

PANEL DISCUSSION:

**JUDICIAL CODE OF ETHICS –
STRENGTHENING CARIBBEAN REGIONAL INSTITUTIONS**

***“WE ARE ALL IN IT TOGETHER:
JUDICIAL ETHICS, JUDICIAL TEMPERAMENT
AND THE ROLE OF THE LEGAL PROFESSION”****

by

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Introduction

Judges hold an important position in society. They are entrusted with exercising considerable power, which can have a dramatic effect on the lives of those who appear in court. They must uphold the highest standards of conduct - both in and out of court. Maintaining high standards of judicial conduct is essential if the community is to have confidence in its judiciary. It has been broadly accepted that the adoption and publication of a framework of judicial ethics helps to ensure that both judges and the public are aware of the principles which guide judges in their personal and professional life.

The knowledge and practice of *judicial ethics* are fundamental to preserving the rule of law, democracy and good governance. It is an essential element in the exercise of Judicial Independence. In particular, *judicial ethics and independence* support the constitutional guarantee of individuals to the impartial and fair resolution of disputes. It is, therefore, the cooperative concern of both judges and the legal profession. But more than that: *judicial ethics* transcends the exclusive domain of Bench and Bar. Judicial

ethics is the right of the citizen because of its crucial supporting role in the realisation of the constitutional guarantee to the impartial and fair resolution of disputes. Judicial ethics is therefore a central principle of human rights.

The History of Judicial Ethics

There is a lot of history on the subject of judicial ethics. But let us start in the USA. In 1924, the American Bar Association makes judicial ethics a central concern, becoming responsible for creating the first ABA Canon of Judicial Ethics. This effort has been repeatedly revisited, the most recent ABA Model Code of Judicial conduct having been adopted on 10th August 2010. I mention this as worthy of recognition because it highlights the cooperative nature of the concern for judicial integrity between the Bench and the Bar. It should inspire proactivity among our national Bar Associations in relation to standards of judicial conduct and judicial integrity, not only where none exists, but also, in monitoring and revising existing codes. The point on cooperation between the Bench and the Bar is emphasised by the fact that those first rules governing the conduct of judges in the United States in 1924, were written by an ABA Committee chaired by William Howard Taft, then Chief Justice of the United States Supreme Court.

Codes of judicial conduct are now widespread and viewed as the hallmark, if not the safeguard of judicial integrity. The impetus to their implementation comes not only from international convocations, but also from judges, from courts and even from the Bar. In 1988, a statement of Ethical Principles for judges was adopted in Canada. In 1998, the European Charter on the Statute for Judges was introduced. In 1999, it was the

Restatement of Values of Judicial Life adopted by the Chief Justices Conference of India. In 2000, the Guidelines for Judges of South Africa were issued and in 2002, the Guide to Judicial Conduct by the Council of Chief Justices of Australia.

In that era the Caribbean was not excluded because there were codes of judicial conduct adopted by the judges of the Eastern Caribbean Supreme Court, Guyana, Barbados and Belize. In the UK, a guide to Judicial Conduct was published in 2004 by the judges' council, and, in 2009, the UK Supreme Court published its guide to Judicial Conduct. Several Judiciaries throughout Africa and Asia have also, adopted Codes of Judicial Conduct. As you would no doubt imagine, the Caribbean Court of Justice has a *Code of Judicial Conduct* together with an established *Judicial Ethics Committee* which engages in an on-going exercise of review and introspection on the principles embodied in the Code. I should add that, as a result of an invitation from the Judiciary of Surinam, we are currently engaged in giving them assistance in preparing their own code.

The standard for Codes of Judicial Ethics is the celebrated *Bangalore Principles of Judicial Conduct 2002*. It emanated from an invitation by the *United Nations Centre for International Crime Prevention and Transparency International* to the *Judicial Group on Strengthening Judicial Integrity*. These principles were approved at a meeting of Chief Justices and other Supreme Court Justices at The Hague in November 2002, after an extensive consultation process. By resolution, The UN Economic and Security Council

has invited Member States to consider the principles when reviewing or developing rules regarding the professional and ethical conduct of members of the judiciary.¹

While it is generally accepted that ethics is a quality or concept that is central to the judicial role, it is not easily defined. This is accommodated by identifying the standards of conduct to which judges should be held. This approach was approved and adopted in The *Bangalore Principles* which promote six fundamental values that must govern the conduct of the judges:

- independence
- impartiality
- integrity
- propriety
- equality and
- competence and diligence

In this discussion, we are not addressing the content of the judicial ethics in any detail. However, it is significant that in the values highlighted, emphasis should be placed on the character of the judge. This was borne out in a Caribbean case. Media spotlight was thrown on the case of Justice Levers, a Judge of The Grand Court of the Cayman Islands, when The Judicial Committee recommended that the judge be removed from the bench on the ground of misbehaviour. The report indicates that the misconduct included summary arrest of jurors, discourtesy to counsel, unfavourable treatment of female complainants, lack of insensitivity and injudicious use of language and criticism

¹ Resolution 2006/23 27 July 2006

of fellow judges. These were not the only matters alleged, but they were specifically used in order to emphasise the standards expected of a judge. It was very significant that Lord Phillips, in giving the judgment of the Privy Council, stated emphatically that, *“The standard of behaviour to be expected of a judge is set out in the Bangalore Principles of Judicial Conduct.”*²

In the wake of this ruling, members of the Bar in Jamaica were quoted in newspaper reports as lamenting the absence of a code of judicial conduct in Jamaica.³ It was reported that the Jamaica Bar Association had been making this call since 1996. Therefore, the question is: who institutes this Code of Ethics: The Bench? The Bar? or is it the Legislature?

The Regulation of Judicial Integrity

I contend that the integrity of the judiciary is for the judiciary to regulate. It must not await the executive or the legislature to intervene. This would be detrimental to judicial independence. There are several instances of this either being done or threatened. In 1969 in the United States, numerous bills affecting the conduct of Federal judges were proposed by Congress after the scandal relating to Supreme Court Justice, Abe Fortas, who accepted certain annuity payments from a foundation whose principal had been indicted for securities fraud. The Justices of the Supreme Court resisted the attempt and legislative imposition only by instituting their own regulation of disclosure of their financial affairs.

² [2010] UKPC 24 [48]

³ *Jamaica Gleaner* July 30, 2010 <http://jamaica-gleaner.com/20100730/lead/lead7.html> accessed 11/9/13.

In Guyana, due to a perception of persistent delay in judgment delivery, the legislature passed legislation regulating the time that judges must take to deliver judgments, and providing for a disciplinary process which involves the Parliament.⁴

I have repeatedly placed on record that I do not support the involvement of the legislature in judicial affairs. However, this can always be averted if the judiciary itself takes proactive steps to introduce its own internal regulatory processes to address unacceptable performance standards.⁵

Appearances matter, because the public’s perception of how the courts are performing affects the public’s confidence in the judicial system. The public is the ultimate judge of the ethical performance of the judiciary. But as judicial ethics is an essential pillar of judicial independence, national judiciaries should assume an active role in adopting and fashioning canons of ethics without the intervention of the executive or legislative branches of government. The process by which a judiciary adopts a code of judicial conduct influences the manner in which it is implemented. The Code has much more meaning when it is developed, by thorough discussion and reflection by the judges, and by agreement on the principles to be adopted. I think that judiciaries could have standing ethics committees whose scope would include disseminating information and providing guidance, as well as, periodic review of the Code itself.

⁴ Time Limit for Judicial Decisions Act 2009 (Guyana)

This is separate and apart from the collaborative efforts which can occur between Bench and Bar, as we all strive towards the realisation of a common goal, that is, the maintenance of the highest ethical standards in the profession.

The second point I wish to make, and this affects us acutely in the Commonwealth Caribbean, is that in small communities there needs to be a rigid and committed adherence to a high standard of judicial behaviour and accountability. We do not have the luxuries afforded large societies where judges can be anonymous. The lack of anonymity combines with the growth of judicial power which has marched in lockstep with a public that is better informed and educated and more critical and outspoken. There is, therefore, an exponential increase in the growth of public scrutiny, especially through the media.

Jonathan Soeharno in his book, *The Integrity of the Judge: A Philosophical Inquiry*, tells us that:

Independent media are a powerful check in a democratic society and their influence on public scrutiny from open internet sources, televised broadcasts of trials or investigative journalism is indisputable. The media promote the awareness of adjudication: they may force judges to formulate clearly and to treat litigants respectfully. In developing democracies it is often the media that expose corrupt judges.⁶

⁶ Jonathan Soeharno, *The Integrity of the Judge: A Philosophical Inquiry* (Ashgate 2008) p. 18

My third comment regarding judicial ethics is another unremitting gospel I will never cease to preach. It is that judicial ethics must be, as one writer terms it, “The ethics of the *practice* of judging as distinct from the ethics of *malpractice*.”⁷ The formulation of ethical standards for judges to meet, with the threat of sanctions for violation, may communicate too narrow and too negative a view of judicial ethics. Judicial ethics is a positive attribute. I note from the *Levers* case that the Judicial Committee was at pains to point out in regard to these codes that, “These are standards that all judges should aspire to achieve but it does not follow that a failure to do so will automatically amount to misconduct.”⁸ The Board noted:

The public rightly expects the highest standard of behaviour from a judge, but the protection of judicial independence demands that a judge shall not be removed for misbehaviour unless the judge has fallen so short of that standard of behaviour as to demonstrate that he or she is not fit to remain in office. The test is whether the confidence in the justice system of those appearing before the judge or the public in general, with knowledge of the material circumstances, will be undermined if the judge continues to sit – see *Therrien v Canada (Minister of Justice)* [2001] 2 SCR 3. If a judge, by a course of conduct, demonstrates an inability to behave with due propriety misbehaviour can merge into incapacity.⁹

This is a rigorous standard of proof, the rationale for which is protection of judicial independence from spurious claims of misbehaviour. But in deconstructing the observations of the Privy Council, we must acknowledge that there is a distinction

⁷ Lewis E. Newman *Beneath the Robe: The Role of Personal Values in Judicial Ethics* 12 J.L. & Religion 507 (1995-6)

⁸ Id at [49].

⁹ Id at [50]

between standards of behaviour, the positive attributes, and the standard of proof in cases of judicial misbehaviour.

Some say that holding a judge accountable for good conduct could interfere with judicial independence. I stoutly reject that notion. I rather believe and advocate that judicial independence and accountability are mutually supportive. I accept that judges are human and are subject to mistakes. But, the question becomes, how do they sustain a high level of probity and integrity beyond what any canon or code prescribes and so make the court the most trusted and legitimate institution in the affairs of the state? This certainly must be our goal!

The answer resides in the concept of *Judicial Temperament*. Judicial temperament is not a matter of personality, but of character. I would define it as the habitual practice of principled judicial conduct or personal integrity as a character trait. It is described by the American Bar Association as having compassion, decisiveness, open-mindedness, sensitivity, patience and courtesy, freedom from bias, and commitment to justice. Judges must show respect for the litigant and their attorneys by treating everyone with dignity. We must be polite and courteous. We must listen carefully to the testimony presented and the arguments of counsel. We must show we genuinely care about the matter being presented. We must convey the attitude of doing our best to decide the case fairly on the evidence presented and on the law.

I must introduce a thought on objectivity and impartiality which some may find somewhat uncomfortable. I will use the words of Professor Wayne McKay, a professor at Dalhousie University in his paper, *Judicial Ethics: Exploring Misconduct and Accountability for Judges* said:

There is beginning to emerge a more modern conception of the role of the judge which is more tolerant of elements of subjectivity. Those who support this version of the judge argue that to completely factor out all subjective perceptions would make judging mechanical and inhuman. It would also be virtually impossible to do. This more subjective and human judge is not to be substituted for the objective judge. The challenge is to put the two roles together. The argument for representation in the judiciary follows from this paradigm: more perspectives leads to more open mindedness, more ways of seeing things. This in turn destroys stereotypes that may otherwise not be confronted if the dominant image of objectivity is not challenged.

Recognizing one's biases may be the best route to impartial judging. Justice Wilson makes this point by citing the following passage from another judge:

[T]he judge who realizes before listening to a case, that all men have a natural bias of mind and that thought is apt to be coloured by predilection is more likely to make a conscious effort at impartiality and dispassionateness than one who believes that his elevation to the bench makes him at once the dehumanized instrument of infallible logical truth. (13)”

Appearances matter. You never get a second chance to make a first impression. There is a direct correlation between the public's perception of how the courts are performing and the confidence in the judicial system as the guardians of the rule of law. In the Commonwealth Caribbean, the judiciary is not directly accountable to the electorate and

it justifies its pride of place in democratic governance through the highest standards of judicial behaviour and ethics as adjudged by the public.

Judicial Ethics and the role of the Legal Profession

This brings me to my final point - the role of the legal profession. Some have said that,

The public's perception of the judicial system is not based solely on the public's perception of the integrity of the judges; it is based on the public's perception of the integrity of judges, of practising lawyers, of lawyers in public service and others in the legal profession.¹⁰

There has always existed a synergistic relationship between the Bench and the Bar. The legal profession has a role in ensuring performance at a high standard. It is not an exaggeration that the competence of the judiciary is proportionate to the competence of the Bar. The best ethical practices of members of the legal profession impact the daily efficient administration of justice based on the paramountcy of their duty as officers of the court.

Bringing the issue closer to home Justice Désirée Bernard, Judge of the CCJ, recently delivered a paper entitled Duties of the Advocate to the Court.¹¹ The substance of that paper is pertinent to our discussion and, with her gracious leave, I intend to utilise some of the points she made as it ties into what I regard as the common enterprise between the judiciary and the legal profession in the ultimate goal to ensure a system of justice trusted by the public.

¹⁰ 66 Neb. L. Rev. 454 (1987)

¹¹ The Hon

Justice Bernard mounts her thesis on the paramountcy of the advocate’s duty to the court and justice, beyond all else. She states that the rationale underlying this preeminent duty is the overriding element of public interest and the goal of inspiring confidence in the administration of justice. After her usual thorough analysis Justice Bernard concludes:

An assessment of the aforementioned views and opinions as well as perusal of professional codes of conduct indicate that advocates in their representation of clients are expected to do so skilfully, efficiently and with a high degree of professionalism. Needless to say the interests of the client must be foremost, but not paramount to the duty owed to the court as the fountainhead in the administration of justice, and in which the public has a vested interest. The interest embraces safeguarding virtues of fairness and integrity, as well as ensuring that the judicial system remains pure, untainted and unsullied.

Four headings of cooperation were identified by Justice Bernard.

1. Duty of Disclosure (and to this I would add the term ‘candour’),
2. Duty not to Abuse the Court’s Process,
3. Duty not to Corrupt the Administration of Justice, and
4. Duty to Conduct Cases Efficiently and Expeditiously.

While Justice Bernard’s excellent paper dealt with the situation of an advocate appearing before the court, I would hasten to add that her observations ring true for all members of the profession, whether they appear before the court or wholly maintain a

law office practice. Any action that involves the representation of the legal affairs of the members of the public is included, whether it be a civil action, a conveyance or just legal advice. Each of these duties impacts on the administration of justice, which does not start at the door of the courtroom.

Ethics Training

In his excellent book, *Judges on Trial*, Shimon Shetreet, in discussing the English Judiciary, points to two factors, (1) the high standards of professional etiquette maintained by the Bar from which the judges are recruited, and (2) their maintenance of membership of the Bar as Benchers in the Inns of Court which creates an environment conducive to the continued adherence to the traditions of the Bar.

Although there is no Caribbean equivalent to the Inns of Court which creates an institutionalised system of interaction between the Bench and the Bar, this initiative by the General Legal Council, the supervisory body of the Jamaica Bar, may to some extent create a systematic interaction which may have the same laudable effects. But there can be no doubt that the newly established regime of compulsory continuing legal education for members of the Bar is a win win situation, and I extend my sincere congratulations. Professional Ethics is a mandatory part of the credits required so that there is every expectation that in Jamaica, high standards of professional etiquette maintained by the Bar will be observed, and improve the reputation of the legal profession and by extension the judiciary. Consistent with what I have said about the judiciary taking the initiative to institutionalise standards of positive behaviour by its

officers, it may be the right time for Jamaica to establish its own Judicial Education Institute. Judicial Officers benefit from ethics training and this is often regular fare in judicial education programmes, and in orientation courses for newly appointed judicial officers. It is good practice, for judges to learn from a forum for judges to consider a variety of ethical problems, and to discuss appropriate responses.

Such a forum provides the judges with a framework for analysing and resolving ethical issues that may arise in the future and assist in choosing the most prudent course of action when faced with an ethical issue. This would be a positive move that would take the application of codes of judicial ethics to another level. As someone who has been involved in judicial educational programmes, throughout the Commonwealth, I can speak of the enormous prestige which such a programme gives to national courts which have taken the care to institute such programmes. The Bench and the Bar will be in congruence in such a move based on the appreciation of the vital interest of society which both institutions serve.

Conclusion

In conclusion, the major point is that, the judicial ethics is the cumulative concern of judges and the legal profession, and moreover, it is not the privilege of judges and lawyers, but the right of the citizen, who is entitled to be convinced that the Court is the most trusted and legitimate institution in our affairs. It is our responsibility. Judicial ethics is the companion of the rule of law, democracy, and good governance. Greater

attention to judicial ethics will lead to public confidence and the constitutional guarantee of individuals to the impartial and fair resolution of disputes. It will serve us well to remember we are all in this together.

Thank you.



The Right Honourable Sir Dennis Byron