what is sometimes described as “social context education” or “sensitivity training”. This is to enable them to be aware and better respond to the many social, cultural, economic and other differences that exist in society, particularly in pluralistic societies. Such education should include international human rights, humanitarian and refugee law. Another vexed question is whether such programs should be compulsory. I have in one of my reports recommended compulsory attendance. More than anything, attendance at such programs could improve judicial competency. However, the programs should be structured and managed by the judiciary.”

- 5.10 The Jamaican justice system already has the benefit of the 1997 established Justice Training Institute. The website for the institute notes that “[t]he Institute, in consultation with the Chief Justice, caters to the needs of the Judiciary by organizing and coordinating training programmes to satisfy its needs.”¹⁵⁹ However paragraph 172 of the Taskforce Report states the following as it relates to the conditions of service and work for judges: “judges need more time to write judgments; judges need more research assistance, judges need more training and education.” This paper acknowledges that in order for judges to improve or enhance the level of their education much needs to be done in the way of the support offered by the justice system. Time is one of the most precious resources with which a judge works. It therefore is pointless to advocate that judges need to enhance their educational ambit if they are not given the resources to do so. That being said however the point must be made that there is a level of personal initiative that resides in each individual judge. Even in the absence of adequate resources, there are judges within the system who make the time and effort to broaden their knowledge. These judges are easily visible and set themselves apart in the system of justice.
- 5.11 It is further acknowledged that the intricacies of judging have grown with the passage of time. In relation to criminal matters judges are required to make the links between old styled offences and the new ones that continue to spring up parallel with the increasing sophistication and variety in which crimes and criminality have grown. On the civil side, there is also an array of growing issues to contend with; the international trending of business transactions, growth in judicial review and constitutional actions especially in the area of human rights, as well as the profusion in the number of litigants who now seek the assistance of the court in solving their disputes. However not all judges would have been exposed to all these areas and even those who are, changes have occurred which require necessary sensitization. It is desirable that all judges should be exposed to new knowledge whether broadly so or in keeping with their specialty.
- 5.12 In order to achieve these results, some training needs to be mandatory. The Task Force recommends that inter alia, “*newly appointed judges participate in an in-depth training course on a mandatory basis.*” This paper submits that there is great force in this recommendation. There are some countries, where there are actual schools established for the training of aspirants to the bench.

¹⁵⁹ Please see the Ministry Justice of Jamaica, Justice Training Institute <http://www.moj.gov.jm/node/view/29>.

However the mandatory training should not be restricted to new judges. There are aspects or subject aspects where it would behoove the judiciary as a whole to know the areas well. As the report observed “ *Judges must be afforded the opportunity to participate in training and continuing judicial education not only on the substantive law and procedures but also in techniques and skills such as judgment writing, jury addresses, case management techniques, judicial resolution process, the use of technology and so on. Access to continuous education is the key to ensuring the highest level of competence on the bench.*”¹⁶⁰

EDUCATION : USE OF TECHNOLOGY TO IMPROVE WORK PRODUCT

- 5.13 There can be no gainsaying that one of the impacts of technology on the learning and usage of the law is that there is now greater ease of access; it is far easier to find, compare and to learn the law. Gone are the days when all learning was carried out by reading through musty and mouldy tomes, threadbare from constant usage and suspected pilfering. Now it is possible to have access to the law not only for what it was in the past, but daily as it is confirmed, or changed or grows. This is in keeping with the ever present dynamism of the law and makes the point even more concretely that the law is always growing and changing.
- 5.14 The efficacy of the use of technology puts the issue of computerization and the use of computers into context. A singular feature of judging of great currency is that judges are presumed to know the law. What computerization does is that it can help judges in making this less of a presumption and more of a fact. It is irrefutable that the judicial system must provide judges with the necessary equipment and access to legal resources to enable them to achieve the goal of being computer literate. Furthermore the Taskforce report advocates that judges be supported not only by being provided with the relevant technology but also by being provided with research assistance. However in keeping with the statement of Lord Bingham of Cornhill, *supra*, surely judges have a responsibility to actively equip themselves with this knowledge, to include using computers as they were meant to be and not as expensive paperweights. There are judges in the system who are quite savvy where computers are concerned and from them are received timely judgments, greater accuracy in note taking, written responses to applications and a greater display of erudition. All this serves to strengthen the view one holds not just of that individual judge but the acuity of the judiciary overall.
- 5.15 A further plus for wider use of technology is that it will allow for greater reliance on and growth of precedents, as well as the ability to witness the trajectory in which the law is being applied by the judges. A very illuminative analysis of this point is made by H. Patrick Glen.¹⁶¹ What Glen does is highlight how the use of computerization can assist in determining how judges decide cases providing important indicators in improving the standard of justice offered. For example in the French system there has been found to be a

¹⁶⁰ The Task Force Report of the JJSTFR, *supra*, para 176.

¹⁶¹ The Use of Computers: Quantitative Case Law Analysis in the Civil and Common Law , ICLQ, 1987, p362

correlation between the level of damages offered and the social standing of the victim.¹⁶² It is not suggested that a similar situation exists in Jamaica. But rather that a greater use of technology provides the opportunity to determine what the correlations are that exist and how to respond to them.

EDUCATION: GUIDANCE AND GROWTH OF JURISPRUDENCE

- 5.16 Another facet of judicial accountability through education concerns the responsibility of the judiciary to write. Jamaica is still a relatively young democracy and with an equally young judiciary. It therefore means that it is at a stage where its judiciary has an important role in standard setting. The judiciary has a responsibility to write and deliver timely well-reasoned judgments that serve the purpose not only of delivering a verdict on the particular issues addressed in the matter but also has as an underlying aim of growing the jurisprudence in the area and in the country and region at large. Judgments that are well-reasoned and educative will tend to provide guidance to the judiciary, the attorneys who practice both at the private and public bar, academia as well as countries in the larger spheres such as the commonwealth. Jamaica must aim to have its cases relied on in a similar manner that those out of for example England, Canada, Australia, or the constitutional court of South Africa are relied upon.
- 5.17 What is more, a right of appeal to the Crown as discussed earlier, to include where a case is terminated at the stage of a no case submission would also mean that judges must give detailed reasons for upholding no-case submissions. The importance of reasons is clear not only because it alerts the public as to the reason why the case failed to reach the threshold required in law but that it also makes it clear whether the weakness rested in the prosecutorial or investigatory arms of the state, or in issues over which neither arm had control. On a similar point an increase in the output of readily accessible practice directions would have no small impact on the practice of law in this jurisdiction.
- 5.18 Another type of writing for which it is not so much that judges should be held to account for but which has great utility, is the writing of academic texts and materials. There is a paucity of legal writing emanating from the Caribbean but especially Jamaica. It would appear that our colleagues in Trinidad and Tobago and Barbados are far ahead of Jamaica in their output of legal writing. Judges who possess the requisite skill set must strive to attain this accolade. All legal writing of the desired quality serve to enhance the justice system and the quality of justice it offers.

¹⁶² Persons from a higher social standing received more. This arguably would be in breach of the Principle of equality as adumbrated in the Bangalore Principles.

CONCLUSION ON OTHER MECHANISMS OF ACCOUNTABILITY

5.19 It is not being suggested that for the categories included under this subsection that there may not exist aspects of them already in practice, however what the analysis hopes to show is that judicial accountability can be enhanced in a number of ways. A growth in the differing aspects of judicial education, greater accountability for the use of judicial time and an improvement in the manner in which judges comport themselves both in and out of court all would augur well for the quality of justice offered by the judiciary. A Code of ethics as well as a disciplinary review mechanism would go a long way in guaranteeing these characteristics. This paper will now consider a code of ethics and a formal judicial complaint mechanism.

PART 6 INTRODUCTION OF A CODE OF CONDUCT/ETHICS AND A FORMAL JUDICIAL COMPLAINT MECHANISM

6.0 *“By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.”*¹⁶³

The creation of a code cannot be considered without equal consideration to the creation of an accountability mechanism. It is noted that in many countries judges have agreed to a code but not to an accountability mechanism. In the absence of a complaint mechanism there will be no guideline as to the procedure to be followed where there is a breach; receipt of the complaint, handling or adjudication on the complaint and sanction if applicable to be meted out.¹⁶⁴ This paper argues that a code without a complaint mechanism will fall far short of achieving the desired aims.

Param in 2003 noted that “[t]he need for a separate complaint mechanism for judges is the subject of debate...” However “In some jurisdictions informal internal mechanisms have been set up. But these have been found to be unsatisfactory....The establishment of a

¹⁶³ Recommendation contained in the Bangalore Principles for giving effect to the principles under the heading “Implementation”

¹⁶⁴ Small Hugh, supra, notes that there is an informal system where you can register complaints with the Chief Justice.

formal judicial complaint mechanism is [therefore] not inconsistent with judicial independence under international and regional standards...In this regard judges should take the initiative before it is forced upon them by politicians.”¹⁶⁵

What is more is that the call for a mechanism is buttressed by Bangalore Principles 23-28 which recommends the creation of a formal judicial complaint mechanism.

6.1 The PIMS report from South Africa, in examining accountability mechanisms note,

“A functioning and transparent system for registering and evaluating complaints from the public forms a core element of judicial accountability. To this end, both the UN Principles, and IFES/USAID “Guidance Principles” encourage countries to adopt appropriate, transparent and objective procedures for discipline (and suggest that legislative and executive bodies should have limited involvement in this process. Complaints procedure should also be well known and accessible to the public.”¹⁶⁶

Despite the suitability of any mechanism realized, one recognizes that the process may very well occasion some pain to the participants.

“[...] the process can be a painful one, especially for a judge who feels unfairly criticized or complainant’s whose deeply felt sense of having been wronged may be found to be without merit or without sufficient merit to represent a breach of the constitutional requirement of good behaviour. The stresses and disappointments of the process notwithstanding, it is vital that those who feel aggrieved by a judge’s conduct have an avenue of recourse. Equally, it is vital that a judge whose conduct is in question know that the matter will be resolved in as timely and fair fashion as possible.”¹⁶⁷ However this ‘pain’ is inherent in all the mechanisms and it has not deterred the countries that have established mechanisms and neither should it deter Jamaica. The Taskforce Report, addresses both the issues of a Code of Conduct and a Mechanism for Complaints and Discipline.¹⁶⁸ It recommends that a Code of Conduct be established and that a mechanism for the receipt of public complaints and comments should be introduced for all levels of the courts.

CODE OF ETHICS

¹⁶⁵ Dato Param, supra.

¹⁶⁶ Judicial Accountability Mechanisms: A Resource Document supra, at para . 2.1

¹⁶⁷ Small, Hugh supra, quoting from the 1996 Report of the Canadian Judicial Council to Parliament .

¹⁶⁸ See JJSRTF Report, supra : See Judicial Code of Conduct paras 183-187 See Recommendation 4.20 and Mechanism for Complaints and Discipline paras 188-191, See JJSRTF Report, supra: Recommendation 4.21

6.2 The Bangalore Principles of Judicial Conduct¹⁶⁹ were endorsed at the 59th Session of the United Nations Human Rights Commission at Geneva in April 2003. The Bangalore Principles illustrate six core “values” and adumbrate their function as being to “provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the Executive and Legislature and lawyers and the public in general, to better understand and support the judiciary.”

The Bangalore principles are:

Independence, Impartiality, Integrity, Propriety, Equality, Competence & Diligence

Here, the paper presents a brief summary of a number of countries that have a code of ethics and/or complaint mechanism and how they are structured. The aim of this section is to provide examples of what exist in other jurisdictions and which Jamaica can consider when formulating its own.

Table showing: COUNTRIES WITH CODE OF ETHICS AND/OR COMPLAINT MECHANISMS

<u>COUNTRY</u>	<u>ADOPTION OF BANGALORE PRINCIPLES</u>	<u>OTHER PRINCIPLES/ PROVISIONS NOT FOUND IN BANGALORE PRINCIPLES</u>	<u>ENFORCEMENT MECHANISMS</u>	<u>COMMENTARIES ON THE PRINCIPLES</u>	<u>LEVEL OF JUDGES TO WHICH APPLICABLE</u>
ARMENIA	ALL SIX	Conduct in court	Enforcement of the		Supreme Court

¹⁶⁹ The Bangalore Principles of Judicial Conduct 2002: (The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-6, 2002) http://www.ajs.org/ethics/pdfs/Bangalore_principles.pdf

	PRINCIPLES	Gifts Recusal of judges Emphasis is placed on the transparency of court proceedings	Code of Ethics is the responsibility of the Judicial Council Training Committee		Judges Judges of Appeal Judges of Cassation ¹⁷⁰
AUSTRALIA	ALL SIX PRINCIPLES	-Conduct in Court -Activities outside the courtroom -Non judicial activities and conduct (commercial activities) -Activities that a judge may participate in after retirement	The code is referred to as “a practical guide”	The commentaries are very in depth and provide a clear outline of what the judge should and should not do with practical examples.	Supreme Court Judges Provisional Judges Magistrates
BELIZE	ALL SIX PRINCIPLES	Accountability is treated as a separate provision	No enforcement mechanisms	No commentaries	Definition of judge includes Magistrate
CANADA **171	five of the principles are explicitly	No other provisions present	Detailed enforcement mechanism ¹⁷²	Commentaries are very detailed and are tailored to the	Federal Judges

¹⁷⁰ Court of Cassation is the French Court of Appeal and is at the apex of the hierarchy of Courts in the Republic of Armenia

¹⁷¹ They are principles of reason to be applied in light of all the relevant circumstances and consistently with the requirements of judicial independence and the law. See ‘Ethical Principles for Judges by the Canadian Judicial Council’ supra page 9.

¹⁷² Ethical Principles for Judges supra, note that the statements, principles and commentaries are advisory in nature and their role is to assist members of the public to better understand the judicial role. They are not and shall not be used as a code or a list of prohibited behaviours. They do not set out standards defining judicial misconduct. See paragraph 2, page 9

	mentioned , propriety is implicit in the treatment of the five			jurisdictions	
GUYANA *see foot note 7	ALL SIX PRINCIPLES	Accountability is treated as a separate provision	Appears to be no enforcement mechanism ¹⁷³	No Commentaries	Supreme Court Judges Magistrates
NEW SOUTH WALES ¹⁷⁴	All six principles although two are mentioned indirectly	Honesty and loyalty to the public interest is dealt with separately	Mechanisms are in place for the public to make complaints online also with set timelines for issues to be addressed	Detailed Commentaries	Judges of the Supreme Court Magistrates
OECS	ALL SIX PRINCIPLES	Political involvement is treated as a separate provision	No enforcement mechanism; only reference to it	Commentaries, appear to be original	Supreme Court
PHILIPPINES ¹⁷⁵	ALL SIX PRINCIPLES	Set out in the Canons of Judicial Conduct	They have a very effective Complaints procedure.	Commentaries	Appeal Court Judges Supreme Court Judges Magistrates
SCOTLAND	ALL SIX	Code of Conduct	Lord President and	Commentaries	Judges

¹⁷³ Singh, Doodnauth, the then Attorney -General of Guyana made the point that the “public should know what process exist for registering complaints about judicial misconduct” at the launch of the Code of Conduct for Judges and Magistrates at Georgetown Club December 12, 2003.

¹⁷⁴The code can be found at <http://www.judcom.nsw.gov.au/access-to-information/code-of-conduct>

¹⁷⁵ The Philippines was the first state to adopt the Bangalore Principles in which became effective 1 June 2004. They are referred to as cannons.

	PRINCIPLES	set out in the Judiciary and Courts Scotland Act 2008	the Scottish Court Service ¹⁷⁶ Complaints against the Judiciary Rules February 2011 ¹⁷⁷		Stipendiary Magistrates Justices of the Peace
SOUTH AFRICA	ALL SIX PRINCIPLES	Independence and Impartiality are dealt with separately	The Judicial Services Commission Act 2007 ¹⁷⁸ under part 3 provides for the remedial procedures applicable to a judge who has a complaint	Commentaries are included	Constitutional Court Judges High Court Judges Judge not in active duty Magistrates

¹⁷⁶ On the 1st April 2010 the Scottish Court Service was introduced to reaffirm the independence of the judiciary. Information on the area can be found at http://www.scotcourts.gov.uk/news/New_Scottish_Court_Service_1_April_2010.pdf

¹⁷⁷ For further information see http://www.scotland-judiciary.org.uk/Upload/Documents/ComplaintsAboutTheJudiciaryScotlandRules2011_1.pdf

¹⁷⁸ <http://www.pmg.org.za/files/bills/071120b50-07.pdf>

			against him. ¹⁷⁹		
TRINIDAD & TOBAGO ¹⁸⁰	No clear indication that the Bangalore principles are contemplated in the provisions	N/A	Complaints are sent to the Integrity Commission, then to the Office of the Director of Public Prosecutions	No Commentaries	Judges
UNITED KINGDOM	ALL SIX principles		-Office for Judicial Complaints ¹⁸¹ -The Judicial Discipline(prescribed procedure) (Amended) Regulations 2008 to be read in conjunction with The Judicial	Detailed Commentaries	Judges Magistrates not included ¹⁸²

¹⁷⁹ (8) Any one or a combination of the following remedial steps may be imposed in respect of a respondent:

(a) Apologizing to the complainant, in a manner specified.

(b) A reprimand.

(c) A written warning.

(d) Any form of compensation.

(e) Subject to subsection (9), appropriate counselling.

(f) Subject to subsection (9), attendance of a specific training course.

(g) Subject to subsection (9), any other appropriate corrective measure.

(9) The state shall not be responsible for any expenditure incurred as a result of, or associated with, any remedy referred to in subsection (8)(e), (f) or (g), unless such remedy was selected from a list of approved remedies or services compiled from time to time by the Minister, after consultation with the Chief Justice, and then only to the extent set out in that list.

¹⁸⁰ For further information visit

http://books.google.com.jm/books?id=iKtvPBy6t7AC&pg=PA321&lpg=PA321&dq=McKay+Commission+Report+on+misconduct+of+judges+Trinidad&source=bl&ots=9syWu4MvN4&sig=knSZbWanDg9u8fLCpeCF4QF1268&hl=en&sa=X&ei=LMz0Tq_OCYehtwesmp3QBg&ved=0CCEQ6AEwAQ#v=onepage&q&f=false

¹⁸¹ The judiciary of England & Wales website has a link for complaints to be made online; www.judicialcomplaints.gov.uk.

¹⁸² Complaints about Resident Magistrates are to be sent to the local complaints advisory committee.

			Discipline (prescribed procedure) (Amended) Regulations 2006		
UNITED STATES OF AMERICA	Four of the Bangalore principles are mentioned explicitly	Political involvement is treated as a separate provision		Detailed Commentaries, giving examples of what amounts to a breach of the canons	Circuit judges District judges Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges ¹⁸³

CANADA

6.3 In Canada there is a multi - tiered system of investigating a complaint about inappropriate conduct on the part of a judge to the Canadian Judicial Council. There is an established Council's Complaint Procedure. The complaint is first screened and if warranted is passed on to a panel made up of high ranked judges. If the matter proceeds an Inquiry Committee is formed which hears the matter. The judge in question, in keeping with natural justice, has a right to be heard and therefore may, like the inquiry, summon witnesses. Upon completion of the investigation a report is made to the Council along with a recommendation. The Council must make a final recommendation to the Parliament.

UNITED STATES

¹⁸³ Calls are being made to bind Supreme Court judges as well.

6.4 At the federal level, judges can be disciplined for violations of the Code of Conduct of United States Judges. These were adopted by the Judicial Conference of the United States. The details of the actual complaints procedure at federal district level is set out in the Judicial Councils Reform and Judicial Conduct and Disability Act. To bring a complaint, individuals submit written complaints to the clerk for the chief judge of the relevant court. A chief judge can also initiate a proceeding based on informal complaints received. Complaints about the behaviour of state court judges can be filed as a grievance with the state's judicial conduct organization referred to above. Sanctions for breach include private or public censure, temporarily suspending a judge's caseload, and requesting voluntary retirement.¹⁸⁴ At the level of the states, a number of sanctions are also provided for. The majority of States adopted the Model Code of Judicial Conduct that was compiled by the American Bar Association. Every state has established judicial disciplinary organization operating either on a one tier or two tier system charged with the investigation, prosecution and adjudication of cases of judicial misconduct.¹⁸⁵

ENGLAND AND WALES

6.5 A very complex disciplinary scheme for the judiciary of England was established by virtue of The Constitutional Reform Act of 2005. A significant feature of the system however is that for a disciplinary sanction to be imposed, the Lord Chancellor and the Lord Chief Justice must be in agreement. According to Lord Phillips, *"I believe that it is a good system. The judges cannot be accused of looking after their own, and yet judicial independence is preserved."*¹⁸⁶ The Office for Judicial Complaints (OJC) was established as an associate office of Justice on 3 April 2006. The Guide notes that it *"Is accountable jointly to the Lord Chancellor and the Lord Chief Justice for the effective and efficient operation of the system of judicial complaints and discipline. The OJC will investigate complaints from the public, litigants, professionals (or on referral by the Lord Chancellor or Lord Chief Justice) about judicial conduct that falls within its remit. Judges are expected to co-operate with the OJC in the discharge of its functions."*

TRINIDAD AND TOBAGO

6.6 In Trinidad and Tobago the Integrity Commission is established by Part II section 4 of the Integrity Commission Act. The Commission has a duty under Part VI to report a breach of the provisions to the Judicial and Legal Services Commission as well as to the Director of Public

¹⁸⁴ Judicial Accountability Mechanisms : supra at 2.4.

¹⁸⁵ Judicial Accountability Mechanisms:, supra 2.4 "The one tier system consists of a panel of judges, lawyers and private citizens who investigate complaints, prosecute formal charges, holds hearings, make findings of facts or imposes sanctions or recommends such sanctions to the state supreme court. The two- tier system consists of one tier similar to the two tier system while another select panel of judges adjudicates formal charges and decides on their final disposition.

¹⁸⁶ See Guide to Judicial Conduct UK (Aug 2011) <http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/guide-judicial-conduct-aug2011.pdf>

Prosecutions. It can be argued that Part IV is contemplating behaviour that amounts to prima facie misconduct but which is also criminal misconduct. In relation to conduct that falls below that threshold Lord Justice McClashfern was given the remit to establish the MacKay Commission of enquiry in 2000. By virtue of the findings a mechanism was created to receive complaints against judicial officers by nominating a particular person or persons to receive these complaints to be considered by the Chief Justice in respect of the judiciary or the chief Magistrate in respect of the Magistracy. On a point of interest the Trinidad & Tobago 'Newsday' in an article dated September 19, 2010¹⁸⁷ stated that Chief Justice Ivor Archie at the opening of 2010-2011 law term stated that ongoing work was being conducted to formulate guidelines for the regulation of judicial conduct. These guidelines have adopted all the Bangalore principles. Justice Archie also indicated that the code of judicial conduct is now substantially complete and will be formally adopted and circulated for public information.

GUYANA

6.7 Guyana appears to have had a code since December 12, 2003.¹⁸⁸ The Chancellor of the Judiciary Justice Desiree Bernard at the launch of the Code at the Georgetown Club in Guyana articulated the aims of the code. It is reported that the Code was compiled by Justice Bernard in consultation with local, regional and international legal authorities and reflects the Bangalore principles.

ORGANISATION OF EASTERN CARIBBEAN STATES (OECS)

6.8 The countries that form the OECS have a code of conduct.¹⁸⁹ Their code is an embodiment of the six principles of Bangalore without a faithful adherence to the terminology in Bangalore. The OECS crafted commentaries peculiar to their jurisdictions. The Code is exclusive to Supreme Court judges and does not cover Resident Magistrates. Under Canon 1 commentary 4 it is clear that the code contemplates disciplinary action as a sanction for judicial misbehaviour. The Code contemplates that there should be sanction for behaviour which reaches the threshold of judicial misconduct, however it does not include or speak to the mechanism by which complaints should be received, investigated or the type of sanction if any, to be imposed.

SCOTLAND

¹⁸⁷ See <http://www.newsday.co.tt/news/0,127781.html>.

¹⁸⁸ See <http://www.landofsixpeoples.com/news304/ns312139.htm>. The writer was unable to find a copy of the code online

¹⁸⁹ Antigua & Barbuda, Montserrat, St. Kitts & Nevis, St. Vincent & Grenadines, Grenada, Dominica and Anguilla: www.pacii.org/.../CodesOfConduct/Code_of_Ethics_EASTERN_Caribbean_Supreme_Court_Judges.

6.9 The Scottish rules sets out the procedure and principles for making a complaint about a member of the judiciary or a judicial officer which includes the sheriff. This procedure has been in effect from 28 February 2011 and is set out in section 5 as noted below.

Making a complaint

5.—(1) A complaint is validly made where a complaint document is received by the Judicial Office.

(2) A “complaint document” is a document in writing which—

(a) is legible;

(b) contains an allegation of misconduct on the part of a named or identifiable judicial office holder; and

(c) states the name, address and telephone number of the person who is making the complaint.

(3) A complaint document is to be accompanied by all documents within the control of the person complaining upon which the person seeks to rely in making the allegation.

(4) For the purposes of this rule—

(a) a document may be sent by any method which the Judicial Office has indicated to be an acceptable means of sending it;

(b) if sent by an electronic means indicated to be acceptable a document is to be treated as valid only if it is capable of being used for subsequent reference.

(5) A complaint is not validly made where the complaint document (or any communication associated with it) indicates that the person complaining does not want the judicial office holder against whom the complaint is made to see a copy of the complaint document or any document accompanying it.

Time limit

6.—(1) Subject to this rule, the Judicial Office is to dismiss any allegation of misconduct in a complaint document which founds on anything occurring more than 3 months before the date on which the complaint was received.

(2) The person complaining may make a case in writing to the Judicial Office that there are exceptional circumstances which justify allowing the allegation to proceed.

(3) Where such a case is not made at the time of making the complaint, the Judicial Office is to write to the person inviting him or her, by such date as is specified, to make such a case.

(4) Where such a case is made, it is to be put before the disciplinary judge and he or she is to then decide whether the allegation is to be allowed to proceed.

(5) Where an allegation is dismissed under this rule the Judicial Office is to write to the person complaining to that effect.

Allegations of criminal conduct

7.—(1) This rule applies to an allegation which is not dismissed under rule 6.

(2) If it appears to the Judicial Office that the allegation is of an act or omission which may constitute a criminal offence—

(a) further consideration under these Rules is suspended until—

(i) the relevant prosecutor indicates that no criminal proceedings are to be taken; or

(ii) any such proceedings have been concluded; and

(b) the Judicial Office is to write to the person complaining to that effect.

PART 7

BASIC CONSIDERATIONS FOR A JAMAICAN CODE OF ETHICS AND DISCIPLINARY REVIEW MECHANISM FOR THE JUDICIARY

7.1 As McLachlin J recognized, the pivotal challenge is *“to develop mechanisms of accountability that do not undermine judicial independence.”*¹⁹⁰ In a bid to meet this challenge one research on judicial accountability mechanisms enumerated these important findings:

“Countries are encouraged to set high and clear standards of ethics which should be contained in an effective code of judicial ethics. Codes of Ethics should be well publicized, even outside of judicial circles, and the public should be able to lodge complaints against breach

¹⁹⁰ Speech of Justice McLachlin, *supra*.

of the code. Mechanisms for enforcement and interpretation of the Code should be established, and ideally a code should be drafted by the judiciary or judges association, with input from civil society."¹⁹¹ This brief outline is an aggregation of some general principles extracted from the models examined above and will address both the Code and a Disciplinary Review Mechanism. It will then particularize characteristics specific to each.¹⁹²

7.2 It should be noted at the outset that a common thread that runs through the examined models is that it is judges who are at the helm of the creation and practical application of the codes. This is a persuasive position to adopt. It makes it plain that the utmost faith is placed in the past and present members to regulate themselves. Furthermore the code should only be advisory as opposed to prescriptive. This maintains the independence of the judiciary¹⁹³ and ensures that '*a margin of appreciation*' is given to each individual judge.

GENERAL PRINCIPLES

7.3 In creating the Code and Complaint Mechanism input should be obtained from civil society to include members of the bar before they are finalized. Furthermore perhaps one of the most important features of the Code of Conduct and the Complaint Mechanism is that they be known and available to the public.¹⁹⁴

- Judges should be at the forefront of the code and the disciplinary review mechanisms. Based on the comparatively small number of judges in Jamaica, it should consider the services of retired judges in the latter. However there should be representation from one non-judicial person on the Committee.

¹⁹¹ Judicial Accountability Mechanisms, supra. 4.1

¹⁹² Of course Jamaica could choose to legislate creating one comprehensive Act such as that in Scotland. Consider the Judiciary and Courts Scotland Act 2008) <http://www.legislation.gov.uk/asp/2008/6/contents>

¹⁹³ Lord Hope of Craighead, supra p6/24.

¹⁹⁴ <http://barbadosfreepress.wordpress.com/2007/05/26/barbados-guide-to-judicial-conduct-not-available-to-ordinary-public-but-it-doesnt-matter-it-doesnt-really-exist-anyway/> A newspaper story out of Barbados touching and concerning their judicial code, underscores this point. The article is a harsh criticism of the decision of the powers that be not to make the code available to the ordinary public'. The writer, within reason concluded that after checking with the Bar Association and all the other august bodies, that the code was really a fiction. While this may not be so, its lack of availability brews this sort of criticism. Ironically too this paper was unable to unearth a copy for perusal and comparison.

- The code of ethics and mechanism for complaints should be, technologically accessible and user friendly to include hyperlinks in the document with definitions and explanations and directions to other useful documents and sections on the web.

PARTICULARS FOR CODE OF ETHICS

7.4

- There should be a preamble that will give a conceptual background for which the code has come into consideration (See South African and Scottish models)
 - In crafting a best model our starting point must be the six values enumerated by the Bangalore Principles of Independence, Integrity, impartiality, propriety, equality, competence and diligence. However a wholesale acceptance of them as is, is not advocated. The principles must serve as a springboard and expounded on accordingly to accommodate the idiosyncrasies of the Jamaican judiciary.¹⁹⁵

PARTICULARS FOR DISCIPLINARY REVIEW MECHANISM

7.5

Credible means of considering and determining complaints against the judges

- The mechanism needs to be public and credible.
- Mechanisms must be put in place to make the complaints as well as receive the complaints. The complaints process must be transparent in that the complainant must feel that their concerns are not being ignored and that they are being addressed with promptitude. Accordingly once a complaint is received a facility ought to be put in place to acknowledge receipt of the complaint within a reasonable time thereafter.
- There is perhaps consideration for a multi-tiered process to ensure that non-meritorous complaints are weeded out and discouraged.
- Tiers of Sanctions: A variety of sanctions suitable to the varying breaches is advocated such as admonitions/reprimands, apologies, fines, requirements of payment of compensation.

¹⁹⁵ See a fulsomely detailed commentary on the Bangalore principles, 'Commentary on The Bangalore Principles of Judicial Conduct' prepared by the UN affiliated Judicial Integrity group. <http://www.coe.int/t/dghl/cooperation/ccje/textes/BangalorePrinciplesComment.PDF>

7.6

Accords with due process

- The judges' due process rights must not be impeached. Every step must be taken to ensure that the judge makes legal representations as he or she considers suitable and within an appropriate time frame.
- Investigations should have a result and how the matter is disposed of must be made known to the complainant.

PART 8 CONCLUSION

8.0 Despite the attendant difficulties in arriving at a code of ethics and a concomitant disciplinary mechanism, it is a path that must be taken. Any system of accountability must bear in mind not only the principle of judicial accountability but equally judicial independence. As the JJSRTF Report so aptly concluded on the issue of judicial independence and accountability *“[t]he aim of any reforms should be to promote accountability of the courts, lawyers and legal institutions to the public while preserving and promoting judicial independence, and should also promote openness to public scrutiny and encourage public participation.”*¹⁹⁶

The PIMS report out of South Africa put the matter thus,

*“The need to ensure that judges are “accountable”; that appropriate levels of performance are reached, ethical conduct upheld and that all of this is demonstrated to the public is an important one. At the same time, such measures should respect the principle of judicial independence- crucial to the functioning of an impartial and effective judiciary.”*¹⁹⁷

Param's, timely reminder asserts

¹⁹⁶ JSJRTF, The Report of the Task Force, supra, para 161.

¹⁹⁷ See Judicial Accountability Mechanisms: A Resource Document, supra. Section 5.

“Judges must also remember that the insulation provided to protect their independence and impartiality has been founded on public policy. Public policy can change with times. The discerning public of today, using fast improving information technology, has high expectations of the judiciary. If judges, by their performance and conduct, do not meet those expectations the insulation will slowly but surely be reduced, again via public policy.”¹⁹⁸

- 8.1 Balancing judicial accountability with judicial independence is not susceptible to an easy fix but it is possible to achieve. Certainly Jamaica on the course of attaining the status of a developed nation and on the brink of its fiftieth anniversary is showing encouraging signs of growth and advancement in multiple spheres. The judiciary is one such sphere. A code of ethics along with a disciplinary review mechanism for the judiciary can only serve to vault Jamaica to the apex of best practices not only in the region but the world at large.

POSTSCRIPT

Shortly before completing this paper it indirectly was brought to the attention of the writer that here in Jamaica, a code is being drafted. It is hoped that as time goes by more will be learnt about the process of the drafting as well as the other stakeholders in the justice system will be given an opportunity to contribute to the code before it is finalized. It is further hoped that this paper may be of some value to those who are preparing the draft.

***See below example of flow chart taken from New South Wales outlining the structure of their complaint mechanism.**

¹⁹⁸ Dato Param, supra.

The complaints process



