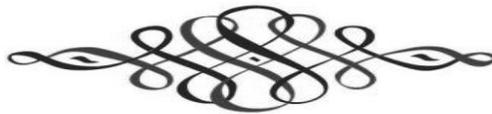


# **JUDICIAL TEMPERAMENT\***

by

**THE RIGHT HONOURABLE SIR DENNIS BYRON  
PRESIDENT  
CARIBBEAN COURT OF JUSTICE**



**Barbados Annual Judicial Retreat (2012)  
Supreme Court Complex  
Whitepark Road  
Bridgetown, Barbados**

**Date: 2<sup>nd</sup> to 3<sup>rd</sup> August, 2012**

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\* This Paper was presented via a video presentation by The Right Honourable Sir Dennis Byron, President of the Caribbean Court of Justice at the Barbados Annual Judicial Retreat 2012 on 2<sup>nd</sup> - 3<sup>rd</sup> August 2012 at the Supreme Court Complex, Whitepark Road, Bridgetown, Barbados.

## **JUDICIAL TEMPERAMENT**

Good day to you all. I must begin by expressing my appreciation to your distinguished Chief Justice, the Honourable Marston Gibson for inviting me to participate in your Judicial Retreat and to address Judicial Temperament. When I informed him that I had a prior commitment for today, he graciously allowed me to make this presentation by video. I hope that it will live up to your expectations.

Judicial temperament is an important element of being a judge. The American Bar Association has published much on this topic which I have found rather persuasive and I will take the liberty of reproducing some of their ideas during the course of my remarks to day. Judicial Temperament is an important judicial quality. It is temperament by which people judge the judges. We must remember that the biblical prohibition *judge not lest ye be judged* is still very apt.

There are those in the Caribbean who feel that our judges lack autonomy, backbone, integrity and morality. They suspect that the judiciary can be influenced and corrupted by politicians. I recently received a letter from a Caribbean friend who professed to have become disillusioned with the courts in her country, (bearing in mind my audience, I confirm that the country is not Barbados) and actually said “*until Judges exhibit their willingness to stand up to big business, and stop bantering to politicians*” we the people cannot have confidence in them. This judgment may be harsh and inaccurate. But if it represents the perception of a significant portion of the public, we must deal with it. I did some research and discovered that the Barbados judiciary does not have to deal with the perception of corruption and political influence if an article in the **Nation News - Slow Justice a drag – Friday 25<sup>th</sup> March 2011**, is anything to go by:

*“While Barbados’ court system isn’t perceived as being tainted by politics or corruption, unfortunately, it is being seen as too slow in delivering justice, sometime as long as six years in civil cases.”*

However, I think that the public deserves some explanation about the performance of the judiciary, and I will say something about the reduction of delay before I close my remarks. After all we render a service to the public. It is customary for service organisations to engage in customer relations. In my view confidence in anything is not automatic. It has to be earned or perhaps learnt. This learning has to be continuous, because as each new generation comes of age it has to develop confidence. This means that judiciary has to continuously provide information to the public about its performance. It must be our concern to make The Court the most trusted and legitimate institution in our affairs.

Judicial temperament is not a matter of personality. It is defined by the American Bar Association as having compassion, decisiveness, open-mindedness, sensitivity, patience, 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 that 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 applicable law.

When constitutional or statutory law supports the position of an unpopular litigant or group, judges are required to uphold the law in favour of the minority. We have to recognise that sometimes differing interpretations are possible, for ambiguous law is still the law. It is unrealistic to expect that that judges can discern meaning uninfluenced by personal or political experience. But it is these cases that make the fair and independent judge indispensable to the ultimate triumph of the rule of law. In small communities the standard of judicial behaviour and accountability ought to be much higher than in large societies where the judges are largely anonymous. In a small community the judge is always under public scrutiny. He or she is always recognised as the judge. Therefore the standards of behaviour on and off the bench have to be continuously high. The judge has to be like Caesar's wife, that is to say, above suspicion.

Here are a few thoughts on how that status could be achieved. The law would be corrupted if interest groups, politicians, powerful or wealthy private citizens or public opinion could

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intimidate a judge into interpreting a law to their liking. The judge must be as independent as is humanly possible. Judges must have the character, and the backbone to be independent enough to resist external efforts to influence inappropriately their decision making. It is also important that the judiciary as an institution is independent enough to resist encroachments from the other branches of government that could place the judiciary – and the decisions its judges make – under the control of the political branch. On this point the adequacy of judicial salaries, security of tenure, budgets, and working relationships with the other branches of government, among other concerns, are critical to the judiciary’s capacity to preserve its institutional integrity.

Judges occupy the role of umpires and their credibility turns on their neutrality. To preserve their neutrality they must neither prejudge matters that come before them, nor harbour bias for or against parties in those matters. It is scientifically established that everyone, including judges, have unconscious biases. It is therefore very important that judiciaries expose their judges to training in the social context of their adjudicative function. There is a well-developed curriculum and expertise of training in this area. Therefore judges are required to recuse themselves not only when the judge has a personal bias or prejudice concerning a party but also when a judge’s impartiality might reasonably be questioned. Appearances matter, because the public’s perception of how the courts are performing affects its confidence in the judicial system. This is critical because the judiciary is not directly accountable to the electorate and thus is more vulnerable to public suspicion. If the public loses faith in a judiciary, the obvious solution will be for the executive or the legislature to intervene to the detriment of judicial independence and the rule of law that judicial independence makes possible. This has recently occurred in Guyana. In that country, 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. I do not support the involvement of the legislature in judicial affairs but can we demand that this unsatisfactory state of affairs is revoked unless we can also say that the judiciary has itself introduced internal regulatory processes to address unacceptable performance standards?

But it takes two hands to clap. When judges follow the rule of law, it is important that the public perceives and acknowledges them as doing so. The public should realize that judicial independence is not a privilege of the judge; its manifestations are not simply perks of office.

Judicial independence is a right of the citizen. It is the way in which the constitutional guarantee of fair and impartial justice is honoured. Therefore the citizen should cherish and fight for it, just as the judge must exhibit it at all times.

However, judicial independence must have its limits. While we do not want judges to be dependent on any individual or group that might impair their capacity to apply the law fairly and without favoritism, neither do we want judges to exercise power arbitrarily. Judicial independence must be tempered with judicial accountability. This idea must not be misused in the service of those who would obliterate judicial independence and the rule of law by intimidating judges to reach results that are popular with the public. Accountability should be defined more narrowly, to serve the principles of a good judicial system:

- Judges should uphold the rule of law, or be accountable to an appellate process that corrects judicial error;
- judges should be independent, or if independence is compromised by taking bribes be held accountable to criminal and impeachment processes;
- judges should be impartial, and be held accountable to a recusal process where there is any perception of bias;
- Judges should maintain the appropriate temperament and competence or be accountable to a disciplinary process.

At the international level it is agreed that the principle of accountability demands that national judiciaries assume an active role in strengthening judicial integrity by affecting such systematic reforms as are within the judiciary's competence and capacity. And there is further agreement that a universally acceptable statement of judicial standards should be adopted at the national

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level by the judiciary without the intervention of the executive or legislative branches of government. The current statement is embodied in the Bangalore Principles of Judicial Conduct.

I strongly advocate the judiciary adopt a code of judicial conduct and have it published. This will have the dual purpose of holding judges to appropriate standards of judicial conduct and of informing the public of the standards of conduct that they are entitled to expect from their judges. In this context, a mere adoption of the Bangalore principles is not sufficient. The judiciary needs to go through an exercise of detailed review and introspection and prepare their own code in accordance with the established standards. After its adoption it is essential that the judiciary spend time to ensure that the public knows of and understands the implications of the code of conduct. The judiciary of Suriname, in conjunction with the CCJ, has embarked on such an exercise. Justice Wit and I attended the official launch of the project on the 29<sup>th</sup> June 2012. The press reports showed that the public were highly supportive of the exercise. At the CCJ, although there is already a code of judicial conduct, we have established an Ethics Committee under the Chairmanship of Justice Désirée Bernard and we are currently in an ongoing exercise of going through, discussing and adjusting the code, line by line. When this exercise is completed, and it will take a few months to do so, we will make sure that it receives full attention from the public.

I accept that there is often substance in the complaint that judicial performance is adversely affected by the failure of government to provide adequate resources and its failure or sloth to pass necessary legislation. I also accept that the attitude of the legal profession often motivated by purely selfish reasons sometimes fosters delay and inefficiencies in the trial process. Nonetheless, it is not acceptable for a judiciary to blame either the government or the bar for all the systemic ills of the administration of justice. A litigant, who comes to the court, is depending on an independent judiciary to give justice. As the guardians of the rule of the law the buck stops with the judiciary and it must accept responsibility.

There are many areas where it can and should undertake reforms without the intervention or participation of the executive and legislature. In this context, the judiciary need not wait any longer on the legislature or the executive to implement and develop ADR in the court system.

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Mediation is now a universally recognized process facilitating discussion between opposing parties with a view to arriving at a settlement. This is a valuable aid in the administration of justice as many cases can be disposed of without a trial, saving judicial time and resources. Mediation also gives a valuable psychological boost to the process, as the litigant feels more involved. Statistics have shown that the success rate for mediation is 40% of the cases referred to the process. This is not the time or place to address the substance of the issue, but in dealing with judicial temperament and attitude it is very relevant that judges become more informed about and committed to ADR as an important tool.

Most people in our region complain that it takes too long for cases to be completed. It is natural that people who have to wait several years for their cases to be finally determined would have little faith in the judicial system. In dealing with judicial temperament and attitudes judges must adopt an attitude of hostility to delay in the litigation process and a determination to eradicate it.

Let us look at the press remarks regarding the criminal process. **Barbados Advocate Editorial – Justice delayed of 07/10/2010** had this to say:

“The wheels of justice often grind slowly, but in Barbados it seems that they can be exceedingly slow – murder cases are tried four to five years after the incident; prisoners can spend years on remand for lesser offences such as drug possession and trafficking.”

“When this causes victims of heinous crimes like sexual assault to simply give up on getting justice, because the court system has prolonged their suffering through a lack of expediency, it is a serious matter.”

We would all agree that one of the most awful human rights abuse areas worldwide today is the unreasonably lengthy time that people spend in pre-trial detention, on remand. This is a matter which in the Caribbean we must address as a human rights crisis. Further, speeding up trials will help in the fight against crime. Whatever the causes for delay in the criminal justice system, the judiciary should implement policies of zero tolerance for avoidable delay. I asked someone in my office to find some time standards for criminal cases and I refer to the local court time standards for New South Wales Australia:

**“NSW Local Court criminal case time standards**

- 95% of summary criminal trials - within 6 months
- 100% of summary criminal trials - within 12 months
- 95% of criminal cases where the defendant enters a plea of guilty - within 3 months
- 100% of criminal cases where the defendant enters a plea of guilty - within 6 months
- 90% of indictable matters discharged or committed for trial or sentence to the Supreme or District Court - within 6 months
- 100% of indictable matters discharged or committed for trial or sentence to the Supreme or District Court - within 12 months.”

With regard to the delay in the civil process, I would like to express my own opinion on the standards and goals to which your judiciary should aim. Some cases are more complex and would require longer to be completed than others. So the court must adopt a system of differentiated case management. I believe that one should expect that in simple cases judgment would be delivered about 9 months after the case is filed; in standard cases no later than 18 months and in complex cases about 24 months. I would suggest that on appeal one should aim for judgment delivery about 9 months after the trial judgment.

There is often delay between filing of the case and the date it is set for hearing. The new rules of court are designed to ensure that there is minimum delay in getting a case ready for trial. Once a case is filed it belongs to the judiciary and the judiciary must take full responsibility for moving it through the system quickly. It is no longer acceptable to blame the lawyers. Then there is the delay between first date the matter comes on for hearing and the completion of hearing. The cause is usually an epidemic of adjournments. The judges have been heard to blame the lawyers because they ask for adjournments. But the lawyers do not have any power to grant adjournments. The judges must accept that it is their responsibility to manage the trial. There should be zero tolerance for adjournments unless required in the interest of justice.

If rescheduling is necessary because there are not enough judges to hear the cases on a given trial day, the trial-setting practices need to be revised. If trials are routinely rescheduled at the request

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of counsel (one or both), an initiative is needed to realign the attitudes of both Bench and Bar about the importance of trial date certainty. Judges should set trial dates in consultation with counsel to carefully consider necessary preparation time and their future schedule to avoid conflicts; bar members need to be convinced not to agree to a trial date they are not prepared to meet; the court should commit to having a judge available to try the case on the scheduled date; and requests for adjournments should be granted, rarely, if at all.

Then there is delay between completion of hearing and delivery of judgment. The judge and the judicial leadership should be extremely vigilant on this issue. Failure to deliver judgments expeditiously without reasonable explanation should not be tolerated. Where there are persistent problems of this nature the judiciary should ensure that its disciplinary process is available and working. Judiciaries have to eradicate this problem. This is a major cause of lack of public confidence and it must be addressed urgently. In this context judges at the trial and even at the appeal court should be encouraged and taught to deliver oral judgments in appropriate cases to avoid unnecessary delays. In such cases the judgment must be recorded and transcribed. Another important element in accountability for timeliness, impartiality, and customer relations is the importance of publishing the judgments on the court's website in a timely manner.

In conclusion, I believe that your judiciary could establish its Judicial Temperament by deciding to adopt and publish a code of judicial conduct, and to assume responsibility for systematic reforms within its competence and capacity. At the least, this should include the development of ADR, and the development and publication of standards for the reduction of delay in all cases that come before the court. It would be a powerful thing if the judiciary could publish its plans for reform and demonstrate its assumption of authority over the administration of justice. Hopefully all this will help to win the respect and confidence of the public in our region.

Thank you.



*The Right Honourable Sir Dennis Byron*