

**The Inaugural Conference of
The Caribbean Association of Judicial Officers
A Judicial Code of Ethics: do we need one?
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Introduction

In 1998 I decided to put my name forward to the then Chief Justice of Bermuda for one of the two positions made available on the Supreme Court bench partly to reduce the back load of criminal trials. He had a salutary piece of advice for me that he put to me in the following way “You think you can be a judge, let me tell you something, in a criminal trial there are always at least two people on trial the defendant and the judge”.¹

I have survived numerous criminal and other jurisdiction trials and the few appeals arising there from over the last eleven years, in part I would say, because I have drawn two lessons from those words. The first is that being a judge is not and does not become easy. The second is that deciding to become a judge is, as it should be I suggest, an ethical decision.

I can best illustrate that second lesson by reference to the Supreme Court of Canada case of *Therrien v Canada (Minister of Justice) and Another*.² Mr. Therrien was no doubt quite bright he entered law school when he was still a minor. But his youthful exuberance led him to commit an offence for which he was imprisoned for a year. Not to be deterred once released he continued his law studies. He obtained his law licence and despite his conviction was subsequently admitted to the bar. In the course of his career he applied for and received a pardon, which vacated his conviction. Eventually he decided to become a judge and made the relevant submissions. He was interviewed on two occasions and in the course admitted his convictions and stated that he had been pardoned. He was not successful. No doubt he deduced that the mention of the convictions was his undoing, so on a further attempt when granted an interview, he did not disclose his criminal record or the fact that he had been pardoned. As luck would have it he was recommended for appointment after all of the relevant checks had been made which confirmed a clear criminal record.

When Mr. Therrien's conviction and pardon were discovered, a complaint was lodged to the relevant authority for his removal for failing in his duty to uphold the integrity and independence of the judiciary and the obligation to perform the duties of his office with dignity and honour, and for breaches of several sections of the Judicial Code of Ethics.³ A Committee of enquiry appointed by the judges' council investigated the complaint. The majority found that because of the gravity and continuing nature of Mr. Therrien's conduct, a reprimand could not restore public confidence in him and they recommended his removal, as did the Court of Appeal's committee of enquiry. Mr. Therrien appealed to the Supreme Court of Canada on a number of grounds including the decision to revoke his appointment.

In its unanimous decision the court said this "In this case apart from his competence to perform the duties of office, it is the appellants qualifications to be appointed as a judge that are in issue. The appointment of a judge is a sign of confidence in him or her personally. The appellant's conduct has sufficiently undermined public confidence, rendering him incapable of performing the duties of his office."⁴

The *Therrien* case was unusual in that it dealt with the unethical conduct of an aspirant for judicial office whom by virtue of his lack of candor gained an appointment to the bench. It illustrates as I earlier said that the decision to put oneself forward as a candidate for the bench is an ethical one. The Supreme Court of Canada opined that the personal qualities conduct and image that a judge projects affect those of the judicial system as a whole, and therefore the confidence that the public places in it.⁵

Mr. Therrien's problem arose in a jurisdiction that has a written code of judicial conduct. Does that imply that a written code is ineffective? The answer to that query can be stated succinctly, and I am sure that you will agree, a code, in whatever form it may take, is no guarantee that a judge's behaviour will change. What it can do however, in the form of guidelines, is confirm the values that members of the judiciary have always adhered to,⁶ and in the formal sense of a legislated code it can provide a standard against which to assess judicial behaviour.⁷

What about us, judges of the region and members of the Caribbean Association of Judicial Officers, whose qualifications and suitability for the post whose conduct unlike Mr Therrien has not been called into question? To restate the topical question

should we as individuals or as collegiate bodies rest on our laurels behind claims of judicial independence, or bury our heads in the sands of historic customary principles in order to resist what I shall demonstrate has been a global clarion call for a written code of judicial ethics?

Through out this paper I will use the term “code of ethics” in the generic sense indicating what is desirable rather than in the strict sense of the obligations arising under a legislated code, unless other wise stated.

The ethics standards expected of a judge whether in the court room or elsewhere, unlike that of other professionals, are indivisible from the personal ethics of that judge. Some judges have expressed fear of punitive strictures of a formal legislated code of ethics. Others fear that codes of ethics may be overused by the public both in an effort to judge shop or to control or intimidate a judge.

Fear of the unknown is a common human response. Lack of understanding of the need for a written code of ethics should not prevent open and honest discussion on the topic. This paper invites the Caribbean Association of Judicial Officers (CAJO) to fully examine the aim and purpose of adopting a code of judicial ethics in each member’s respective jurisdictions.

Judicial ethics, in the mode of established principles have always existed in an unwritten form to guide judges. A trend however has emerged in Commonwealth and other common law countries of adopting written codes of ethics in one form or another to meet the concerns of judicial officers and to address the public’s disquiet about questionable standards of conduct of judicial officers.

This trend is one aspect of a world wide effort to reinforce valued judicial qualities. For some jurisdictions around the world codes are seen by judges to be a necessary mechanism for prevention of corruption. Some other jurisdictions have concerns about the myriad of other threats to the integrity of the judicial process.

Evaluating the need for a code of ethics will require judicial officers to consider aspects of judicial conduct including⁸ but not limited to: a judge carrying out judicial functions in court; circumstances in which a judge should decline to sit; and the extent to which a judge engages in non-judicial activities.

In order to make as fulsome a foray into the subject as time and space will allow in this paper the following considerations will be covered: a brief history of judicial office; the functions of the judiciary; a judge's duty; judicial independence and judicial accountability; the distinction between guidelines for judicial conduct and a legislated code of judicial conduct. Additionally there will be consideration of global initiatives at universal adoption of judicial codes of ethics; in particular the Bangalore Principles.

History of Judicial Office

In order for one to know where one is going sometimes it is helpful to know where one has come from. It is true that common law jurisdictions have enjoyed a long history without recourse to written codes of conduct. It has been said that the earliest affirmation of the requirements of conduct for Commonwealth judges is found in an England statute dating back to 1346, during the reign of Edward III.⁹ The principles enunciated therein are alive today in the embodiment of the judicial oaths of office that each of us has sworn and are bound by.

Indeed, for hundreds of years judges were revered, and thought to be without blemish in character as well as judgment. This may be explained in part by the fact that it was not unusual to have judges come from the church. In a sense they had mythical qualities. Judges enjoyed the benefit of having reserved to themselves the use of technical language; they operated within a framework of complicated procedures, cloistered architecture and material finery.

The sociology of the time did not encourage a look into this brotherhood. Nor was there an opportunity to challenge the source of the law, this was so even from within the brotherhood, such was the monarch's control over the judiciary. The laws of England were held to be the king's law.¹⁰ The Acts of Settlement in 1701 would eventually loosen that control. Notwithstanding the politics of the day or perhaps because of it, in this climate, a judge's work was not questioned let alone understood. We commonly understand that this is how judicial traditions became endowed with a lasting, and valuable culture of moral fortitude, honesty and integrity.

There were of course problems with individual judges that in the clear light of hindsight we now know caused them to exhibit from the bench such human

weaknesses as indolence, ill temper, ignorance of the law and prejudice. It was not unknown for judges sometimes to be corrupted intellectually by ambition, the hope of promotion or the prayer for a title.¹¹ Notwithstanding the integrity of British judges was then beyond reproach.

That culture of morality, honesty and integrity carried over into a more modern time. The Inns of Court were established and judges were recruited from the bar. They came to the bar with the advantages of age and maturity.¹² They were for the most part independent thinkers. The essential functions of the judiciary however; inherited from the long history that preceded these more modern judges were firmly rooted. Those functions we continue to honor to this day.

Function of the Judiciary

British Colonies in the Caribbean region inherited the English common law and relevant statutory law and precedents. Our present day judiciaries are a product of that system, and are based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern it. In our jurisdictions the role of the judiciary continued to be synonymous with the concept of justice and the rule of law. Therein lies our strength, and our purpose.

In contrast to that earlier time, we live in modern democracies yet the traditional image of a judge from that past era is still valued. It has been said

“... one of the burdens of being a judge is that one is expected to rise above mere mortal status and dispense justice with an objectivity that borders on the divine. Independent from the pressures of everyday life and free from political influences, the judge is to resolve difficult disputes with the Wisdom of Solomon. This is the idealized version of the judge and is at best something to aspire to. It tends to obscure the human dimensions of the practical task of judging.”¹³

This expectation of the objective judge and judging stands in stark contrast to the modern more humane or subjective concept of what being a judge is and what the role encompasses.

Professor Wayne MacKay¹⁴ cites a survey of judges showing that knowledge of the law was not at the top of the most desirable qualities identified by provincial and court of appeal judges in Alberta Canada. In fact industry, diligence, courtesy,

empathy and patience were all held in higher esteem than knowledge of the law, intelligence or sense of fair play.

The respective jurisdictions of the members of the CAJO are diverse in culture, interest and values. Regional judiciaries have evolved to reflect that diversity. This is a rich source of perspectives and should not, in my view, be denied. The apparent dichotomy between the more traditional objective judge and the more modern subjective judge need not persist.

Community standards vary both in reference to geography and time. We recognize that the public must have confidence in judicial standards. As shown above the public has respected the rule of law and placed a high degree of confidence in judges. There can be no doubt that the authority of the courts of the members of the CAJO is rooted in the public's acceptance of the judiciary as the fountain of justice according to law.

The dichotomy therefore can be reconciled provided judicial conduct is in conformity with the public perception of it in relation to community standards. Thoughtful preservation of judicial ethics will assist the public in this regard. Judicial codes of ethics help to promote and protect the public's perception of the judiciary.

This discourse therefore takes its impetus from this basic but vital aspect of a judge's reason for being. Stated boldly, judges amount to naught, if it were not for the public's confidence in them. The rule of law is a theory that is brought into the human realm through the act of judging.¹⁵ To borrow an expression from the field of advertising, the public's confidence in the judiciary is gained the old fashioned way, by earning it, principally in the high profile of the court room.

The societies reflected in the membership of the CAJO are evolving and change can be a difficult adjustment for people and, after all, judges are people too. A written code of ethics therefore should reflect the community standards of the time. Codes of ethics would be a guide for judges who bring a new perspective to judging as well as those that have difficulty adjusting to normative changes.

A comparative study of the effect of codes of ethics on judicial conduct may not have been carried out. However the increasing adoption of such codes provides empirical evidence of their effectiveness. The implementation of codes of ethics in the Commonwealth Caribbean would be a useful guide for the public in a society where

some may have on the one hand superhuman expectations of judges, yet on the other, some have a jaundiced view of judicial integrity.

Impartiality

The hallmarks of a judge's duty are impartiality, independence and the pursuit of justice. Judges require the public's acceptance of the judiciary as the fountain of justice. Members of the CAJO must accept that public confidence is crucial to the administration of justice. Professor MacKay aptly makes this point in an instructive paper on judicial ethics:

“in a democracy, the enforcement of judicial decrees and orders ultimately depends upon the public co-operation. The level of co-operation, in turn depends upon a widely held perception that judges decide cases impartially.... Should the citizenry conclude, even erroneously, that cases were decided on the basis of favouritism or prejudice rather than according to law and fact, then regiments would be necessary to enforce judgments.”¹⁶

Impartiality is the first of a judge's duty. Impartiality has been said by Lord Devlin to be the supreme judicial virtue.¹⁷ A judicial code of ethics would reassure the public of a judge's duty of impartiality. The public would of course need access to the code. Jurisdictions that have adopted such codes have ensured that their code is readily available for the public's edification. Judicial codes of ethics are readily accessible by the public through the Internet.¹⁸

Bias is inimical to impartiality. Allegations of bias are destructive of public confidence in the judiciary. The rule against bias is of antiquity and has found various forms of expression in old cases.¹⁹ It has coalesced in the “*Nemo Judex*” rule for many purposes. A judicial code of ethics would be available to a judge as an objective template against which to assess his or her susceptibility to a claim of bias.

A judge is not always aware of his or her biases. What is more he or she is not always aware that his or her conduct may give rise to a claim of bias. There are two instances giving rise to a judge's disqualification on the basis of bias although the dividing line is sometimes blurred. Automatic disqualification arises when a judge has a pecuniary, financial, family or other direct interest in either the parties or the subject matter of a case in question. This is often thought of as the more obvious instance of bias, which should require no soul searching at all on the part of a judge.²⁰

An example of an automatic disqualification can be illustrated in the facts of an appeal from a decision of the House of Lords, which I shall refer to as the *Ex p. Pinochet* case.²¹ In an earlier appeal to the House of Lords Mr. Pinochet sought to have warrants for his arrest for crimes against humanity discharge. The warrants were based on claims that he committed these acts during his term of office in Chile. There was much public interest in the case, and Amnesty International applied for and was granted standing.

By a majority of three to two, Mr. Pinochet's appeal was dismissed. Lord Hoffman had been in the majority. It later came to light that Lord Hoffman was an unpaid director and chairman of the Amnesty International Charities Ltd. In an unprecedented move a differently constituted House of Lords applied the principle of automatic disqualification for bias and set aside the earlier decision.²²

The House of Lords acted in the public's interest in setting aside that earlier decision. They did so to preserve the long valued public trust in the judicial process. There is another point to be made in citing this case. It demonstrates that even judges in apex courts are liable to fail to appreciate an instance of bias. Even they may fail to appreciate what to a reasonable observer could not amount to a fine distinction. For those members of the CAJO with aspirations to high office such as the Caribbean Court of Justice, a written code of ethics would provide guidance along the career path that could assist them in the scrutiny of open competition for that bench.

The question of apprehended or perceived bias may arise where the judge is subject to a more insidious influence than by the case as presented. It calls into question a judge's ability to be impartial. The test commonly applied comes down to whether a reasonable observer, aware of the facts, would apprehend a lack of impartiality on the part of the judge.

Judicial officers have families, friends, and social connections, and in the islands of the Commonwealth they live in close knit communities in small jurisdictions. A variety of instances may arise in relation to trials and hearings that may call for a careful consideration of the possibility of a claim of bias being perceived. A written code of ethics could serve several functions in this regard.

A code of ethics has the potential to make a judge aware of the need for restraint in the use of injudicious language for example. It could guide a judge through his or her own examination of the issue, perhaps forming a useful starting point for a discussion with another colleague in the search for clarity. Hopefully it would disabuse a member of the public's suspicions; or at least offer some deterrence to a specious claim. Additionally it could provide a useful aid to a Chief Justice who may increasingly need to answer an enquiry by a member of the public or by the press concerning perceived bias on the part of a judge.

A recent nominee for the bench of the Supreme Court of the United States has publicly been shown to have questioned whether fairness and integrity based on the reason of law is possible in all or even in most cases. She is reported to have said this in reference to a comment by a colleague that gender, race and ethnicity should not impact a judge's decision.²³ To paraphrase her, we are creatures of our experiences and our environments and our decisions are shaped by that notwithstanding our efforts at impartiality.

This raises an interesting question in relation to the subject of judicial ethics. If judges are to do their best at being impartial, should they be required to be so restrained, as English tradition would have them be, that they are forced to deny the very essence of who they are and the realities of their experiences and communities ?

The answer to that question is subject to great debate. Such an enquiry requires each judge and judiciary in every jurisdiction to decide the appropriate standards of judicial propriety within their regional and cultural realities. This does not suggest, of course, that judges should act other than consistent with the role of a judge or the function and dignity of the office.

What it means for members of the CAJO is that determining appropriate ethical standards can best be achieved by judicial officers after inclusive open and honest discussion, full consultation and if necessary debate. After arriving at appropriate standards, agreement can be reflected in a written code of ethics.

Judicial Independence and Judicial Accountability

A written code of judicial ethics is not a threat to judicial independence. It is well known that judicial independence is not a right of judges but a public trust. The rule

of law ensures a system that is for the benefit and use of citizens for their own protection and for their benefit in their relations with the machinery of government and with other citizens or legal bodies.

In the recent case of *Independent Jamaican Council for Human Rights (1998) Ltd and Others v Marshall-Burnett*²⁴ the Privy Council stated that the independence of judges is “all but universally recognized as a necessary feature of the rule of law”. Judicial independence presupposes the faithful performance of judicial duties. The Commonwealth Caribbean plays its part in this universal recognition. This statement recognizes that judicial independence underpins a stable democracy by providing an independent forum for the resolutions of disputes.

Judicial independence has come to be seen to have two important features. On the one side is the autonomous judge who is expected to perform his or her duties of impartiality, fairness and the pursuit of justice without allowing him or herself to be influenced or controlled by any consideration outside of the parties, arguments of counsel, the issues and law at hand.

On the other side are the necessary institutional protections against improper interference and threats to the autonomy of judges. Constitutionally mandated separation of powers is traditionally thought to provide an appropriate mechanism for protecting the independence of the judiciary.

In his seminal paper²⁵ delivered to the Commonwealth Law Conference in Kenya in 2007 the esteemed Chief Justice of Barbados, Sir David Simmons with whom I have the honor of appearing on this panel, postulated that judicial independence and judicial accountability must co-exist:

“Judicial independence and judicial accountability are not inconsistent. The judiciary cannot treat itself as ungovernable or elitist. It must be accountable to the other branches of government, to itself and to the people. In short judicial independence must defer to accountability”.²⁶

It should be clear that the two concepts have as their mutual goal the advancement of the integrity, impartiality and fairness of judges. In doing so, they support public confidence in the judiciary and the judicial process.²⁷

Sir David identified security of tenure, financial security and administrative independence as three core characteristics of institutional judicial independence in the Commonwealth Caribbean. These characteristics are consistent with the aims set out in the Bangalore Principles of 2001 and to a greater or lesser extent are enshrined in the constitutions of our democracies. Such institutional securities are designed not only to prevent illicit interference in the work of judges but also to prevent politicians from arbitrarily removing a judge from the bench.

Accountability, from a Commonwealth perspective has come to be required of all those who exercise government power and accordingly judicial accountability is a check on the abuse of judicial power. The principles of open justice are the primary means of judicial accountability.²⁸ Four elements of accountability can be readily identified in our adversarial system:²⁹

1. Accountability to higher courts for decisions
2. Performance of all judicial functions in the presence of the parties and with minor exceptions in public
3. The scrutiny of academia and the press
4. The duty to give reasoned decisions promptly

To this list can be added appointments procedures that are open and transparent.³⁰ The judicial system can only operate reliably if there is honesty and integrity in the appointment process of judges. Therefore, the assessment of applicants for judicial appointment is an ethical one and appointing bodies should be held to ethical principles to ensure fairness in the process.

In Bermuda vacancies in the Judiciary are openly advertised in the Official Gazette and on the government portal accessible on the Internet.³¹ The same is true of vacancies in England and Wales, the Eastern Caribbean Supreme Court and for the apex court for the region, the Caribbean Court of Justice.³²

Absent the court process itself additional accountability is ensured through Commissions of Inquiry that are occasionally appointed after the outcome of a trial has caused a public outcry from a sense of injustice that has permeated.

The Emergence of Judicial Codes of Ethics.

This brings me back to the subject of the independence of the judiciary. Judges as we have seen are independent from the executive branch of government. However judges

are also independent from the influence of other judges. Therein lies the rub. Chief Justices are not immune to this principle, and can take no ameliorating action against a misbehaving judge with out the agreement of the judge whose conduct has been called into question.

Agreement is required in cases where the judiciary adopts a guideline of judicial conduct. A code of ethics in the form of guidelines, by its very nature, is not intended to be a formal code of conduct. As such it does not identify misconduct nor does it prescribe discipline; it is only guidance.

In Bermuda we have adopted guidelines for judicial conduct. The development of appropriate standards of judicial conduct in the form of guidelines was produced by the Chief Justice Richard Ground in 2006 in consultation with the judges of the Supreme Court and the Magistracy. We took into account rules of ethics that had in substance been observed by the Bermudian judiciary for a long period of time.

To put our rules into context, in 2005 Bermuda celebrated the centennial of its Supreme Court Act 1905. In fact, records reveal that the High Court of the Admiralty heard its first case in 1671. That court had jurisdiction over matters relating to maritime causes like “crimes at sea, monetary claims against ships and shippers, piracy and prize, wrecks, etc.”³³

In the opening paragraph of the preface our guidelines state:

“Section 6 of the Bermuda Constitution entitles all civil and criminal litigants the right to a hearing before an “independent and impartial court”. Such independence and impartiality requires not only the adherence by Judges and Magistrates to supportive ethical principles, but also public awareness of and confidence in the relevant ethical rules.”

The Bermudian judiciary has the distinction, as I hope the many jurisdictions of the CAJO do, of working in the spirit of collegiality. That essence is a necessary feature for reaching consensus for self-regulation in the context of guidelines for ethical judicial conduct.

The self-regulatory nature of guidelines is apparent from sections 3 and 4 of the Bermuda guidelines for judicial conduct. Respectively they provide:

“The application of the principles in practice to circumstances as they arise every day is not always as clear cut as agreement on the general principles may suggest. The application of a principle may be novel or may be affected by changing community values. In some cases, whether the principle is engaged at all in the particular circumstances may be a matter of reasonable difference of view. In other cases there may be reasonable differences of opinion as to whether particular conduct by a judge affects the judicial function or whether it is private.

For these reasons, the guidance provided in these statements and comments is not intended to be a code of conduct. It does not identify judicial misconduct. It is advice. The advice is designed to assist judges to make their own choices informed by a check list of general principles and illustrations drawn from experience.”³⁴

One of the advantages of guidelines, one can see, is that they are readily amenable to changes which arise from evolving community values, or for example, to address uncertainties that arise with such frequency that may require further clarification.

Those of you who think that guidelines are only appropriate for small jurisdictions such as Bermuda should be informed that England preceded Bermuda in adopting guidelines as opposed to a legislated code of conduct. The malleable nature of guidelines is reflected in the several supplements to the English guidelines that have been issued by their Lord Chief Justice.³⁵

Guidelines can address in-court judicial functions, recusals, and extra-judicial functions or activities. Guidelines can speak to such diverse topics as judicial demeanor and conduct in court, ex parte communications, case management and administrative imperatives, financial activities and disclosure, civic and charitable activities, election and political activities for example.³⁶

The aim of guidelines therefore is two fold: as a reminder of the ethical rules; by which all judicial officers are bound; in the form of advice; and as a form of education for members of the public. It is in this way that confidence in the administration of justice is maintained and enhanced.

Many judges have come to accept that guidelines reflect sensitivity to ethical rules, both on and off the bench, and in that way help protect the independence and impartial status of the courts.³⁷ The premise underlying the grant of judicial independence is that it exists for the promotion of the public interest. Reinforcement

of the principle of independence of the judiciary is therefore a necessary feature in the preamble or explanatory notes.

Bermuda's experience with judicial misconduct has been limited, to my knowledge, to one instance where a judge's lack of probity was called into question. In that particular case the judge chose to resign and he promptly returned to his homeland.

That judge had been hearing a commercial law matter involving a famous and extremely wealthy European family and their trust domiciled in Bermuda. Because of that the case attracted international media attention. However, the Bermudian judiciary has always enjoyed an unblemished reputation for fairness and integrity; the reputation was unscathed by that incident.

The decision to adopt guidelines in Bermuda revolved primarily around concerns for judicial independence. I fully participated in the discussions in Bermuda with my colleagues and we determined that self-regulation suited us. In Bermuda's case guidelines are appropriate in light of the upstanding reputation of the Bermudian judiciary, its history and our culture.

Enforceability is the distinction between guidelines and a legislated code. Guidelines have the advantages of self-regulation; they concern what is desirable in a judicial officer. It is when self-regulation has either been proven to be ineffective and or the public's perception is that it is ineffective, that standards are required to be enacted by law to effectuate the purpose and intention of the principle of accountability of judicial officers. The standards accordingly become obligatory.

Arguably a formal judicial code of ethics can be seen to be a more reliable facet of judicial accountability than guidelines. However it is viewed, it is not a threat to judicial independence. I take as an illustration of that assertion the dicta of the Supreme Court of Canada in Moreau-Bérubé v New Brunswick (Judicial Council)³⁸ where, in reference to a legislative code the court held as follows:

“A core principle of judicial independence is the liberty of the judge to hear and decide cases without fear of external reproach. ... Part of the expertise of the Judicial Council lies in its appreciation of the distinction between impugned judicial actions that can be dealt with through a normal appeal process, and those that may threaten the integrity of the judiciary as a whole, thus requiring intervention through the disciplinary provisions of the Provincial Court Act.”

In that particular case the panel appointed to conduct an inquiry and report its findings on the utterances of the judge in court, concluded that the judge's comments in question did constitute misconduct, but that she was still able to perform her duties as a judge. They recommended a reprimand. The Council concluded that the judge's remarks created a reasonable apprehension of bias and a loss of public trust. They recommended her removal.

In Bermuda a Court of Appeal or Supreme Court judge can only be removed from office for inability to discharge the functions of the office or for gross misconduct by the Governor acting on the advice of the Judicial Committee of the Privy Council. Such an extraordinary action can only come about after a resolution by both houses of Parliament. In the independent nations of the Commonwealth Caribbean similar checks and balances inherited from England's parliamentary system dating to the Acts of Settlement of 1701 secure judges.

In England, and the Commonwealth Caribbean procedures for removal of a judge for gross misconduct or incapacity have rarely been used. There is force in the argument that this is a reflection of parliaments accepting that the independence and impartiality of the judiciary is so important that the threshold for misbehavior must be set high. England in fact has only resorted to the procedure twice in the past thirty years.

Nonetheless it is common knowledge, not the least among judicial officers that judges do not always display qualities that are thought, whether by the public, the press, or lawyers, to be inherent to the role. Herein lies the difficulty. There is a wide range of inappropriate and undesirable conduct by judicial officers that fall short of gross conduct for which the sanction of removal cannot possibly apply. Short of removal from office, in the absence of a formal code of conduct few options exist at the disposal of Chief Justices to ensure that judges are accountable for the considerable power that they have at their disposal.

Not very long ago lesser forms of offending behaviour attracted no sanctions at all in the judiciaries of modern day Commonwealth countries. In recent times however there has been a rise in the adoption of codes of ethics that seek to address this lacuna in judicial accountability. Complaints of misconduct are brought to the attention of Chief Justices from counsel or parties to proceedings, but more often than not such

complaints come from the general public. This challenge was met in several Commonwealth jurisdictions by the adoption of formal written codes of conduct.

This leads to the inevitable question, what form should a judicial code of ethics take for the judiciaries represented by the members of the CAJO. Part of the answer, I would suggest lies in the history and culture of the jurisdictions within the region.

I am not that familiar with the specific concerns that may arise in reference to the conduct of judicial officers in the Commonwealth Caribbean. I can only imagine that they cannot be that different from other Commonwealth jurisdictions.

I am of course aware of a case from the region of misconduct which resulted in the removal of a judge from the bench. I speak of *Meerabux v A. G. of Belize*.³⁹ This case is illustrative of the existence of circumstances in the region that may make its judges susceptible to inappropriate influences and corruption. This no doubt must be of grave concern.

It may be going too far to speculate that there is concern about the lack of probity of judicial officers in the region merely because of the very presence of the topic of ethics on the programme of this inaugural conference. It could be that you wish to be proactive in opening lines of dialogue. In either case the interest is laudable because consideration of instituting ethical codes engenders public confidence.

Having already covered the topic of guidelines for judicial conduct it is relevant to this discourse whether a legislated code may be the way forward in the Commonwealth Caribbean. Securing the integrity of the system by a legislated code would provide an answer to the lacuna that exists in respect of discipline of judicial officers for conduct falling short of gross misconduct.

Like guidelines a part of the purpose and intention of a legislated code would be to remind judicial officers of their role, function and the need for conduct appropriate to their office. It could thereby ameliorate the misuse of the constitutional removal process that currently appears to be the only sanction available in the region.

A legislated code has been recognized as providing certainty, not only of the standard of conduct expected, but also of the range of corrective or restorative measures that would be available to meet a breach.

In some other Commonwealth countries the history or culture required a more robust approach to ensuring judicial accountability. The approach adopted in New South Wales is instructive. There had been wide resistance in most of Australia to this approach at the time; however that resistance has given way to open dialogue.

New South Wales opted for a more formal mechanism for dealing with complaints of a judges' conduct. To facilitate this, a statute was enacted that established a Judicial Commission. The Commission consists of ten members six of which are the judicial heads of the six divisions of the court. In addition the Chief Justice is the president of the Commission. Thereby the majority of the Commission consists of judicial officers.

The independence of a judge is maintained by the statutory scheme in that the Commission has no authority to determine and is required to dismiss complaints falling under any of the following examples: impugned judicial actions where there is a right of appeal; instances where the complaint is frivolous or trivial; and where further consideration is unnecessary or unjustifiable.

In the case of substantiated complaints found to be minor, and thus not justifying removal the Commission does not itself perform a disciplinary function but rather is required to refer the matter to the Chief Justice. The Chief Justice deals with the referral in his discretion.

Serious matters that potentially may attract the sanction of removal are referred to the Conduct Division which consists of three judges one of whom may be a retired judge. The Conduct Division presents a report stating whether or not the complaint could justify parliamentary consideration of removal. Where such a report is presented the judicial officer is subject to suspension from duty.⁴⁰ Procedures are included in the system to ensure that a judge is fully aware of the complaint and the judge is given the opportunity to make representations in person or through counsel.

Other Commonwealth countries that have opted for formal legislated codes include Kenya, Tanzania and Canada. In each case a Judicial Commission has been established to play a similar role as the Commission in New South Wales. There have been several challenges to the constitutionality of Canada's code however all have been defeated.

We are all aware of the challenges that South Africa faced from the apartheid system in which there was no distinction between the executive and the judiciary. However upon the dismantling of that system and the adoption of the Constitution in 1996 the judiciary in South Africa now has guarantees of independence.

In 2000 South Africa adopted guidelines for judges.⁴¹ As such they are not legally binding however there has been a move afoot since to introduce a formal legislated code. There were found to be some problems in interpretation of the guidelines and a need for a complaints mechanism as well as sanctions for breaches of the code in light of recurring misdemeanors of judges.

The United States is preeminent in the common law jurisdictions for legislating judicial codes of ethics which are referred to as Canons of Judicial Conduct. They are based on the American Bar Association Model Code of Judicial Conduct. The Model Code is not binding on judges unless it has been adopted in their jurisdictions. Only one state has not adopted the code. That state opted for differently constituted canons of judicial ethics. The Model Code applies to federal and state judges.

Over thirty five states and the United States Judicial Conference have judicial advisory committees to which a judge can submit an inquiry regarding the propriety of contemplated future action. In eight states the discipline commissions issue advisory opinions. The opinions are not binding on the discipline committee or the Supreme Court. The use of advisory opinions has not found favour in the Commonwealth.

Education

A fundamental component of a judicial code of ethics is the provision of training for judges both newly appointed and seasoned. The Bangalore Principles encourage judiciaries to take responsibility for the education and training of judicial officers at all levels of experience. This is justified by the ethical duty of a judge to perform judicial work professionally and diligently. It is an accepted principle that training should be arranged separately from disciplinary functions under a formal code of ethics.

There is a basic need for training of all judicial officers. Training should address changes in the law, technology, and the assumption of new duties. In England judges

are required to attend what is termed continuation courses every three years. Some judges in England are required to attend special courses to assist them for example in appreciating the changing face of Britain if I may put it so delicately. Each judiciary should decide what the training needs of its judicial officers are.

Ghana has instituted a Judicial Training Institute and has sought to incorporate ethics for judges into its training. In 2007 the Chief Justice in Ghana stated that her mission was to build a credible and trustworthy judiciary for the administration of justice in Ghana⁴². Bermuda has also instituted a Judicial Training Institute. It was implemented in 2008 and had had several training sessions for Judges, Magistrates and the lay members of the Family Court. The Judicial Training Institute draws up a schedule of courses to be offered through the year after consultation with the judicial officers.

Global Initiatives

The influence of international law on our domestic legal systems would be difficult to deny. International and regional bodies including courts contribute to the development of principles that have relevance for judiciaries now and in the future. It is certainly the case that since 1971⁴³ most if not all judiciaries in the larger Commonwealth countries have adopted codes of conduct or ethical principles for the guidance of its judges and magistrates.

Worldwide concerns about corruption invading the lower and upper ranks of the judiciary resulted in an initiative being spearheaded by the United Nations⁴⁴ in cooperation with Transparency International.⁴⁵ This led to the creation of a high level judicial group of senior judges from several countries. The group drafted an international code of judicial conduct. It drew on codes already in effect in many parts of the world. The expectation was and is that it will stimulate those countries that have not yet adopted codes to do so.

Through the spirit of international cooperation that exercise has resulted in the Bangalore Principles of Judicial Conduct. The core principles are reaching universal acceptance as the defining international standard for ethical conduct by members of the judiciary. The Bangalore Principles has been described as “an instrument of great potential value not only for the judiciaries but also for the general public of all nations

and for all who are concerned with laying firm foundations for a global judiciary of unimpeachable integrity.”⁴⁶

The purpose of the Bangalore Principles is three fold:

- To spread the examples of codes of judicial conduct to those jurisdictions which do not have them yet
- To encourage deliberation amongst judges and others concerning the terms of the code and the improvement of codes of judicial conduct already in existence
- To develop the broad principles appropriate to an international code of judicial conduct drawing on the best practice and precedents in many jurisdictions of the world

A detailed commentary on the Bangalore Principles has now been adopted and has greatly strengthened the Principles. The Bangalore Principles and the Commentary are available through the internet.⁴⁷

International support for judicial codes of conduct has been fortified by the participation of the Commonwealth Lawyers Association, the Commonwealth Legal Education Association, and the Commonwealth Magistrates’ and Judges’ Association in various meetings around the world. The support for the adoption of codes of conduct has been memorialized by the following reports:

- Statement of Ethical Principles for Judges adopted in Canada in 1998;
- The European Charter on the Statute for Judges in 1998;
- The restatement of values of Judicial Life adopted by the Chief Justices Conference of India in 1999;
- The UN Human Rights Commission at Geneva 2003.

Conclusion

This paper is an attempt to provide useful information on the merits of adopting codes of judicial ethics in an effort to assist the members of the CAJO to answer the question, “*Do we need a code of judicial ethics*”? The decision whether or not to adopt a code of judicial ethics is an ethical one. The paper has explored the history of the Commonwealth Caribbean, showing a heritage based on the principles of the independence of the judiciary, respect for the rule of law and trust in the integrity of

judges. It has demonstrated that codes of judicial ethics are a useful adjunct to judicial accountability.

This paper has taken into account changing societal values and the flexibility of codes of ethics to accommodate such change. It has demonstrated that there is a growing trend in Commonwealth and common law jurisdictions of adopting codes of conduct along the lines of the Bangalore Principles to guide the conduct of judicial officers, to educate the public, and to provide mechanisms for addressing minor instances of judicial misbehaviour.

Hopefully information and ideas presented in this paper will support an earnest consideration by the CAJO of the merits of adopting a judicial code of ethics in which ever form found suitable to the history and culture of each member's state. Most importantly the paper has highlighted that most of the Commonwealth judiciaries and much of the world have adopted codes of judicial ethics to protect the integrity of judicial office.

The Honorable Justice Charles-Etta Simmons

26 June 2009

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¹ Ward, A, Personal Communication 1998

² The Supreme Court of Canada case of Therrien v Canada (Minister of Justice) and Another [2001] 5 LRC 575.

³ The Canadian Judicial Code of Ethics

⁴ p 634-635.

⁵ Ibid, 621.

⁶ Guidelines for Judicial Conduct for the Judges of the Supreme Court of Bermuda and the Magistracy, Hon. Chief Justice Richard Ground, 2006.

⁷ MacKay, A. Wayne. Judicial Ethics: Exploring Misconduct and Accountability for Judges, Dalhousie University, 1995.

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¹² Ibid.

¹³ ibid n 7.

¹⁴ MacKay, A. Wayne. Judicial Ethics: Exploring Misconduct and Accountability for Judges, Dalhousie University, 1995 citing McCormick and Greene, Judges and Judging: Inside the Judicial System (Toronto: Lorimer, 1990), c.4, at 103..

¹⁵ St Jane, M., Personal Communication June 2009.

¹⁶ MacKay, A. Wayne. Judicial Ethics: Exploring Misconduct and Accountability for Judges, Dalhousie University, 1995, p. 9.

¹⁷ Judges and Lawmakers, (1976) 39 Modern Law Review 1 at 4.

¹⁸ The Bermuda Guidelines for Judicial Conduct has been published on the Judiciary's web site. http://www.gov.bm/portal/server.pt?open=512&objID=204&mode=2&in_hi_userid=2&cached=true

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²⁰ Ibid. The author's focus is on the subject of automatic disqualification; see that paper for a deeper and interesting understanding of that topic.

²¹ In R. v Bow Street Metropolitan Stipendiary Magistrates, ex p. Pinochet Ugarte (No. 2) [1999] 1 All E.R. 577.

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- ⁴⁰ ibid n 25
- ⁴¹ Adopted by the Chief Justice, the Presidents of the Constitutional Court, High C, Labour and Land Claims Courts.
- ⁴² The Commonwealth Secretariat.
- ⁴³ Latimer House Guidelines for the Commonwealth 19 June 1998.
- ⁴⁴ The UN bodies involved were the Un Global Program Against Corruption based in Vienna and The Office of the High Commissioner of Human Rights based in Geneva.
- ⁴⁵ Transparency International is a non governmental organization that promotes an effective response to corruption.
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