

# **The Importance of an Independent and Impartial Judiciary – Placing the Spotlight on Judicial Accountability<sup>1</sup>**

by

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Protocols.

It is an honour and an immense pleasure to be invited to deliver the Keynote Address at the Annual Bar Association Dinner. I thank the Bar Association for their gracious invitation and I also take this opportunity to publicly congratulate the newly elected Executive and offer them my best wishes in their term. I also wish to acknowledge the great work the Executive have been doing thus far, and in particular their activism in marshalling support from the local legal fraternity in response to the recent hurricane events in the region.

### **Judicial Independence in Context**

I was born during the Second World War. This was an era in which the Caribbean man and woman still lived under colonial rule. It was also during this era that the colonised people of our region fought side by side with the British colonial powers against the enemy of Nazism which sought world domination in the name of ethnic superiority. One sequel to the war was the Universal Declaration of Human Rights which was adopted in 1948. This proclaimed the concept of human equality and dignity, and today, countries such as Guyana can sit in the General Assembly of the United Nations and contribute to making decisions that influence world affairs with the same voting power as the most powerful nations in the world. I would like to recall an excerpt from the Preamble which is one of my articles of faith:

“recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”

As our communities in the Caribbean enjoy freedom, justice and peace, let us recall that social stability and economic development depend on a properly functioning justice system. In Guyana, we are fortunate to have a tradition of law and order. However, we complain that the administration of justice has not received an adequate share of the public purse to enable it to function as an efficient institution with the management tools of the 21<sup>st</sup> Century. Although this may reflect the perception that investments in the justice administration system is not a vote-catching activity, the government needs to strengthen the justice sector.

Tonight, I would like to suggest that one of the most important strengths of the justice sector is judicial independence. It is of great importance to the citizens of the country and is guaranteed in the Constitution. Article 122A of the Constitution of Guyana provides:

“All courts and all persons presiding over the courts shall exercise their functions independently of the control and direction of any other person or authority, and shall be free and independent from political, executive, and any other form of direction and control.

This sets out the essentials of judicial independence in Guyana. It is the ability of the judicial system to exercise its judicial role fairly, impartially, efficiently and effectively in a manner that is completely free from external interferences. It requires judges to adjudicate on cases based on merit by impartially assessing facts and objectively applying the law, and in keeping with the overriding objective to implement systems for efficient and effective disposal of the court’s caseload. The judiciary serves a crucial function in maintaining the rule of law and protecting the civil liberties of citizens. Its ability to perform this role relies not only on the independence of the judiciary itself, but also on the public perception of the judiciary by the wider citizenry. Judicial independence exists as a right of, and a protection for, the people. It operates in the public interest for the benefit of the entire community. It is neither an end in itself nor is it a personal privilege of the judges. Assuring judicial independence has two aspects: the individual and the institutional components.

Let us look firstly at an institutional component. Judicial independence does not mean judicial autonomy. It is important to recall that there is one government with three distinctive and separate branches of powers. All three branches need to interact and cooperate for the public benefit. There is no need for the executive to fear the development of judicial authority. Each of the three branches is limited in its authority and its powers. None of them is omnipotent. The legislative branch, the executive branch and the judicial branch have no authority beyond that granted to them in and by the Constitution.

This is an important feature because the judiciary must depend on the other branches of government for the provision of adequate resources to do its work. This is a topical issue. At the beginning of this year, there was a declaration of intent to reform and improve the delivery

of justice with the introduction of the new Civil Procedure Rules. It is beyond dispute that the judiciary needs to be better resourced in terms of its personnel, infrastructure and support systems. For example, there are existing vacancies in the current complement of judges and it is reasonably assumed that reducing the backlog to zero will require additional resources. This should be addressed with urgency because the failure to do so undermines judicial independence.

### **Judicial Accountability**

I wish to now turn to the concept of judicial accountability. While judicial independence does not exist for the sole benefit of judges, it is nonetheless a powerful tool in their hands. It is important to appreciate, therefore, that judicial independence must be accompanied by judicial accountability. Accountability is not an uncommon notion since it permeates throughout the course of public life. Today, citizens are increasingly demanding that all aspects of government ought to be held accountable to the people they serve. In this sense, I believe it is a fair observation to make that the judicial branch of government has probably been, from a historical perspective, one of the most accountable areas of government.

This accountability is manifested in several ways. As a starting point, the business of the courts is, except certain specific instances, conducted in the public sphere. Trials are conducted in open court and judgments are delivered in open court which keeps the work of the courts continuously before the public gaze. Judges resolve disputes under an implicit obligation to publish reasons for their decisions.<sup>2</sup> Additionally, decisions issued are typically subject to some prescribed appeal mechanism.

I now wish to discuss four specific issues which I believe contribute significantly to the judiciary being held to an accountable standard. These are: (i) judicial ethics; (ii) acting appointments; (iii) judicial education; and (iv) court performance standards.

#### **I. Judicial Ethics**

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<sup>2</sup> Public Service Board of New South Wales v Osmond (1986) 159 CLR 565; Soulenezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247.

A high regard to ethical standards by judges is one of the most important dimensions of judicial accountability. Judicial ethics as a component of judicial accountability is a central principle of human rights. Unfortunately, history is replete with regrettable examples of judges falling well short of the required ethical standards. 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. During the proceedings, the judge not only made disparaging remarks to the jury but made further insensitive remarks about women and Jews.<sup>3</sup> Closer to home was the case of Madame Justice Priya Levers who was removed from the office of judge of the Grand Court of Cayman on the ground of misbehaviour both on and off the bench. This misbehaviour 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.<sup>4</sup> The case of George Meerabux from Belize is another regional example.<sup>5</sup> His removal was based on misbehaviour 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 conduct.

The context of the ethical standards to be followed by a judge was effectively framed by the words of the Honourable Dr. Abdulai Conteh, former Chief Justice of Belize, in the landmark case of *George Merrabux v The Attorney General of Belize & the Bar Association of Belize*:<sup>6</sup>

“News that a judge of the Supreme Court is to appear before anybody for the purposes of investigation is certainly of general public interest. This must be so because of the position of a judge in nearly every society. It has been said rightly so; in my view, that society attributes honour, if not veneration, learning if not wisdom, together with detachment, probity, prestige and power to the office of a judge. Therefore, news of any probe concerning a judge would elicit public attention, whether of the concerned or the plainly curious. This may be for the public good.

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<sup>3</sup> “The Bienvanne Inquiry”, Canadian Judicial Council Annual Report 1996-97, p. 30.

<sup>4</sup> 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”).

<sup>5</sup> Privy Council Appeal No.9 of 2003.

<sup>6</sup> Action No 65 of 201.

But the public weal itself will be damaged if the news is not handled with care and circumspection; for it may inevitably result in the corrosion of public confidence in the judiciary itself, with deleterious effects on the administration of justice as a whole.

The public right to know and to be informed is one which the courts ought always to protect, but this must be balanced with the way that knowledge or information is purveyed. Anything tending to convey unsubstantiated rumours, idle gossip or the salacious must be restrained, particularly in a society such as we have in Belize. which is a veritable fish bowl for almost every public office holder. Otherwise, the right to know becomes corrupted with the zeal to feed frenzy on unsubstantiated rumours and stories. This will be a positive disservice to all Belizeans, for when facts and fiction collide, faction is the result...”

While public criticism can serve as a useful check on the activities of the judiciary, a distinction must be made between criticism that is fair and reasonable and criticism that is malicious and scandalous in nature. Criticism of the latter nature has the danger of destroying the proper influence of judicial decisions by creating unfounded prejudices against the courts. We have repeatedly seen examples of such incidents. Recently, the Chief Justice of Kenya and his judiciary received sustained threats after a highly controversial ruling that resulted in the recently held general elections being declared void. Similarly, the Chief Justice of the United States Supreme Court has been the subject of attack by President Donald Trump. In the Caribbean, we have not been immune from such attacks and even I have been the target of false and scandalous attacks from a litigant who lost a case before the CCJ.

The traditional response of the judiciary in these cases has been silence and refusal to enter the public discussion on these issues. However, this used to be accompanied by institutions which had a duty to society to protect the integrity of courts acting in defence of the courts, including institutions such as the office of the Attorney General and the Bar Associations. Now, when these institutions remain silent and inactive or even themselves make inappropriate attacks on the judiciary, does it imply that the rule of silence should be lifted?

The integrity of the judiciary is primarily a matter for regulation by the judiciary itself. It need not await intervention of the executive or legislature. I observe that such intervention did occur in Guyana where, due to a perception of persistent and systemic 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.<sup>7</sup> Given that judicial ethics is a critical component of the independence of the judiciary, the onus should be placed on national judiciaries to play an active role in developing and enforcing ethical regimes 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. 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.

## **II. Acting Appointments**

Article 127(1) of the Constitution provides as follows: “The Chancellor and the Chief Justice shall each be appointed by the President, acting after obtaining the agreement of the leader of the opposition.” This provision was a key subject of amendment in 2001. Whereas under the previous 1980 Constitution the appointment of the Chancellor and Chief Justice could be made by the President after “consultation” with the Minority Leader, under the 2001 amendments, the actual agreement of the leader of the opposition is now required. Twelve years ago, the Office of Chancellor of the Judiciary of Guyana became vacant when my sister judge, the Hon Mme Justice Desiree Barnard, joined the Bench of the CCJ. The ascension by a daughter of the Guyana soil to yet another professional first in her lifetime – the first female judge of the CCJ – was indeed a landmark accomplishment for celebration by Guyana and the region. So, it is with some disappointment that I acknowledge that since that time, successive Presidents and Leaders of the Opposition have been unable to agree on the substantive appointment of a Chancellor. This has brought us to the situation today where the number one and number two officials of the Guyana judiciary have not been substantively appointed. This is a most unfortunate state of affairs.

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<sup>7</sup> Time Limit for Judicial Decisions Act 2009.

I draw attention to Article 127(2) of the Constitution which provides, in relevant part, “If the office of Chancellor is vacant ... then until a person has been appointed to and has assumed the functions of such office...the functions shall be performed by such other of the judges as shall be appointed by the President after meaningful consultation with the leader of the opposition.” The language of Article 127(2) suggests to my mind that any appointment made pursuant to that provision is envisioned as a short-term appointment. This highlights a critical factor in the interpretation of Article 127 as a whole, i.e. Article 127(2) does not provide an alternative method of appointing the Chancellor and Chief Justice. The use of the word “shall” in Article 127(1) imposes a mandatory obligation upon both the President and the Leader of the Opposition to come to an agreement on the persons to be appointed as Chancellor and Chief Justice. Despite the subjective component of reaching agreement, the Constitution could not have intended the decade long paralysis that has resulted from the failure to agree. The importance of the appointment to good governance and the welfare of the citizens may explain why the bar was lifted from “consultation” to “agreement” in the 2001 amendment. But it should also indicate that the Constitution intended that the identified officials would exercise high standards of good faith and reasonableness because failure to agree is not an acceptable option in the interpretation of that constitutional provision.

Of course, I do acknowledge that there are practical problems in identifying precisely where the liability lies in the failure to come to an agreement. It seems entirely plausible for such liability to lie with either the President or Leader of the Opposition, or both, in accordance with the mandate of section 127(1) and depending on the process that has been followed to reach agreement between the two sides. This naturally raises the question of whether an appropriate statutory or regulatory framework to establish agreement is in existence. If the answer to this is in the affirmative, that may be a basis for judicial intervention, and if it is in the negative, now would be the opportune time to address such a regulatory or statutory lacuna if it does indeed exist, and that too may be a basis for judicial intervention.

This situation has moved well beyond what ought to be acceptable in a modern democracy where respect for the rule of law is maintained. The Constitution envisages the judiciary of Guyana to be headed by officials who are substantively appointed and enjoy all the legal and institutional mechanisms to secure their tenure. Anything otherwise is, to my mind, a violation of the spirit and intent of the Constitution. I wish to reiterate the provisions of Article 122A(1): “All courts and all persons presiding over the courts shall exercise their functions

independently of the control and direction of any person or authority; and shall be free and independent from political, executive and other form of discretion and control.” This provision effectively promises to every citizen of Guyana a judiciary that is completely independent in all aspects. It cannot be said that this provision contemplates and/or condones in any way prolonged acting services of the country’s number one and number two judicial officers. Such a situation poses a genuine “risk” to the constitutional promise to every citizen of an independent and impartial judiciary. As has been observed by a distinguished Guyanese academic, Professor Arif Bulkan, “Acting appointments for protracted periods are generally inimical to fearless, independent performance” and serve to place a judge “in a perpetual state of probation, and demands strength of character in order to rule fearlessly”.<sup>8</sup>

The Constitution is the supreme law of the land and no authority is above it. It is the duty of the court to interpret it and ensure that its provisions are applied. The delay in complying with section 127(1) of the Constitution has long reached a level of justiciability and the most appropriate authority for resolving this situation is the court system. Section 127(1) ascribes an obligation to the President and the Leader of the Opposition that is mandatory in nature and not discretionary. Any failure in fulfilling this obligation must therefore be regarded as a breach of the Constitution. It is interesting to note that the interpretation of Article 127 has already been the subject of litigation in the court. Ten years ago, in the case of *Committee for the Defence of the Constitution v AG*<sup>9</sup> the court was confronted with a challenge to Justice Carl Singh performing the functions of both Chancellor and Chief Justice. The court ultimately determined that it was a breach of the Constitution for the functions of both offices to be performed simultaneously. What is interesting about this case is that while the court appears to have acknowledged that the failure to appoint a substantive Chancellor for a prolonged period violated Article 122A(1) of the Constitution, it seems to have viewed itself as constrained by Article 127 not specifying any time limit for the period of an acting appointment or within which agreement must be reached. With the passage of 12 years the undesirability of further delay could no longer be controversial. This is a very serious issue because attacking the problems of delay and all other issues that need reform requires strong leadership. It is simply obvious that a leader who is not appointed is under a disadvantage, and criticisms of the sector

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<sup>8</sup> D. Berry and T. Robinson, *Transitions in Caribbean Law* (Kingston, 2013), pp 208-209.

<sup>9</sup> (Unrep) 16 Nov 2007, Civ Act No 993-S/A of 2006 (HC Guy).

need to be received with the knowledge of the impediment that is placed on the leadership of the institution, an impediment which the Constitution specifically frowns on.

### **III. Judicial Education**

Another important dimension of judicial accountability concerns judicial education. A culture of judicial education should be developed where training is organised, systematic and ongoing and under the control of an adequately funded judicial body. Continued legal education for judges is important for several reasons. It assists in keeping judges abreast of developments in the law and practice both at the domestic and international levels. Additionally, such continued training can employ a useful social context that enables judges to become more acutely aware of and allow them to better respond to the many social, economic and cultural factors that operate within the pluralistic societies of the Caribbean. The nuances that affect the work of judges are evolving with the passage of time. In criminal matters, judges are often required to deal with more specialised criminal offences, such as anti-money laundering, terrorism and trans-national criminal law issues. On the civil side, there is also an array of growing issues to contend with such as international trade and commerce and the expansion of 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.

In this regard, it is with great pleasure that I commend the recent launches of Judicial Education Institutes (JEIs) in Guyana and Jamaica. These institutes are a critical mechanism for facilitating continuing legal education programmes for Judges, Magistrates, Commissioners of Title, Registrars, and other court staff, to improve the way courts dispense with cases fairly and in a timely manner. They assist in ensuring an efficient, competent, transparent and impartial court system that commands public trust and confidence. The launch of the JEI in Guyana is particularly timely as earlier this year the new Civil Procedure Rules came into effect. Through partnerships with the JURIST Project, the CCJ has been pleased to lend its support in facilitating training sessions which are geared towards the efficient transition and application of these rules. For jurisdictions in the region without adequate training facilities, access to facilities in other jurisdictions ought to be provided. To this end, bodies such as the Caribbean Association of Judicial Officers (CAJO) and the Caribbean Academy for Law have been instrumental supporting continuing judicial and legal education initiatives across the region through its biennial conferences and various workshops and seminars.

#### **IV. Court Performance Standards**

Several complaints have been levelled against the performance of judiciary. The most common amongst these are inordinate delays, low performance and efficiency, high costs of court operations and low levels of public confidence. Discussions on judicial independence usually concentrate on the tensions between the executive and the judiciary. But let us recall the definition of judicial independence as the guarantor of the right of the citizen to a fair and timely trial. If the trial process fails to provide this, should the judges and the legal profession look at their influence on judicial independence?

I want to introduce some ideas that have influenced our operations at the CCJ. The concept of the framework of court excellence. This does not define excellence as a state that is achieved, but as the process of continuous improvement. So that the best courts are those that are continuously assessing where they are, developing plans to deal with weaknesses, implementing those plans, evaluating the effects of what they did, and then starting over.

In this regard, the International Framework for Court Excellence (IFCE) is a quality management system designed to help courts to improve their performance. The framework is particularly useful to judicial policymakers and practitioners, and it prescribes a set of focused, clear and actionable core court performance measures that deconstruct the ultimate question: “How are we performing?” by addressing two enabling questions: What should we measure? How should we measure it? The Framework makes it clear that a court’s “pathway to excellence will also be enhanced by open communication regarding its strategies, policies and procedures with court users and the public in general”. The Framework stresses the imperative for courts to be open and transparent about their performance, strategies and their processes to ensure public respect and confidence in the judicial system and to publish details of what actions they are taking to address problems within the court system. This goes hand in hand with strategic planning. One of the advantages of strategic planning is that the stakeholders, the Bar being the most critical, get an opportunity to contribute to the development of the strategies which will guide judicial performance. At the CCJ we also embraced this concept and now we are at the end of the first plan from 2012-2017. We are currently in the process of developing the new plan for 2018 – 2023. I recommend a similar process for the courts here.

a. Digital Recording of Court Proceedings

Reducing delay and improving court efficiency is often thought to be an expensive process. However, there are techniques that challenge that perception. One of the problem areas of trial management in Guyana is that the official court transcript is mostly managed manually by or under the supervision of the trial judge or magistrate. It is currently believed that moving to a digital transcript which is automatically recorded at the pace of the proceedings will not only improve the accuracy and fairness of the record and provide the litigant with improved access to it, but it will speed up the proceedings about three times. Making the court record available to the public, litigants and judges is important for open and fair justice for all. If one takes it to its logical conclusion, a relatively inexpensive process such as making the digital record the official transcript of the court, would have the same effect as hiring three times as many judges, and building, furnishing and equipping three times as many court rooms. We have set the example at the CCJ and those of you who practice before our courts would have seen and benefited from the process. Need I say more about the potential impact on the administration of justice?

b. Case Management Systems

Case management encompasses many court administration processes aimed at improving the primary processes of courts, i.e. processing filed cases to adjudication. Again, at the CCJ we set an example when we deployed the CURIA E-Filing and Case Management suite, which also incorporated a performance tool-kit with the ability to generate statistical reports. This system has allowed our Court to be more efficient and responsive in delivering justice to the region. I am convinced that the transition to e-Filing is a logical and beneficial progression that allows litigants to file documents online thereby facilitating broader, cheaper and more effective access to the jurisdiction of the Court. It also facilitates the use by the court of technology systems that will improve its operations and reduce costs. This system takes us further into the realm of the 21<sup>st</sup> century with a mobile application component which allows the judiciary and senior court staff to now access and manage court information anywhere and at any time. This system is also available to the legal profession and will undoubtedly contribute to the efficient and effective management of their litigation workloads. The benefits of such a system are tremendous and far outweigh the cost of introduction. Since the decision to improve justice delivery has already been undertaken and is being implemented this will optimise the benefits from it. Adopting such e-Filing systems and other ancillary measures

would go a far way in supporting the effective operation of the new Civil Procedure Rules, and as a compliment to a dedicated backlog reduction programme.

*c. APEX*

One of the major accomplishments of my presidency occurred this year with the promotion of the Advanced Performance Exponents Inc. (APEX), which is a special-purpose, not-for-profit, agency, that is committed to delivering technology-based solutions and services to support court ecosystems. APEX is owned by the regional judiciaries and legal profession and has the potential to further advance the justice landscape of the region. APEX has developed technology modules specifically for the legal profession as well to support the litigation management in law offices. The Guyana Bar Association is an institutional member. The President and the Secretary for the Bar Association facilitated a road show for APEX yesterday during which its officers made presentations on the software. It was well attended and seemed to have been very well received and I expect that the quality of law office litigation management will show considerable improvement. I challenge the legal profession to support the judicial effort to improve justice delivery with their own efficiencies. The Hon Chancellor attended the session and demonstrated her support for efforts to improve the quality of justice delivery among the profession.

As APEX develops I envision it continuing to facilitate programmes and initiatives aimed at strengthening the justice systems of the region and improving the standards of efficiency of court-related services. Support for APEX has been strengthening and, in fact, the body is currently preparing to host its inaugural Stakeholders Convention. The gathering will be held at The Atlantis Hotel, Paradise Island, The Bahamas on Monday, 27<sup>th</sup> November 2017. As stakeholders you are all welcome to attend. Please check on the APEX website for particulars. This Convention will be a milestone event for justice sector in the Caribbean. Through APEX, the goal is to create an entire value chain to support the improvement and strengthening of Caribbean courts and justice sector institutions and the development of Caribbean jurisprudence.

**Conclusion**

In closing, I wish to reiterate that judicial accountability must be considered as a necessary corollary to the fundamental principle of an independent and impartial judiciary. We must

strive to ensure that the two concepts co-exist and thrive for the benefit of all citizens. I also call on the high officials of our community to do their constitutional duty and appoint the highest judicial officials as an important element in guaranteeing judicial independence to our citizens. And to the judges and legal profession, we should always be aware that a tremendous amount of trust and faith is placed in the judiciary by the people to whom we serve. To safeguard their independence, we must therefore remain appropriately accountable to the people in the exercise of our functions. I am convinced that we in the Caribbean Judiciary will continuously strive to meet this standard. Our region continues to produce judges of great distinction who can stand shoulder to shoulder with the finest judges anywhere in the world. It is only through a recognition of these principles that a proper balance can be attained and preserved between accountability and judicial independence.

I thank you.