Restoring Public Confidence in the Independence of the Judiciary*

by

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Introduction

Protocols.

The essence of every modern democracy is founded on the concept of a rule of law. The operation of the rule of law in a society necessarily imposes a high standard of duty on its principal actors, most notably, the law and the courts. The judiciary must have and exhibit judicial independence. Many definitions and interpretations of the concept of judicial independence have been proferred over time. At its core, judicial independence is a right of the citizen to fair and impartial justice. It speaks to the ability of the judicial system to exercise its role completely free of external interference. Judges are expected to adjudicate cases strictly on the basis of merit by an impartial assessment of facts and objective application of law. The concept of judicial independence consists of several important elements. At the individual level, it requires judges of the utmost integrity and competence who are efficient and effective. At the institutional level it requires fair and transparent appointment process that is not influenced by politics, security of tenure and adequate remuneration, administrative independence, adequate resources and exclusive jurisdiction over judicial issues. Further, the concept of an independent judiciary requires an environment whereby lawyers are able to advance the interests of their clients fearlessly and without fear of reprisal.

Tonight I want to look at another way of interpreting judicial independence. Trinidad and Tobago was once a colony. Today it is an independent republic. But its independence does not include judicial independence as the final appellate court is still the colonial Privy Council. One would have to recall that the founding fathers of the Caribbean Community entered in treaty obligations to establish the Caribbean Court of Justice (CCJ) to replace the Privy Council. So

that Trinidad and Tobago is already bound by treaty to achieve this. Although it can be argued that the Treaty did not impose any particular timeline, inordinate delay could be seen as a rule of law issue as a non-compliance with international obligations. The other two republics in CARICOM, Guyana and Dominica, have already completed their circle of independence, including judicial independence and have the CCJ as their final appellate court.

Independence in the region started in 1962 with Jamaica and Trinidad and Tobago, with the other CARICOM countries joining over the next 15 years or so. One can say that it was reasonable for a transitional period to exist while the region prepared itself to take care of its judicial independence. But more than 50 years have elapsed, and the existence of the CCJ over the last 10 years has provided a home grown institution well equipped and ready to assume that role.

In this regard, discussions surrounding the accession of Trinidad and Tobago to the final appellate jurisdiction of the CCJ often deteriorate into discussions about the risk of political interference in the exercise of the judicial power. It seems that there are still some who think that having an overseas court is an antidote to that. Of course this is based on a perception held in certain circles that judicial independence is not a "Caribbean thing" or perhaps even that things, institutions and people from outside the region are better. Tonight, though I don't suppose I have to address this sort of inferiority complex as I am sure that in this gathering you are aware of the excellent reputation of Caribbean jurists internationally, many of whom hold judicial office in the highest international courts. Instead, I want to add some thoughts to the concept of judicial independence and the reasons why you should be confident that the CCJ will contribute to the rule of law here in Trinidad and Tobago, and to economic development and social stability.

The argument has been made from time to time that investment and commercial security is dependent on the brand of the Privy Council as the final court of appeal in Trinidad. There are many rebuttals to that view. There is hardly anywhere else in the world where this view prevails. At present, there are only 10 independent countries in the commonwealth whose appeals go to the Privy Council. Of these, eight are in the Caribbean; and the other two are Mauritius, an Exotic Island in the Indian Ocean with a population of 1.2 million, and Tuvalu an exotic island in

the Pacific with a population of 10,000. Then there is Kiribati an exotic group of atolls in the Pacific with a population of about 103,000 which allows appeals to the Privy Council only if there is a constitutional issue. Finally, Brunei, a tiny nation on the island of Borneo with a population of about 450,000, with limited appeals, only where an appeal is made to the Sultan. The other courts that access the Privy Council are the British Dependent states, like the five in the Caribbean, Gibraltar, the Isle of Man, St. Helena, the Falkland Islands and so on. This is the company in which some independent Caribbean States opt to remain. Speaking for myself it is a bit embarrassing.

But the rest of the world does not have the Privy Council as its final court. Since they attained independence from Britain, while remaining part of the Commonwealth, every other country has abolished appeals to the Privy Council and assumed full responsibility for their own justice delivery. In the Americas, there is Canada, Belize and Guyana, in Africa one can run from South Africa in the south, to the Kenya in the East, Ghana in the West; in fact every African commonwealth country has abolished appeals to the Privy Council. In Asia, from the great nations of India, Pakistan, Bangladesh, Sri Lanka and their environs, one moves over to Malaysia, Singapore, then on to Hong Kong, and then Australia and New Zealand. All of these countries have established their own final courts of appeal. Many of them have grown economically, are socially stable and most importantly they have populations that do not regret the abolition of the colonial links with the Privy Council.

The CCJ is celebrating its 10th anniversary this year. Over the last ten years it has already established a track record of excellent judicial records on several areas of the rule of law. The court has delivered over 160 judgments on a wide range of subjects. It has addressed the complex land issues in Guyana inherited from its Roman Dutch ancestry, it has addressed many issues of human rights, criminal law, constitutional law issues, the whole range of commercial matters, and it has delivered important judgments on the movement of goods and persons in the region contributing to economic development and social stability. However, addressing Transparency International, I must pay some special attention to the subject of corruption. The CCJ has dealt specifically with this issue and the related issue of accountability of public

officials. The case of *Florencio Marin v Attorney General of Belize*[1] originated from a dubious transaction involving two ministers of Government whereby prime government land was sold to a private company that was beneficially owned by one of the ministers at below market value price. The CCJ determined that the Attorney General of Belize, as official custodian of the national patrimony, was authorised to institute an action for the tort of malfeasance in public office against errant officials that would permit the State to recoup damages or compensation. The significance of this decision lies in the fact that prior to this decision, torts of malfeasance in the various territories of the region were initiated by individuals as opposed to on behalf of the government for the misfeasance of public officials. In making such a pronouncement, the CCJ has established a landmark precedent that provides another mechanism for addressing corruption in the form of legal proceedings brought by the Attorney General for the tort of misfeasance.

Tonight is not the occasion to get into too much detail, but to demonstrate that the CCJ has earned confidence on the international scene. I quote from the report of The Global Arbitration Review Awards ceremony in Paris on February 13, 2014 to evidence the point I am presenting:

> "Voted on by the international arbitration community, the awards are the flagship honours within the practice of arbitration. The "Most Important Published Decision of 2013" accolade went to a Caribbean Court of Justice (CCJ) case *British Caribbean Bank v AG of Belize* in which a team from Debevoise's London office led by Lord Goldsmith QC successfully represented the British Caribbean Bank (BCB)."

Nonetheless, people have been complaining about the quality of the local judiciary as a ground for reservations about having the CCJ as the final appellate court. Statistically, the studies show that the percentage of decisions overturned by the Privy Council in Trinidad and Jamaica is lower than those overturned by the Supreme Court in appeals from the English Court of Appeal. The study over a five-year period showed that while in England the percentage was 58%, in Trinidad it was 54% and Jamaica 52%. So that the Caribbean courts had a better "score" than the English Court of Appeal. Every time I have referenced these facts it has caused surprise. People do not realise that the reason for appellate courts is that trial courts and courts of appeal

[1] [2011] CCJ 9 (AJ).

need to be reviewed. Reversals are inevitable and there is a statistical standard, which the courts in the Caribbean have successfully maintained. Another interesting thought is that reversal of an appellate court by an apex court does not condemn the judiciary, because it usually means that the decision of the trial judge has been affirmed. The statistics also reveal that there is a low number of matters appealed from the Court of Appeal in Trinidad to the Privy Council. Out of the thousands of cases heard at all levels of the court every year there are much less than 10 appeals to the Privy Council. This indicates one of two things. Either people are not so dissatisfied with the Court of Appeal, or there is a problem with access to justice, because appealing to the Privy Council is too expensive or complicated. This raises a notable point on the impact of the Privy Council since it does not oversee that many cases and, as a result, does not provide significant advice, assistance and guidance to the manner in which the local courts operate. The value of the Privy Council has been restricted to a few sensational cases. Statistics from the courts where the CCJ is the final court suggest that one would expect an increase of appeals to the CCJ of about 300% from the present numbers going to the Privy Council. As a result our Court has had a much greater opportunity to influence the way in which the local courts operate. And this has been happening, because even here in Trinidad and Tobago our decisions have already been cited and influence the way in which the courts are conducting their business.

Another important thought is that apex courts play an important role in helping with judicial reform and education. In this regard, the CCJ is actively involved in a number of programmes aimed at promoting judicial reform and improving access to justice in the region, particularly among vulnerable groups. This is testament to the fact that the Court views itself as a transformative institution for achieving regional integration. The Privy Council judges who support the English Judicial Studies Board which provides this function for the English Judges are not so involved with the Caribbean Judiciary. This is a function that the CCJ is willing and able to provide. In both these ways it would help to improve the rule of law and restore confidence in judicial independence.

The nexus between the concepts of the rule of law and judicial independence lies in the fact that if the law is presumed to apply to all persons equally, then all persons must necessarily have

confidence in the judicial system to apply the law in an impartial manner. This notion has been endorsed in judicial decisions; where it has been noted that the law must be applied by courts without favour, and should be applicable to everyone, from the "prime minister down to a junior clerk."[2] The court's role in ensuring that the law applies to all persons becomes especially important in instances of litigation between citizens and the State. In the context of the Commonwealth Caribbean, the judiciary has been at the forefront of safeguarding the fundamental rights and freedoms guaranteed to the citizenry under the Bill of Rights provisions in the various constitutions. It is true, that the Privy Council as the final appellate court in some jurisdictions has contributed to this. But in its short time the CCJ has delivered a number of land mark constitutional judgments, some of them creating international standards. The most notable has been the case of Boyce where the court advanced the law on the right of citizens to benefit from treaties entered into on their behalf by the state even before these treaties are adopted by the legislature.

In exercising its power, the court must be absolutely free from political influences. There is no need for the executive to fear the judicial authority. I can do no better than to adopt the words of Alexander Hamilton in the Federalist No 78:

> "The judiciary …will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them... the judiciary has no influence over either the sword or the purse; no direction either of the strength or of the wealth of society; and can take no active resolution whatever. It may be truly said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

This independent judicial power is guaranteed by two features. The institutional arrangements and the integrity, character and learning of the judge. In both these regards the CCJ excels. It is interesting that the very same governments who are suspected of desiring to bring improper influence to bear on the judicial power created an institution that is a world leader. The judges are selected by an independent RJLSC. Its independence is guaranteed by the way it is selected. Two members are appointed jointly by all Bar Associations in the Region, two are appointed

[2] Gairy v AG (1999) 59 W.I.R. 174 at [9] per Byron CJ.

jointly by OCCBA and the OECS Bar Association, two are appointed jointly by the law faculties of the region and the Council of Legal Education, two are appointed jointly by the Secretary-General of CARICOM and the Director-General of the OECS, and there are two *ex officio*, the Chair of a Public Service Commission and a Judicial Services Commission, (these rotate alphabetically by country every three years), and the President of the Court who is Chairman. The Commission adopts an open and transparent selection process as stipulated in the governance instruments of the Court. All vacancies are advertised, worldwide and the selection process is competitive and merit-based. The terms and conditions of service are published and consistent with international standards. Diversity cannot be regulated by quotas because there are so many interests, nationality, religion, ethnicity, gender to name the most visible, but there are only seven seats on the court. To use the nationality test, and there are many other areas of diversity, the current composition of the Court includes two Trinidadians, one Jamaican, one St. Vincentian, one Kittitian, one Dutchman, and one Englishman. The administrative independence is characterised by the financial arrangements which do not depend on subventions from the governments of the region. They established a Trust Fund, which is again independently managed by representatives of regional institutions, including, *inter alia*, the Caribbean Association of Indigenous Banks; the University of the West Indies; the Insurance Association of the Caribbean; the Caribbean Institute of Chartered Accountants; and the Caribbean Association of Industry and Commerce.

They deposited 100 MILLION US Dollars with the intention that the Fund would generate interest which would fund the Court. The Court is now celebrating its 10th anniversary and the Fund has carried it and is still intact. It may be necessary to top it up though because the calculations were made over 15 years ago, and the cost of services and the return on investments have changed dramatically. In addition, our imagination as to what the Court could and should do has also developed. But the fact is the model has and is working effectively, because after 10 years of operation, the Trust Fund is still intact.

These and the other institutional arrangements have been commended by international scholars who have described them as an international model. I need not say much about the judges,

because each judge has had a full, public career and everything is known about them. I would only confirm that the court is very well served by its judges.

Conclusions

The rule of law is essential to economic development and social stability. It is guaranteed by judicial independence in the traditional sense. But in the modern era in Trinidad and Tobago judicial independence has an additional meaning, the removal of the remaining vestige of colonialism by the abolition of appeals to the Privy Council and accessing the final appellate jurisdiction of the CCJ. The institutional arrangements for the establishment of the CCJ and its complement of judges deserve public confidence. Just as the other nations of the commonwealth have relied on their own courts at the highest levels of justice delivery, a process which completed the circle of their independence. It is time for Trinidad and Tobago to the same. The CCJ is protected by the best institutional safeguards, and by the high quality of its judges. Having one's own final court as the apex of independence judicial authority will aid the rule of law, economic development and social stability in Trinidad and Tobago.

Thank you.

The Right Honourable Sir Dennis Byron