

# JUDICIAL CONDUCT IN THE CARIBBEAN: ETHICAL, POLITICAL AND SOCIAL DIMENSIONS

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## Introduction

Over the last 30 years or so, there has been a rise of what might be termed the ‘governance of judicial conduct’. We have seen codes or guidelines on judicial conduct promulgated in several Commonwealth jurisdictions including: Canada (1998), Australia (1998), Bangalore Principles – (2002), Latimer House Guidelines (2003), New Zealand (2003), Belize (2003), England and Wales (2004), Hong Kong (2004), Barbados (2007), UK Supreme Court (2009), Jamaica (2012), South Africa (2012) and Trinidad and Tobago (2017). Several of these Guidelines or Codes have been updated or revised since initial publication.

The publication of Guidelines has been paralleled by closer examination of judicial independence as one of the pillars of the Rule of Law<sup>1</sup>. This is because the issue of accountability of judges implicit in the issuance of guidelines impinges on the principle of judicial independence which "limits the type of action that can be taken against a judge who has acted in a way that, although not serious enough to merit dismissal, is nevertheless considered to be unacceptable."<sup>2</sup>

What accounts for this elevated interest in ‘judicial conduct’ or ‘judicial ethics’? Is it that judges have been more badly behaved? Or have judges become demonstrably biased? Historically, there have been judges who have been notoriously badly behaved. Francis Bacon was one such. He was Attorney General and became Lord Chancellor in England in 1618. He procured the torture of the clergyman Edmund Peacham and was found guilty of taking bribes. Lord Denning in his inimitable style, said of Francis Bacon:<sup>3</sup>

He had an intellect of the first quality. He had a superb command of language. He laid down moral principles of high worth. But he failed miserably to keep them himself. His mind was golden, but he had feet of clay.

This was the same Francis Bacon who characterised the judges in the 17th century as the “lions under the throne” for their supine dealing with the Crown and defence of ‘royal prerogative’, with the notable exception of the redoubtable Edmund Coke<sup>4</sup>. Denning also relates the stories of two other Lords Chancellor - Macclesfield and Cottenham -- who strayed from the path of virtue.

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<sup>1</sup> See Shetreet and Turenne (2013); Robinson, Bulkan and Saunders (2015), Chap. 8.

<sup>2</sup> Harrison, *Judging the Judges*, 2009

<sup>3</sup> Denning (1984, 32). Francis Bacon is well known to social scientists. His *Novum Organum* outlines the inductive method of scientific reasoning taught to students of the scientific method and it is interesting that Bacon was not a scientist at all but was in fact a lawyer and a judge!

<sup>4</sup> Shetreet and Turenne, 2013, 25ff

Individual acts of misconduct are one thing. But what of situations where the judicial system as a whole, displays systemic bias against certain groups in a society. David Dyzenhaus has explored the systemic bias of the courts in South Africa during apartheid, and R. W Kostal explored the response of the judicial system to the criminal conduct of Governor Eyre in Jamaica during the Morant Bay uprising.<sup>5</sup>

However, the fact is that, since the egregious behaviour of these holders of high judicial office in the 17th and 18th centuries, there have been relatively few (reported) cases of judicial misconduct in the developed countries within the Commonwealth which follow the English judicial system and jurisprudence. So why have we seen the rise of judicial conduct governance in those countries? This requires explanation.

However, in the developing countries of the Commonwealth, not least right here in the English-speaking Caribbean, there have been proportionately many more instances of controversy in respect of judicial conduct. Why this should be so also requires some interrogation and explanation.

Moreover, the topic of judicial conduct is again very topical, especially in Trinidad and Tobago where we have had recent rumblings which are high on the Richter scale, with also minor tremors elsewhere in the region as well. Judicial conduct has recently been the subject of discussion by several legal professionals and jurists.<sup>6</sup>

### Our Basic Hypothesis

The Judiciary is an institution within the society and the judges who operate the judicial system are social actors. Judges are neither ‘above society’ nor ‘outside society’, nor are they impervious to social norms and cultural influences. Whether they know it or not, or accept it or not, judicial officers are influenced in their behaviour by their societies and the social and cultural forces operating within them.

This seems fairly trite, though I would suggest that many social actors operate within ‘bubbles’, that is, they are in daily contact with people who share their mission, their values, their mental models and paradigms about how the world works, how the society functions, and they have a more or less shared understanding of their role and place in the society. Having these mental models is actually functional because they allow us to transact daily life at minimum cost or effort. It would be impossible for any professional to revisit first principles every time he is confronted with a problem to be solved. The methods and models we use to resolve problems make us more efficient and enable us to be right, more often than not, for the class of problems we usually confront. But they can leave us at times blinkered to certain realities, including the perceptions of or the reality of our own behaviour.

We therefore need to examine the society and its cultural dynamics carefully if we want to understand how the judicial system actually functions and how judges actually behave. This too may seem perfectly acceptable until we remember that in most respects the ethos and standards to which the judicial system in our region is supposed to conform are derived from the English legal system with its assumptions and conventions around democracy, the separation of powers and judicial

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<sup>5</sup> David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality*, Oxford, 2010; R.W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law*, Oxford 2005. The Morant Bay rebellion actually began in the courthouse and the very courthouse was the scene of the hanging of George William Gordon!

<sup>6</sup> Adrian Saunders (2018). See also Harrison (2009), Lord Hope (2010) and Sedley (2011).

independence, and the rule of law, and its mostly unwritten rules of what constitutes acceptable judicial conduct.<sup>7</sup>

However, our post-colonial republics or constitutional monarchies may not function in key respects like the English society whose colonizers gave birth to them by force of arms and who maintained order by institutionalized violence. In other words, we inherited and implemented the institutions which now comprise our justice system. But *how* these institutions actually operate is influenced or indeed determined by culture, and our culture in the region is not English, nor French nor Dutch. It is our West Indian culture.

This is the fundamental tension that we wish to explore, between the formal rules of the institutions of the Judiciary and specifically the guidelines on judicial conduct, and the culturally-influenced behaviours, and to see whether or not this tension explains what we observe of judicial conduct in our West Indian territories.

### PUBLIC CONFIDENCE

The litmus test of judicial conduct is the actual or likely impact on public confidence in the judicial system and the administration of justice. Aharon Barak noting that a judge 'has neither sword nor purse', elaborated the importance of public confidence in the judge thus:

It means confidence in judicial independence and impartiality. It means public confidence in the ethical standards of the judge. It means public confidence that judges are not interested parties to the legal struggle and they are not fighting for their own power but to protect the constitution and democracy. It means public confidence that the judge does not express his own personal views but rather the fundamental beliefs of the nation.<sup>8</sup>

The Australian judge, Justice J.B Thomas put it as follows:

We [Judges] do form a particular group in the community. We comprise a select part of an honourable profession. We are entrusted, day after day, with the exercise of considerable power. Its exercise has dramatic effects upon the lives of those who come before us. Citizens cannot be sure that they or their fortunes will not some day depend on our judgment. They will not wish such power to be reposed in anyone whose honesty, ability or personal standards are questionable. It is thus necessary for the continuity of the system of law as we know it, that there be standards of conduct, both in and out of court, which are designed to maintain confidence in those expectations.<sup>9</sup>

Given that upholding public confidence is the test of judicial conduct, how do we know whether the public has confidence in the Judiciary? How do we know whether that confidence is high or low, rising or declining?

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<sup>7</sup> I acknowledge of course, that the judicial system in some parts of the region are founded on the civil law system and not the English legal system and that the colonial judicial system differed in important respects from what obtained in Britain at the time, having been shaped by British prejudices and perceptions of colonial peoples.

<sup>8</sup> Aharon Barak (2006, 109).

<sup>9</sup> J.B. Thomas (1988, 7).

## Data on Public Perception of and Confidence in the Judiciary

In corporate terms, the key performance indicator of the success of the Judiciary would be public confidence and it would then be necessary to develop appropriate measures of public confidence. However, this has not been done either consistently in respect of methodologies, or regularly over time. The data we do have available are sketchy and inadequate.

Selwyn Ryan (2001), one of only a few Caribbean social scientists to study the politics of the Judiciary wrote:

A number of recent studies have show that the public in Latin America and the Caribbean does not hold the judiciaries in high esteem. ...In a survey done in Trinidad and Tobago in March 2000 by St. Augustine Research Associates (SARA), 56 percent of the sample said that they had no trust in the Trinidad judiciary, with only 23 percent saying that the institution enjoyed their trust. In a similar study done by SARA in Guyana in August 2000, 53 percent of those polled said they had "no" or "little trust" in the Judiciary.<sup>10</sup>

In 2010, the World Values Survey asked respondents in Trinidad and Tobago whether they had confidence in various institutions. In respect of the 'courts', 31.2% of respondents had 'quite a lot' or 'a great deal' of confidence, while 44.5% had 'not very much' and 16.7% had 'none at all'.

In Trinidad and Tobago, the polling organisation, Solution by Simulation carries out annual surveys on behalf of the Express newspaper which includes questions on public confidence in various institutions including the 'judicial system'. The data for the judicial system shows low and declining reported confidence (Table 1).

	2011	2012	2013	2014	2015	2016	2017	2018	2019
<b>Yes</b>	18	16	n/a	19	21	14	16	10	12
<b>Neutral/ Not Sure</b>			n/a	33	32	34	20	37	32
<b>No</b>			n/a	48	47	52	64	53	56
<b>Sample Size (n)</b>				700	625	501	452	434	401

Source: Data provided to the author by Solution by Simulation (Nigel Henry)

In respect of Jamaica, I have not found survey data of the kind reported for Trinidad and Tobago and Guyana. However, the Jamaica Justice System Reform Report seemed to embrace contradictory positions on the level of public confidence in the judiciary there. It asserted:

The greatest strength of the Jamaican justice system is the widespread confidence and belief in the integrity and commitment of the *judiciary*. This general perception is validated by the fact that there has been only one charge of judicial corruption in a generation and that charge led to a successful conviction.<sup>11</sup> (my emphasis)

<sup>10</sup> Ryan, Selwyn (2001, 205 and footnote #30)

<sup>11</sup> Jamaica Justice System Reform Task Force, Final Report, June 2007 (para. 31)

Yet the same Report later states:

One of the main consequences of the problems of access and delay has been a decrease in public confidence in the justice system. It is clear that there is public distrust about the *courts*. (para. 46) (my emphasis)

Confidence has also been eroded because of the frustration with the proposed reforms that have not been fully implemented and due to the failure of successive governments to prioritise funding for justice reform. This experience has resulted in cynicism and distrust on the part of many stakeholders and some members of the public. (para. 48)

The Report cites "lack of public confidence in the system" as one of the major problems. The Jamaica Justice Reform Report does not indicate how it arrived at the conclusions it reports.

It is arguable that these data are not necessarily irreconcilable. Some questions relate to perceptions of the 'courts'; some about perceptions of the 'judiciary'. The pollsters ask about confidence in the 'judicial system'. It is possible that in the minds of the respondents, the 'judicial system' includes the Police, the Office of the DPP, the Courts (Magistrates and High Court) and the Prisons. Perception of judges and the higher Judiciary may be conflated with perceptions of these other actors in the system which dispense justice.

There are some other indicators which might assist us to infer the level of public confidence in the justice system or the judiciary. Indicators such as the World Justice Project Rule of Law Index or the Global Competitiveness Index are developed by administering questionnaires to ordinary citizens and/or to selected respondents such as lawyers or businessmen.

The World Justice Project Rule of Law Index provides a ranking of countries in respect of several aspects of the 'rule of law' – Constraint on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice and Criminal Justice. Each of these aspects is comprised of several components. The Corruption aspect assesses corruption in the Judiciary. Table 2 summarises the overall results for Caribbean countries as well as the United Kingdom (UK), together with the judicial corruption score for each territory.

	Jamaica	Barbados	Guyana	Trinidad & Tobago	St Lucia	St Vincent	UK
Overall Score	0.56	0.65	0.50	0.54	0.61	0.62	0.80
Absence of Corruption in Judiciary	0.83	0.88	0.61	0.74	0.87	0.83	0.96
Civil Justice	0.51	0.65	0.53	0.58	0.66	0.61	0.73
Criminal Justice	0.50	0.58	0.38	0.35	0.57	0.60	0.75
Sample	401	513	527	1006	500	500	1056
Source: World Justice Project, Rule of Law Index 2019 downloaded on 25/09/2019 at <a href="https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019">https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019</a> ; surveys were done in 2018							

The World Economic Forum's Global Competitiveness Report queries two variables under the 'Institutions' pillar which touch on public confidence in the Judiciary – Judicial Independence and Efficiency of Legal Framework in Settling Disputes. These data are available only for Trinidad and Tobago and Jamaica for 2018 and these are compared with the United Kingdom.

Table 3 Judicial Performance Indicators for Competitiveness, 2018			
	Jamaica	Trinidad & Tobago	UK
Judicial Independence			
Score	4.8	4.5	6.3
Global Rank	38/137	47/137	6/137
Efficiency of Legal Framework in Settling Disputes			
Score	3.5	3.0	5.6
Global Rank	72/137	104/137	6/137

Source: World Economic Forum, Global Competitiveness Report, 2018 downloaded on 25/09/2019 at <http://reports.weforum.org/global-competitiveness-report-2018/>  
 In the recently released 2019 Global Competitiveness Report: Trinidad and Tobago's Judicial Independence score has declined to 4.1 and its global rank to 58/141; Jamaica's Judicial Independence score declined to 4.5 and its global rank to 49/141; Barbados's Judicial Independence score is 4.2 and its global rank 52/141

Finally, we note that some commentators have claimed that the results of the recent referenda in Grenada and Antigua and Barbuda, which both rejected accession to the CCJ as the final appellate court for those countries, are indicators of the lack of public confidence in the judiciary in the region. President Saunders of the CCJ also seems to be of that view, noting:

For reasons that I would prefer Caribbean historians and social scientists and psychologists to elaborate, there is a vast chasm between popular perception and reality as to how ethical Caribbean judges are. I believe that the recent referenda results in Grenada and Antigua & Barbuda about accession to the CCJ confirm the existence of that chasm. Curiously, in the Dutch Caribbean, Dutch judges are not held in the same negative light by the local population. In Suriname and Curacao, the general public have a high regard for their judges. But unfortunately, as far as judicial ethics are concerned, we do have a problem in the English-speaking Caribbean.<sup>12</sup>

Martin Daly SC, a former member of the Regional Judicial and Legal Service Commission" observed:

Principally however, the rejection of the CCJ is a function of low public trust and confidence in our institutions and deep-seated fear of relationships and hobnobbing with regional politicians.<sup>13</sup>

There are methodological difficulties with some of the data and analyses that we do have on public confidence in the Judiciaries in the region. Such data as we have do not, I think, allow us to conclude that public confidence in our Judiciaries is high. The data might admit the tentative conclusion that while the judicial system is not generally perceived to be corrupt, it is perceived to be inefficient.

#### ISSUES GIVING RISE TO CONCERNS ABOUT JUDICIAL CONDUCT

##### Delay

The problem of delay has two aspects. There is the problem of the length of the judicial proceedings themselves where the system is unable to strike a reasonable balance between procedural fairness and efficiency. These delays are not always or even usually of the judges' making. Claimants and lawyers contribute significantly to the problem. Administrative support for the Judiciary may be weak or

<sup>12</sup> Adrian Saunders (2018, 4); a similar view was expressed by the most recent appointee to the CCJ, Peter Jamadar Trinidad Guardian July 6<sup>th</sup> 2019 news item entitled: Jamadar: Lack of Trust stalls CCJ as T&T's final court.

<sup>13</sup> Martin Daly, Two More Setbacks for the CCJ, *Sunday Express*, 18<sup>th</sup> November 2018

absent. It is astonishing, but nonetheless true, that courts in Trinidad and Tobago, supposedly the wealthiest country in the region, are sometimes non-functional because of lack of air-conditioning, water, faulty sewage system, or some structural problem.

The second aspect of delay has to do with delays in giving judgments. Given too quickly, and there are concerns that the judge had made up her mind long before she has heard the submissions. But when the delivery of judgments stretches into years, claimants, or defendants die before delivery or are otherwise prejudiced, the conduct of the judge is unacceptable and indeed inexcusable.<sup>14</sup>

## Bias

Impartiality is recognised as the bedrock principle of Justice and hence the fundamental principle underlying judicial conduct. Lord Bingham wrote:

...a judge must free himself of prejudice and partiality and so conduct himself in court and out of it, as to give no ground for doubting his ability and willingness to decide cases before him solely on their legal and factual merits as they appear to him in the exercise of an objective, independent and impartial judgment.<sup>15</sup>

There are several sources of bias, including the idea of 'apparent bias' from the perspective of the hypothetical fair-minded observer as developed in *Porter v Magill*. These sources have been extensively discussed in the literature and in the reported cases.<sup>16</sup> In summary, these sources of bias are: Conflict of Interest; Political Influence; Issue Bias and Elite Bias.

Conflict of Interest arises where the judge or a relative may have a pecuniary interest in the matter, or as in the famous *Pinochet* case, even a non-pecuniary interest, where Lord Hoffman was associated with Amnesty International which had an interest as an intervener in the extradition of Pinochet. Stephen Sedley has documented instances of conflict of interest of judicial officers on both sides of the Atlantic.<sup>17</sup>

Political Influence is seen to be particularly pernicious as it trenches directly on judicial independence. Influence is usually assessed to run from the Executive to the Judiciary so that the Executive gets its way in litigation. This may be important for example, in the case of election petitions. Judges are seen to get something in return, promotions where these are the gift of the Executive, or honours. The relationship between the Judiciary and the Executive may be complicated and nuanced. The Chief Justice or Chancellor has to work with the Executive to secure funding for courts and for remuneration or pensions of judicial officers and may be asked to work collaboratively with the Executive on the implementation of the provisions of legislation. It may be the case that the public generally mistakes these interactions for instances of or opportunities for bias. On the other hand, judges are sensitive to attempts to oust the jurisdiction of the courts or executive interference in matters of say, sentencing, which the Judiciary regards as its prerogative within the wide discretionary limits it enjoys.

Issue Bias is different from Political Bias in that it relates to any issue, not just partisan politics, which might influence the judge's disposition of a matter. She might be personally concerned about the

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<sup>14</sup> The problem of delay and growing backlog has been acknowledged in all the discussions on judicial reform. See Jamaican Justice System Reform Task Force, June 2007.

<sup>15</sup> Thomas Bingham, Judicial Ethics, in *The Business of Judging* (2000, 74)

<sup>16</sup> See Shetreet and Turenne (2013) Chap. 5.

<sup>17</sup> Stephen Sedley (2011).

environment, or gender equality, or the exploitation of children. She might be an avid investor in the stock market, or a keen supporter of the rights of workers.

Elite Bias may be seen for example, in the fact that senior judges in the UK tended to be white males drawn disproportionately from Oxbridge. This was noted as a possible source of unconscious bias since the political elite in the UK tended to be drawn from similar backgrounds and would likely share the same worldview.<sup>18</sup> Lord Neuberger observed:

...judges may not appear to be neutral because they will almost always be seen, normally rightly, to come from a more privileged sector of society, in both economic and educational terms, compared with the many of the parties, witnesses, jurors in court. ... Thus a white male public school judge presiding in a trial of an unemployed traveler from Eastern Europe accused of assaulting or robbing a white female public school woman will, I hope, always be unbiased.<sup>19</sup>

Lord Neuberger's hypothetical brings to mind the case of Terrence Calix, a 'homeless man', who was awarded paltry damages by the Trinidad and Tobago High Court for malicious prosecution which was subsequently corrected by the Privy Council.<sup>20</sup>

Ethnic Bias may be particularly relevant in the context of the Commonwealth Caribbean, and other plural societies such as Mauritius and Fiji. Ethnic bias refers to the notion that a judge of a particular ethnicity would be influenced by the ethnicity of the claimants before her. She would be more favorably disposed to a co-ethnic and less favorably disposed to a litigant or prisoner from another ethnic group. In these societies, stratified by race and class, ethnic bias may be bound up with class or elite bias.

The possibility of such bias is explicitly recognised in the various Guidelines on Judicial Conduct where judges are enjoined in the words of the Bangalore Principles:

A judge shall be aware of, and understand, diversity in society and differences arising from different sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

There is a good deal of academic research on ethnic bias in the judicial system in the United Kingdom<sup>21</sup>, the United States<sup>22</sup> and Canada<sup>23</sup>. However, although in plural and multi-racial societies the perception is that there is indeed ethnic bias, and the outcomes suggest that there is, the empirical support for ethnic bias is difficult to establish scientifically. In the Caribbean, I have not been able to identify any empirical studies that have addressed ethnic bias in the Judiciary.

Apart from Delay and Bias, there are three other issues which could impact public confidence in the judicial system. These are: Opinion Conflict, Internal Administrative Conflict, and Personal Conduct.

Internal Administrative Conflict and Opinion Conflict: the former refers to non-judicial matters relating for example to compensation, accommodation, transfers and other essentially human

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<sup>18</sup> J.A.G Griffith, *The Politics of the Judiciary*, Fontana Press, 5<sup>th</sup> Edition, 1997.

<sup>19</sup> Lord Neuberger, Fairness in the courts: the best we can do, Address to the Criminal Justice Alliance, April 2015.

<sup>20</sup> See *Terrence Calix v Attorney General* [2103] UKPC 15 and Terrence Farrell, *Where Justice Lives: The Calix Case*, Trinidad Express June 22, 2013.

<sup>21</sup> UK Judicial College, *Equal Treatment Bench Book* (2018); Lammy (2016)

<sup>22</sup> Rachlinski, Jeffrey et. al (2008-2009); Bielen, S. et. al., (2019)

<sup>23</sup> Selwyn Pieters, (2015)



resource management issues, while the latter refers to differences of judicial opinion on a case. These conflicts become significant when they spill over, by accident or design, into the public domain. It is the 'spilling over' that is the problem as this may undermine the institutional integrity of the Judiciary.

Like any other organization, the Judiciary is unlikely to be comprised of all saints and angels. There will be infighting, jealousies, vaulting ambition, likes and dislikes among the 'brothers and sisters' on the bench. As Lord Hope stated: "...judges are human beings not robots. Human nature being what it is, things happen." But the Judiciary needs to present a unified face to the society it serves, and judges need to be mindful of what they say both on and off the bench. When internal issues leak into the public domain, the public's level of trust and confidence in judges may be eroded.

There have been notable instances of opinion conflict spilling over into the public domain. At the appellate level, there are often dissenting judgments. There is Lord Atkin's famous dissent in *Liversidge* in which he had strong words for the majority. Lord Atkin had said: "...amid the clash of arms the laws are not silent" and warned of judges who "...when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive". Atkin went further to use Alice in Wonderland's character, Humpty Dumpty, to describe the approach to statutory interpretation of the majority. This prompted a public response from Lord Maugham to which Atkin wisely declined to reply.

Personal Conduct refers to the behaviour of a judge outside of court and not directly related to any matter before him. These may concern private activities such as drug-taking, domestic violence, sexual harassment, and so on. In the American theatre, there are many colorful instances cited.<sup>24</sup> The notion that a judge's private life should become grounds for a finding of misbehaviour might seem far-fetched. After all, judges are people too and entitled to a private life, even if that conduct falls short of or is different from the mainstream community standards. But Thomas (1988, 12) argued that the relevant test is whether or not the judge's conduct adversely affects public confidence, writing:

A judge's duties go beyond his work in and around the courts and reach into his private life and dealings. The suggestion that duty is no higher than that of abstaining from committing offences is a heresy and needs to be laid to rest. ...promiscuity is not a criminal offence, but a judge who continually flouted community standards of sexual morality to the extent that it became a public scandal may well reach the position that members of the public would have little confidence in his sitting in judgment on them. In such a situation misconduct or misbehaviour could be found against the judge.

Thomas J. was writing in 1988 and community standards have since evolved and what might have scandalized a community in the 1980s might provoke little adverse comment today. On the other hand, standards in respect of behaviour such as sexual harassment have clearly become more strict. J.O. Wilson (1980, 4) also commented on a judge's conduct in public, writing:

If a judge behaves badly in public, if he is crude, arrogant, unmannerly, intemperate, the ordinary observer might well think, "What manner of justice can we expect from that man?" From this may follow not only distrust of the work of that particular judge but some loss of faith in the whole judiciary.

However, the question remains: What threshold of personal misbehaviour must be reached to trigger removal from office? The Privy Council in *Gibraltar*, perhaps the definitive modern case on judicial

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<sup>24</sup> In recent memory we have the contentious Senate confirmation hearings of Justice Clarence Thomas accused of sexual harassment by Anita Hill, Robert Bork, and Brett Kavanaugh.

misbehaviour, wrestled somewhat inconclusively with the issue of a judge's character as the basis for his removal.

### THE RISE OF GOVERNANCE OF JUDICIAL CONDUCT

Setting aside the statement in the Magna Carta (1215), to wit: "To none will we sell, to none deny or delay right or justice", the academic purist or historian of Law might argue that probably the first Code or set of guidelines for judicial conduct was penned by Sir Matthew Hale in 1660 when he was appointed to the Court of Exchequer. That historian would also point out that Hale wrote out his 18 rules for himself and most of his writings were not published until after his death. Hale did not intend to promulgate a Code for the Judiciary as a whole.

In the modern era, we find detailed Codes for Judges in the United States at both federal and state level from the 1970s. But the United States is a special case. Their Code on Judicial Conduct is quite detailed and prescriptive.<sup>25</sup> The explanation for the early promulgation of the US Codes is that its systems for the appointment of judges is of course quite different from countries in the English Commonwealth tradition or the European civil law tradition. Some judges in the US run for office and are elected. At the lower levels of the judicial system there, the qualifications needed to become a judge are low. At the higher federal and US Supreme Court level, they must go through a process of Senate confirmation which is public, intrusive, and highly partisan-political.

In contrast with the American approach of congressional oversight and scrutiny and the codification of conduct, the English approach was benign. The approach was described thus:

One attitude toward judicial ethics is that the less definition attempted, the better; that if you pick judges who know how to behave, then all will be well — and if you do not, no amount of analysis of ethical problems will help.<sup>26</sup>

Given that the key was to pick the right judges, Lord Bingham (2000, 69) noted:

...the practice of appointing judges from a small pool of candidates sharing a common professional background and known personally or by professional repute to those making and advising on appointments has enabled much to be taken for granted.

The book, *Judicial Ethics in Australia*, written in 1988 by Justice J. B. Thomas is sometimes credited with giving impetus to judicial conduct governance in the Commonwealth. However, in Canada, *A Book for Judges* by J.O Wilson was published even earlier in 1980 and the Canadians might well lay claim. Thomas's book was prompted by incidents involving Australian judges which involved the laying of criminal charges and then the setting up of a royal commission. Thomas thought that the incidents were ethical rather than criminal and argued the need for a Code covering areas of possible misconduct.

Given that there was no sudden increase in judicial misconduct which caused alarm, there are perhaps three explanations for the rise of judicial conduct governance in the Commonwealth from the 1980s. The first is the abandonment of the Kilmuir rules. The Kilmuir Rules promulgated in 1955 by the then Lord Chancellor, forbade judges from speaking to the media outside the courtroom. It did not apply to retired judges and did not prohibit public lectures on existing law or proposals for law reform.

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<sup>25</sup> The Guidelines adopted in most Commonwealth jurisdictions are not 'codes' and are merely persuasive of good conduct, with much of the interpretation of what constitutes good conduct in any particular case being left to the individual judge.

<sup>26</sup> Justice Pincus in Foreword to Thomas, 1980, p. v.

But there were some judges, including Lord Denning, who did give press interviews. It was the self-same Francis Bacon who had written in his *Essay on Judicature*: "...an overspeaking judge is no well-tuned cymbal". And it was said, reportedly by Lord Kilmuir: "So long as a judge keeps silent, his reputation for wisdom and impartiality remains unassailable; but every utterance which he makes in public, except in the performance of his judicial duties, must necessarily bring him within the focus of criticism."<sup>27</sup>

The Kilmuir Rules were abolished by Lord Mackay, the Lord Chancellor, in 1987, leaving engagement with the public to the discretion of the individual judge.<sup>28</sup> Judges were now explicitly self-regulating in interfacing with the media. They were expected to be circumspect, but not distant from the public they served. The zeitgeist, reflected in 24 hour television, multiple newspapers and, from the 1990s, the Internet and then social media, encouraged public officials, including judges, to explain themselves.<sup>29</sup>

The second explanation is perhaps what Jonathan Sumption, former justice of the UK Supreme Court, refers to as "the expanding empire of law".<sup>30</sup> Sumption argues that custom and convention which regulated life up to the 19<sup>th</sup> century, and when law regulated a "very narrow range of human problems", has given way to the contemporary situation where law penetrates "every corner of human life" from the welfare of children, the world of employment, human rights, administrative law governing most aspects of the relationship between citizen and government, and as we have seen most recently, the exercise of certain prerogative powers by the Prime Minister of the United Kingdom in respect of the prorogation of Parliament. Decisions which would have been left to families, to doctors, and to politicians are now placed before the judges for adjudication and decision. These judges though, are unelected and unaccountable.

The third explanation for the rise of judicial conduct governance is the global push for greater transparency and accountability in Business and in Government. It is possible to discern the rise of the movement for transparency and accountability from around the 1980s. In the business world, there were a number of high-profile corporate scandals including BCCI, Worldcom, and Enron which triggered not only lengthy litigation, but also, at first, a self-regulatory and then a regulatory response. The Cadbury Committee report (1992) gave prominence to the role of the board and the role of the auditors. This was followed by the Higgs Review (2002) and the Combined Code (2003). In the United States, the Sarbanes-Oxley legislation was a tough regulatory response to the corporate excesses in that country. Corporate Governance codes were developed in countries around the world. The Caribbean was not immune to corporate scandal with the collapse of several financial institutions in Jamaica in the late 1990s and the Trinidad-based CL Financial in 2009.

The Nolan Committee on Standards in Public Life reported in 1995 and articulated seven principles of public life:

- Selflessness – Holders of public office should act solely in terms of the public interest. They should not do so in order to gain financial or other benefits for themselves, their family or their friends.
- Integrity – Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might seek to influence them in the performance of their official duties.

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<sup>27</sup> A.W. Bradley, *Judges and the Media- the Kilmuir Rules*; and also, Lord Woolf, below, 31.

<sup>28</sup> Shetreet and Turenne, 2013, 361.

<sup>29</sup> The relationship between the judiciary and the media continues to provoke comment. See Lord Woolf, *Should the Media and the Judiciary be on Speaking Terms?* Lecture at University College, Dublin, 2003.

<sup>30</sup> Jonathan Sumption, *Trials of the State: Law and the Decline of Politics*, Profile Books, 2019.

- Objectivity – In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.
- Accountability – Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.
- Openness – Holders of public office should be as open as possible about all the decisions and actions they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.
- Honesty – Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.
- Leadership – Holders of public office should promote and support these principles by leadership and example.

The Nolan Committee did not include judicial officers within the ambit of holders of public office, but it is evident that the principles overlap to a significant degree with the principles of judicial conduct which were being articulated around the same time.

Governments have been made more accountable and their decision-making more transparent through the mechanisms of judicial review and Freedom of Information legislation. While some argue that judicial review is of long-standing, the fact is that there was a quantum leap in judicial oversight of executive action following the Independence constitutions and legislation formalizing and expanding the scope of judicial review (Barbados 1980, Trinidad 2000). That led to speculation about ‘judicial adventurism’ or ‘judicial activism’ on the part of the local courts.<sup>31</sup> Similarly, FOIA requests sometimes bring the courts into play where public authorities are not forthcoming with the requested information.

In summary, over the last four decades there has been a growing impetus toward greater accountability on the part of those who wield power, whether in business, in politics or in the judiciary. The judicial system is often used to bring businessmen and politicians to account. However, judges themselves have had to be made more accountable, but without trenching on judicial independence. The mechanism of judicial conduct guidelines was preferred, buttressed in some instances by legislation guaranteeing judicial independence but prescribing carefully the ways in which judges might be removed.<sup>32</sup>

In the English-speaking Caribbean those same global forces which were encouraging accountability were also at play. The Commonwealth Caribbean judiciaries promulgated their own Guidelines or Codes of Judicial Conduct which are in essential respects virtually identical with those published by the judiciaries in the developed Commonwealth countries and with the Bangalore Principles, with its six values — Judicial Independence, Integrity, Impartiality, Propriety, Equality and Diligence— providing the starting point for many of the Guidelines.

However, the drive for accountability was not always received openly and trustingly by local judges who viewed the efforts to make them more accountable with suspicion of the motivations of the Executive and potentially as an attack on judicial independence.

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<sup>31</sup> Michael de la Bastide (2006).

<sup>32</sup> Harrison (2009) and Shetreet and Turenne (2013).

## WHAT ARE OUR SOCIETIES LIKE?

The judicial conduct guidelines for several Commonwealth countries recognise the importance of judges being part of their communities and understanding the people they serve, though there are risks to be weighed in the balance.

The judge administers the law on behalf of the community and therefore unnecessary isolation from the community does not promote wise or just judgments. (Canada Guidelines C.2, 34; Trinidad and Tobago Guidelines, A.2, 29)

Notwithstanding the universal principles of judicial conduct which may be embraced, judicial conduct in the Caribbean, as in any other region, has its own societal, cultural and ethical forces driving it. As I have suggested above, our judges come from our societies and, acknowledged or not, are imbued with our Caribbean culture. So it is important to try to understand what our societies and our cultures are like, that is, what values, attitudes and behaviours our people exhibit.

There are different ways of approaching such an understanding. Our writers and poets — Naipaul, Lamming, Carter, Walcott, Lovelace, and Winkler - have been insightful about us and our behaviours, as have our singers - Marley, Sparrow, Rudder -- and one could explore those insights to describe and to understand our societies.<sup>33</sup>

Another approach is that of the cultural anthropologists and comparative sociologists. What these analysts seek to do is to define certain social and/or cultural characteristics and using survey methods, assess how these characteristics vary across countries. The work of the World Values Survey and Geert Hofstede and his associates are noteworthy because they include Trinidad and Tobago and Jamaica in their sample of countries.

Ronald Inglehart and Christian Welzel developed and propagated the World Values Survey (WVS) which uses a common questionnaire in over 100 countries, poor and rich, big and small, administered in 'waves' since 1981. Wave 6 was completed in 2014 and Wave 7 was started in 2017 and will be completed in 2019. The focus of the WVS studies is to map how values and beliefs change with economic progress and development or 'modernization'. Trinidad and Tobago is the only Commonwealth Caribbean country in Wave 6 and was surveyed in 2010. The sample was 999 persons and addressed over 200 questions to respondents on a range of issues.

The results of the WVS survey suggest that Trinidad and Tobago reflects 'Traditional' values as distinct from 'Secular-Rational' values and while it has progressed beyond 'Survival' values, it remains low in respect of 'Self-Expression' values. Of specific interest for our purposes here, Trinidad and Tobago emerges as a 'low trust' society with 96.3% of respondents indicating that one had to be very careful in dealing with people.

Hofstede and his collaborators, whose research centered on variations in workplace culture, identify six (6) dimensions of national culture. These are: (1) Power Distance (2) Individualism v Collectivism (3) Masculinity v Femininity (4) Uncertainty Avoidance (5) Long Term Orientation v Short Term Normative Orientation and (6) Indulgence v Restraint.

The descriptions of the cultural dimensions are as follows:

'Power Distance' - "the degree to which the less powerful members of a society accept and expect that power is distributed unequally. It assesses how a society handles inequalities among people. People

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<sup>33</sup> See for example Morgan and Youssef (2006) who examine violence through our literature. Rohlehr (2019) has also been insightful in his analysis of Naipaul, Walcott and other writers.

in societies exhibiting a large degree of Power Distance accept a hierarchical order in which everybody has a place and which needs no further justification. In societies with low Power Distance, people strive to equalise the distribution of power and demand justification for inequalities of power.

'Individualism' is a preference for a loosely-knit social framework in which individuals are expected to take care of only themselves and their immediate families whereas Collectivism represents a preference for a tightly-knit framework in society in which individuals can expect their relatives or members of a particular in-group to look after them in exchange for unquestioning loyalty. A society's position on this dimension is reflected in whether people's self-image is defined in terms of "I" or "we."

'Masculinity' represents a preference in society for achievement, heroism, assertiveness, and material rewards for success. Society at large is more competitive. Its opposite, 'Femininity', stands for a preference for cooperation, modesty, caring for the weak and quality of life. Society at large is more consensus-oriented.

'Uncertainty Avoidance' expresses the degree to which the members of a society feel uncomfortable with uncertainty and ambiguity. The fundamental issue here is how a society deals with the fact that the future can never be known: should we try to control the future or just let it happen?

'Long term Orientation' expresses the disposition of the society towards pragmatism, thrift and preparing for the future versus holding on to tradition and viewing change with suspicion.

'Indulgence' allows relatively free gratification of basic and natural human drives related to enjoying life and having fun. Restraint stands for a society that suppresses gratification of needs and regulates it by means of strict social norms.

	Power Distance	Individualism	Masculinity	Uncertainty Avoidance	Long Term Orientation	Indulgence
Trinidad and Tobago	47	16	58	55	13	80
Jamaica	45	39	68	13		
United Kingdom	35	89	66	35	51	69
United States	40	91	62	46	26	68
Norway	31	69	8	50	35	55
Singapore	74	20	48	8	72	46
New Zealand	22	79	58	49	33	75

Source: <https://www.hofstede-insights.com/country/trinidad-and-tobago/> Downloaded September 2019

Based on these attributes, Table 4 indicates what Trinidad and Tobago and Jamaica are like in comparison with other selected countries. The Power Distance score suggests that people in Trinidad and Tobago and Jamaica do not accept hierarchical order without justification and are inclined to be more egalitarian, though these tendencies are not as strong as say the USA or the United Kingdom. Trinidad and Tobago and Jamaica are more 'collectivist', comparable to Singapore, but rather unlike the USA and the UK in this regard. Our societies are also more 'masculine', that is more inclined to be assertive and open to conflict rather than cooperation.

While these global studies do provide some insight, they are inadequate in several respects. They do not speak to the historical circumstances of the societies which engendered the cultural traits or attributes which these societies now evince. They also do not account for the intensity of personal and ethnic or tribal relationships which occur in small societies, nor do they account for differences or variations *within* these societies which could be significant.

In my own attempt at trying to understand West Indian cultural attributes, I have identified eight attributes: Ambivalence and Masquerade; Status, Respect and Respectability; Rules and Authority; Amusement; Risk-taking and Non-possession; Intergenerational Thinking; Corruption and Trickery, and Conflict and Cooperation.<sup>34</sup> Of these eight, I think four are salient in respect of considerations around judicial conduct. These are: Ambivalence and Masquerade, Rules and Authority, Status and Respect, and Conflict and Cooperation.

Ambivalence and Masquerade, and more specifically, Elite Ambivalence

The idea of our ambivalence runs through the work of our writers and is also noted by literary commentators such as Gordon Rohlehr.<sup>35</sup> We are torn between and may move between two standards of behaviour, what might be termed a 'Metropolitan' standard adopted from our British (or French or Dutch) colonial past, and which allows the post-colonial elite to be comfortable with and indeed seek to master Western philosophy, literature, music, and science<sup>36</sup>, and a 'Creole' standard which derives from our survival and thriving in the reality of our local environment, the pragmatic responses of the community to colonial oppression and hypocrisy, and the contestation for political and social dominance within our post-colonial societies. So, for example, the Creole standard approves of Anansi the trickster who is able to defeat the system and the odds and to 'get through' by cunning and trickery, and may openly admire the conman or the person who rebels against authority because that authority is seen to have questionable legitimacy. The Metropolitan standard, for example, values the knowledge and appreciation of European Classical music or Shakespeare as markers of learning and good taste. For lawyers and judges, the Metropolitan standard elevates English jurisprudence and appearance before the Privy Council as markers of success and accomplishment.

In circumstances in which protagonists determine that it is unwise or impolitic to declare their true position or feelings, they may engage in masquerade, that is, project a position or a behaviour which is expedient. Cross-ethnic interactions are prone to masquerade. Because everyone knows that others may engage in masquerade, they tend not to trust what others may say or do as evidence of their real feelings or intentions.

Status and Respect

Our West Indian societies were created strongly hierarchical and have remained so post-Independence. One's position in the hierarchy was largely ascribed by ethnicity, colour and complexion, and then by wealth. In the Caribbean, the idea of an elite, and who is or is not in it, is contested. Some lay claim to their lower-class roots, even as status and privilege are sought and enjoyed.<sup>37</sup> I have argued elsewhere that elite status in the region is conferred more by proximity to political power and less by education and wealth.<sup>38</sup>

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<sup>34</sup> Terrence Farrell (2017)

<sup>35</sup> Gordon Rohlehr (2019)

<sup>36</sup> See Lloyd Best (1967).

<sup>37</sup> Clinton Bernard (2019). Bernard writes of one episode thus: "I also recall one moment of embarrassment when, even though I had already been named as Chief Justice Designate, my wife and I were not given preferred seating at the head table for a dinner at President's House that was held for the Queen of England who was visiting Trinidad and Tobago." (p.88)

<sup>38</sup> Terrence W. Farrell (2017). In his recent address at the opening of the 2019-2020 law term, the Chief Justice Ivor Archie observed: "This job is not about profiling in the media or storming big people party. ...if you are power or status-driven, you could be as bright as you want, you are not [suitable]."

The emergence of a professional class of doctors, lawyers and later, engineers, saw these professions achieve relatively high status through merit, though the highest positions in the status hierarchy are reserved for those who wield political power. High status brought respect and entitlement to honours, to privilege, and access to resources such as bank credit. However, it did not automatically confer legitimacy. While high status also did not confer immunity from prosecution, it could enable the office-holder access to resources which could delay, intimidate prosecutors, or ensure leniency. Noting that some writers view the history of law as the movement from status to contract, Richard Drayton points out:

This tidy liberal teleology does not work in the history of the Caribbean, where despotic forms of contract shaped and overlapped with enduring regimes of status discrimination.<sup>39</sup>

Those whose ethnicity, complexion and lack of wealth consigned them to low status and respect, could at least aspire to 'respectability' so as to mark themselves as distinct from the lowest elements of society.

Rules and Authority -- historically, in our West Indian societies, there were one set of rules for the colonial rulers and another set of rules for the colonial subjects. In the post-colonial period, we do have one formal set of rules ostensibly for everyone. But in reality, for the wealthier, the well-connected, the lighter complexion citizen, informal processes produce results which differ from the results for the man in the street. There is what I have described as 'contingent rule-following' -- the rules may apply, except when the person has high status in the society, or if one of one's co-ethnics or colleagues is involved.<sup>40</sup> The adaptive response of the man in the street in the face of systemic discrimination is to resort to corruption and trickery. The end result is that in our societies, relationships often trump the rules; loyalty to friends, family and co-ethnics is given precedence over following the rules.

Authority is often exercised in a heavy-handed manner and leadership may be autocratic and arrogant. But authority can be ridiculed or challenged, either overtly and aggressively leading to conflict and violence, or passively, which produces resentment and sabotage. Resistance to or the ridiculing of authority may be punished in an exemplary fashion in ways which are disproportionate to the perceived infraction. Further, in our plural societies in the region — Guyana and Trinidad and Tobago, the exercise of authority, whether legitimate or not, may be interpreted first and foremost through a racial lens.

Conflict is normal in societies born in and of violence.<sup>41</sup> Citizens are socialized that they must keep within their section of society. People must not get 'too big for their boots' or hang their hats too high as this may invite others to put them in their place. Punishment is inflicted sometimes in arbitrary fashion, for no reason other than to keep someone, a child or a member of the lower class, in his place. Among the society's elite, conflict is often played out within the courts.

### Institutions vs Culture

It is appropriate here to address the question of 'institutions versus culture'. There is an ongoing debate in the literature on economic development on the role of culture versus the role of institutions in promoting or inhibiting development. Institutions establish rules and processes to ensure that outcomes are consistent with their objectives regardless of who operates the process. The Judiciary

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<sup>39</sup> Richard Drayton, *Whose Constitution? Distinguished Jurist Lecture*, Judicial Education Institute of Trinidad and Tobago, 2016, p. 13

<sup>40</sup> There is for example, a perception that medical doctors are reluctant to testify in court against each other and that the Law Associations are slow to discipline errant lawyers.

<sup>41</sup> See Morgan (2014) and Morgan and Youssef (2006) who unmask the violence of our societies in our literature.



is an institution. It has rules and processes and precedents. So it should not matter who is the judge or magistrate. His race, ethnicity, religion, age or gender ought to be irrelevant. We expect the outcome to be fair and just. For the proponents of the importance of institutions, culture and personal idiosyncrasies ought to be largely irrelevant.

I am more persuaded by the culture theorists for the following reasons. First, institutions usually cater for routine matters, those which are amenable to rule-making. But exceptional matters are dealt with sometimes by unwritten conventions or else, innovatively. Where, as we often do in post-colonial societies, many of our institutions are imported, we may import the institutional 'hardware' but not the 'software'. When the rules fail or are inapplicable, we are unable to resort to conventions or to think innovatively to devise solutions.

Second, we do not check our culture when we enter the doors of our institutions. As Hofstede (2010) remarked:

...institutions follow mental programs and in the way they function they adapt to local culture...A country's values are strongly related to the structure and functioning of its institutions and much less to differences in identity. ...we cannot change the way a people of a country think, feel and act simply by importing foreign institutions.

So although our judicial systems in the region may look very much in terms of structure like that of the United Kingdom, the outcomes in respect of delay, for example, are markedly different. Institutions can and do constrain behaviours in the normal course, but may fail to do so in exceptional circumstances.

Putting it all together

We have a society in which judges and magistrates are more often than not drawn from and, *ex officio*, constitute part of the elite in our societies, that is, their position or office automatically confers high status in what are status-conscious and status-hungry societies. But status and power are open to challenge. As Naipaul observed:

Power was recognised, but dignity was allowed to no one. Every person of eminence was held to be crooked and contemptible. We lived in a society which denied itself heroes.<sup>42</sup>

And Gordon Lewis wrote:

Social pretensions receive short shrift, although that of course does not make them disappear. No social rank, not even that of the Governor, is privileged against sharp comment.<sup>43</sup>

Judges are affected by elite ambivalence. They are torn between the Metropolitan standards of fairness, respect and meritocracy, and the 'Creole' standards of (contingent) deference to power, elite disrespect of the ordinary citizen, and ascription or entitlement based on colour, complexion or class. In societies where status is conferred by proximity to executive power, judges desirous of recognition and status have a problem since such proximity brings their independence and impartiality into question.

Citizens are suspicious of and exhibit low trust in institutions and expect that these institutions -- the Judiciary included -- will be biased against them. Citizens may be rebellious and confrontational or display passive-aggressive behaviour or trickery where power cannot prudently be directly confronted.

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<sup>42</sup> Vidia Naipaul (1962, 43)

<sup>43</sup> Gordon K. Lewis (1968, 12)

## JUDICIAL CONDUCT IN THE CARIBBEAN

The Caribbean, especially Trinidad and Tobago, has produced what appears to be a disproportionate number of the cases involving controversial judicial conduct.<sup>44</sup>

In 1978, Sir Fred Phillips, prophetically called for a Code of Judicial Ethics for Caribbean judges. This was even before Justice Thomas of Australia in 1988 or Justice Wilson of Canada in 1980! Sir Fred (2002, 275) argued:

There can be no doubt that more and more pressure will inevitably be brought to bear on the judicial department in the exercise of its functions in developing countries. The suggestion is not made because of any noticeable change or deterioration in the conduct of judges, but because the pressures of modern life may in time bring about such deterioration.

As the pressures increase, there are bound to be lapses and judges will, no less than the public, find it useful to have such a reminder of the principles which should govern their conduct. Such a Code would in fact be supportive of the provisions in the various Constitutions purporting to proclaim the independence of the judiciary and the absence of political control.

Sir Fred perhaps anticipated that post-Independence the pressures were likely to come from the Executive who would seek to test the malleability of the Judiciary, as had indeed occurred in Ghana and elsewhere in the Commonwealth.<sup>45</sup> Sir Fred's keen insight on the likely effect of "pressure" on judicial conduct among judges in the region is noteworthy and explored later in the cases cited.

### Delay

The courts in the region are notoriously slow, though the record of disposition seems to have been improving. However, there have been instances of egregious delay in giving judgments. In Trinidad and Tobago in *Sookar*, a case which was heard in 2000 and judgment eventually given in 2012, after two of the protagonists had already died, Justice Ricky Rahim had this to say of the failure of a former fellow judge to deliver written judgments:

It is common ground that the state of affairs which existed and in which Justice Myers found himself at the date of demitting office, was highly unsatisfactory and unacceptable having regard to the continuing duty of judges and the judiciary as a whole to ensure that decisions are given in a timely manner so as not to impose injustice on litigants. It also does not augur well for the administration of justice in that such a state of affairs erodes public confidence in the system of justice to which the nation subscribes and in the judiciary as an independent institution.<sup>46</sup>

The Belize case of *Boyce and others v Judicial and Legal Services Commission* [2018] CCJ 23 also concerned the question of "excessive delays" in giving judgment by a judge (Justice Awich) who was elevated to the Court of Appeal. In its judgment, the CCJ pointed out that:<sup>47</sup>

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<sup>44</sup> In stating this I do not intend to minimise or ignore the numerous instances of misbehaviour by judges in other jurisdictions including the United Kingdom. These have been instanced by Shetreet and Turenne (2013).

<sup>45</sup> Selwyn Ryan (2001) documents Prime Minister Eric Williams's delay in appointing a new chief justice after the Black Power and army mutiny events of 1970, eventually passing over the senior judges – Aubrey Fraser, Clement-Phillips and Telford Georges - who had ruled against the State in the mutiny trials, and appointing Isaac Hyatali.

<sup>46</sup> *Sookar v The Attorney General CV 2010-04777* (unreported). Myers had left some 31 judgments outstanding at the date of his resignation.

<sup>47</sup> *Boyce and others v JLSC* [2018] CCJ 23, para. 41. This judgment is important for its excellent discussion of 'misbehaviour' as one of the reasons for removal from office.

The public, quite understandably and reasonably, has certain expectations of the qualities to be exhibited by all judges, whatever the tier of the judicial ladder on which the judge sits. Behaviour that diminishes public confidence, if it is sufficiently serious, cannot be ignored and the slate wiped clean by a mere promotion.

In Trinidad and Tobago, one of the current matters relating to judicial conduct concerns the elevation of a former Chief Magistrate to the High Court having left behind a large number of unfinished cases in the magistracy, most of which have had to be tried de novo.

Contempt of (the) Court?

I have taken note of several Contempt of Court cases which sometimes instance improper behaviour on the part of judges and tell us something about the attitudes in society toward judges as part of the society's elite. The cases I cite here are *Ambard*, *Chokolingo* and *Maharaj*.

*Ambard* (Privy Council Appeal No. 46 of 1935) involved a journalist and the case is famous for the statement therein:

...no wrong is committed by any member of the public who exercised the ordinary right of criticising in good faith in private or in public the public act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.

These words have been cited in numerous cases in the Commonwealth Caribbean where either the courts have been perceived as seeking to 'gag' the media or used by commentators who have challenged the state of the administration of justice.

What I think is significant is that just preceding this statement, the Privy Council, which comprised Lords Atkin and Maugham, noting the importance of taking local conditions into account, cited apparently without any hint of disapproval, the statement by Lord Morris in an earlier West Indian case, *McLeod v St Aubyn* (Privy Council Appeal, July 1899):

Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, *consisting principally of coloured populations*, the enforcement in proper cases of committal for contempt of Court for attacks on the court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court. (my emphasis)

In *McLeod*, a St Vincent case, the acting Chief Justice St Aubyn was described as a 'briefless barrister' who would 'nod and wink' at counsel, cross-examine witnesses, and display his displeasure at the verdicts of the jury. The administration of justice in St Vincent was described in the article as "rotten and corrupt".

Is it that colonial judges were hyper-sensitive to criticism where such criticism emanated from the 'coloured' sections of the population? Or did they think that citizens of non-white colonies would show disrespect for the Court? It would be useful to know the ethnicities of those two successful appellants (*Ambard* and *McLeod*) against contempt of court orders by colonial judges.

The Chokolingo case, which occurs soon after Independence, also involved a journalist, Patrick Chokolingo, who penned a 'short story' entitled *A Judge's Wife*. The *Bomb* newspaper which Chokolingo edited was well-known for its exposes and attacking the society's elite and was very popular with the population at large.<sup>48</sup> It was, on the facts, scandalous even by today's standards and a clear case of disrespect for the Judiciary. What is significant about the Chokolingo case is that the contempt was not in the face of the court but contained in a weekly tabloid popular among the masses, and the suit was brought not by any judge (the impugned newspaper 'short story' did not name any judge at all but alleged misconduct and bribery) but by the Law Society which felt impelled to rally to the defence of the administration of justice. It is arguable that the action taken was as much about inflicting punishment for ridiculing the elite as for the defence of the administration of justice. The Law Society clearly felt that it could not leave the scandalous statement to the court of public opinion as advised in *Ambard*, but there had to be 'enforcement' as urged by Lord Morris 70 years earlier.<sup>49</sup>

The *Ramesh Lawrence Maharaj* contempt case ([1976] UKPC 22) was in my view a clear instance of judicial misconduct.<sup>50</sup> Maharaj, then a young barrister, was representing several clients before the judge (Justice Sonny Maharaj). Maharaj was unavailable when the matters were called and in one instance the judge summoned Maharaj's wife also a barrister and demanded that she represent the client though she had no instructions to do so, dismissing her requests for an adjournment. The Privy Council stated: "Their Lordships doubt whether [Maharaj's] clients left Court that day without feeling that they had received something less than justice". And further: "...a judge who gives judgment against a party without giving him a proper opportunity of putting forward his own case could be regarded as acting unjudicially".

Maharaj challenged the conduct of the judge and in the words of the Privy Council "...tactlessly and *no doubt* discourteously" asked the judge to disqualify himself for acting unjudicially. The matter escalated. The judge, incorrectly, interpreted Maharaj's request for his recusal as an accusation of corruption or dishonesty and, refusing Maharaj's request for representation when cited for contempt, committed him to seven days simple imprisonment.<sup>51</sup>

## Bias

*Rees v Crane* is the case which defines how a commission ought to proceed in initiating the removal of a judge. What emerged from the case was that a set of experienced senior judges, including the then Chief Justice, did not accord Justice Crane basic natural justice. The Privy Council, in agreement with the Court of Appeal, declared that the Chief Justice's suspension of Crane, which could only be done in accordance with the provisions of the Constitution, was unlawful and ultra vires his powers relating to the administrative arrangements of the courts. The Court of Appeal had been divided on the question of bias. The Privy Council judgment (p.18) noted that there was an allegation of personal animosity between Crane and the Chief Justice:

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<sup>48</sup> This tradition of weekly tabloid journalism has continued unabated in Trinidad and Tobago.

<sup>49</sup> It is ironic that 35 years later the Chief Justice of Trinidad and Tobago would challenge the Law Association all the way to the Privy Council on its bona fides in seeking to uphold the administration of justice! This I suspect reflects the fracturing of elite solidarity in the post-Independence period when membership of the elite has become politicized.

<sup>50</sup> The story as well as the judgments are documented in Marcel Berlins, *Barrister Behind Bars*, Key Caribbean, Port of Spain, 1979.

<sup>51</sup> Lord Salmon's judgment while finding for Maharaj, describes his conduct as 'tactless' and 'no doubt discourteous' but curiously had no words of censure for the judge implying that he was possessed of 'an excess of zeal for disposing of his list'.

There is certainly evidence of an acrimonious relationship between the two men and if the respondent's account (which was not challenged or answered) is accepted, the Chief Justice showed from time to time between 1986 and 1990 hostility towards the respondent.

However, the Privy Council discounted the possibility of bias on the part of the Commission given their 'professional backgrounds' and also discounted the possibility that they were unduly influenced by the Chief Justice as chairman of the Commission. On weighing the matter therefore, the Privy Council held that the claim of bias was not sustained.<sup>52</sup>

The significance of the *Rees v Crane* affair is that the public would be entitled to wonder: if judges can fall into the basic error of unfairness in respect of a process involving fellow judges, due it would seem to emotion, how could they adjudicate fairly in a society characterised by class and ethnic bias and unfairness?

### Political Bias

Actual instances of political bias are difficult to identify and almost impossible to prove. In Trinidad and Tobago, the ethnicity of a judge may influence the perception of bias in some sections of the community and there remains a perception that 'forum shopping' is possible.

There have been many election petition or election-related challenges, most recently in St. Kitts and Nevis and Guyana. The Guyana No Confidence/Election controversy (which is ongoing at the time of writing) has seen speculation on the possible bias of the Caribbean Court of Justice by certain commentators in the media.

The public's perception that judges may be politically aligned has been given credence over the years by movements from the Executive or Legislature to the Judiciary, and vice versa. In Barbados, Sir David Simmons had been an MP and served as Attorney General before being appointed Chief Justice in 2002. In Jamaica, Carl Rattray was a former MP and Attorney General and subsequently became President of the Court of Appeal. In the case of *Panton v Attorney General*, [2001] UKPC 20, the appellants claimed that they did not have the benefit of an impartial tribunal since Rattray had been the Attorney General who had certified to the Governor General that the Financial Institutions Act was constitutional, but had then come to adjudicate on that very point in their matter before the Court of Appeal.<sup>53</sup> In Trinidad and Tobago, Justice Gillian Lucky, a former MP, was recently appointed to the bench, while Justice Herbert Volney resigned from the bench to enter politics only a few days later, then became an MP and Minister of Justice after the general election.

The possibility of political influence was raised with the decision to award 'silk' to three sitting judges of the Trinidad and Tobago Court of Appeal, including the Chief Justice. The award of silk (Senior Counsel) is under the current arrangements, a gift of the Prime Minister.<sup>54</sup> The judges returned the awards to the Government after considerable public outcry. The essence of the public objection was that this could be seen to compromise judicial independence.<sup>55</sup> The subornation of the Judiciary can

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<sup>52</sup> It is interesting to note that former Chief Justice Clinton Bernard in his recently published autobiography *Beyond the Bridge* makes no mention whatsoever of the Crane matter.

<sup>53</sup> The Rattray case is similar to the case of Scottish judge Lord Hardie cited by Lord Hope (2010, 9). Lord Hope noted: "It was held that there was a risk of apparent bias where a judge was called upon to rule judicially on legislation which he had drafted or promoted during the parliamentary process. Lord Hardie had committed himself to a view on the very point that was raised in the appeal. He ought not to have sat on the case and the decision of the court on which he was a member was vitiated." In *Panton*, the Privy Council found that there was no bias.

<sup>54</sup> The Law Association of Trinidad and Tobago has made comprehensive recommendations for the reform of the award of silk. See Law Association of Trinidad and Tobago: Report of the 29<sup>th</sup> Council on the Appointment of Senior Counsel "The Silk Report", August 2015.

<sup>55</sup> See Terrence Farrell, Sackcloth and Silk *Express* January 2012.

be achieved in different ways including flattery and pandering to a judge's desire for recognition and status.

#### Internal Administrative and Opinion Conflict

I am not aware of instances of opinion conflict which have spilled over into the public domain. However, in Trinidad and Tobago, administrative conflict between the Executive and the Judiciary and internally within the Judiciary itself have garnered public attention. Chief Justice Michael de la Bastide in his 1999 Law Term opening address took issue in the strongest terms with what he perceived to be an attack on the independence of the Judiciary by the Attorney General, Ramesh Lawrence Maharaj. Ostensibly, the conflict had to do with the AG's insistence that the Judiciary needed to be 'accountable', that his office was the conduit between the Judiciary and the Executive, and specifically his specific approval was required for judicial travel even though expenditure for such had already been appropriated by Parliament.

The conflict also involved the Law Association some of whose members at the time, including its president Karl Hudson-Phillips, were objecting to the implementation of the new Civil Proceedings Rules promoted by the Chief Justice and who sought the help of the AG in delaying this.<sup>56</sup>

De la Bastide interpreted the attack from the Attorney-General and the President of the Law Association personally, stating:

It would be foolish of me not to recognise, and cowardly not to acknowledge, that I am the target of much, if not all, of this. I assure you it is not a comfortable position, to be the target of a combination of such powerful forces. But I give you this assurance that I will not turn and run. ... These are not just my policies, they are my principles and I will descend into the arena with anyone who attacks them.<sup>57</sup>

So heated was the conflict that the Law Association appointed Telford Georges to report on whether judicial independence was indeed threatened. Georges's report was largely supportive of the position of the Judiciary though he found "...no adequate evidence to support the charge of an attempt to drive [the Chief Justice] from the Bench eliciting the response that he would not be so driven". Georges also described as "immoderate" the language of the Chief Justice in his speech at the opening of the law term.

The Government for its part essentially ignored the Georges one-man committee and instituted a Commission of Inquiry in 2000 led by Lord Mackay, a former Lord Chancellor.<sup>58</sup> The Mackay Report disposed of the conflict in two paragraphs, concluding that the Attorney General had not been attempting to undermine the independence of the Judiciary and noting that: "In the heat of disputes things are sometimes said which are much better unsaid and on both sides of this dispute it appears to us that this has happened. Inflammatory remarks on one side are apt to provoke extreme reaction on the other." (p.63)

In recent times matters internal to the administration of the judicial system in Trinidad and Tobago have been ventilated in public. These concern issues such as sabbatical leave for judges, transfer of judges, and even parking facilities! Email exchanges have been leaked to the media and

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<sup>56</sup> The three main protagonists in this conflict – Michael de la Bastide, Karl Hudson-Phillips and Ramesh Lawrence Maharaj – were among the leading barristers in the country, and of different ethnicities. In addition, Hudson-Phillips and Maharaj were partisan political figures as well; the former had been AG under the PNM and then leader of his own political party and the latter AG under the UNC government. Ryan (2001) gives a detailed account of this conflict.

<sup>57</sup> De la Bastide, Law Term Opening Speech, 1999.

<sup>58</sup> Report of the Commission Appointed to Enquire into and Report and Make Recommendations on the Machinery for the Administration of Justice in the Republic of Trinidad and Tobago (Mackay Report), 2000.

commentators have weighed in on these matters. Statements by the Chief Justice have been openly challenged by puisne judges. None of this conduces to building public confidence in the Judiciary.

### Personal Conduct

There have been few instances in the Caribbean of personal conduct of judges or magistrates that were found to be criminal. But there have been several high-profile instances or allegations of conduct possibly amounting to misbehaviour and perhaps warranting censure or removal from office.

Belize has produced two instances of alleged judicial misbehaviour which progressed all the way to the Privy Council and the CCJ. The Awich case has already been cited under the rubric of Delay. The George Meerabux case ([2005] UKPC 12) reached the Privy Council because Meerabux claimed that the procedure which secured his removal from office as a judge was flawed. He had been removed because he allegedly used his office corruptly for private gain and “engaged in a conduct that is immoral and reprehensible” (para. 3)

The case of Chief Justice Satnarine Sharma in Trinidad and Tobago is notable for its messiness involving allegations by the Chief Magistrate that the Chief Justice had sought to pervert the course of justice by interfering in the trial of the former Prime Minister for a breach of the Integrity in Public Life Act. The criminal trial of the Chief Justice was aborted by the Chief Magistrate’s refusal to testify and a tribunal was appointed under section 137(3) of the Constitution at the instance of the Prime Minister.<sup>59</sup>

The tribunal was chaired by Lord Mustill and included Sir Vincent Floissac, the St Lucian jurist, and Dennis Morrison QC, now President of the Jamaica Court of Appeal. The tribunal, which included those two West Indians who would certainly have a deep understanding of our societies, was clearly shocked by the events, writing:

The picture presented to this Tribunal almost defies belief. ...The air was full of rumour, innuendo and gossip, around and across deep political (*and, we are forced to say, ethnic*) divides. At least within this narrow field of view, the concept of the separation of powers seems to have been ignored. We need not go on. The picture is “troubling” indeed, both for the Tribunal and for the peoples of Trinidad and Tobago. (my emphasis)

The tribunal found that the conduct of the Chief Justice “was not without blemish” but found however, that on consideration of the evidence, there was no basis for a recommendation for the removal of the Chief Justice, who was reinstated.

A mere ten years after the Sharma matter, the Judiciary in Trinidad and Tobago has once more descended into controversy and again involves allegations around the personal conduct of the Chief Justice. The statement quoted above from the Mustill Tribunal is very appropriate to the situation today. What is perhaps worse on this occasion is that sitting judges have commented on the ongoing saga in the media. It is therefore not surprising that public confidence in the Judiciary in Trinidad and Tobago is registering at its lowest level since the annual polling began.

### Conclusions

In this region, we have been witness to what seem to be multiple instances of questionable judicial conduct which may be having a cumulative negative impact on public confidence in the Judiciary.

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<sup>59</sup> See In the Matter of an Enquiry Under Section 137 of the Constitution of Trinidad and Tobago, Report of Tribunal to His Excellency the President of the Republic of Trinidad and Tobago, December 2007.

Some of the pressures which promoted such conduct have emanated from the Executive, but equally, in many instances, were self-inflicted. Consistently appropriate conduct, especially among the highest judicial office holders, is required to build and sustain public confidence in judges and in the judicial system. That confidence is initially low because of the historical circumstances within which our societies were created, characterised by inequality, ascription within status hierarchies, arbitrary punishment as the means of maintaining order, with a concomitant lack of conflict management skills which need to be learned and inculcated from an early age. Our judges are born into and socialized in these societies and must ‘unlearn’ the behaviours which typify the elite of which they are inescapably a part. Standards of appropriate conduct are understood intellectually but may be practiced culturally. Judges in our region must learn to operate ‘counter-culturally’.<sup>60</sup>

‘Corporatisation’ of the Judiciary is necessary and needs to be embraced, along with codes of conduct (as distinct from mere guidelines) and real accountability. Corporatisation entails organisational structures which do not derogate from the independence of the individual judge in her courtroom, but locates that judge in an organization which is accountable to society through Parliament for its performance, and which accountability goes beyond the ritual *ex cathedra* speech at the opening of the law term and the annual report, to responding to the questions of an appropriately selected parliamentary committee through a reconstituted Judicial Appointments Commission. It is an organization of written job descriptions and delineation of authorities.<sup>61</sup> It is an organization in which, while judges may speak extra-judicially on matters of law and jurisprudence, only designated officers speak to the media on ‘corporate’ matters. It is also an organization where the Judicial Appointments Commission has the means to impose intermediate sanctions, including de-rostering and suspending judges, counsel poor performers out of the judiciary, and refer judges to EAP-type counseling, all within the confines of the Judiciary itself without any involvement of the Executive or Legislature.<sup>62</sup> Along with other relevant tests of competence and temperament, aspiring judges should be required to do the Harvard Implicit Association Test as well as other assessments for bias.<sup>63</sup>

The ‘corporatisation’ of the Judiciary will require that it focuses on performance measurement in a serious manner and cascades the overall performance measures down to the performance of the individual judge. There must be regular measurement of public confidence in the Judiciary. This can be undertaken as a regional project so that the survey instruments are standardized across the jurisdictions in the region thus facilitating comparison. In addition, there needs to be collected a broader set of indicators similar to the EU project covering employment, types of matters transiting the system and their disposition, delay, incidence of judicial review, and so on.<sup>64</sup> Perhaps the Regional Judicial and Legal Services Commission could spearhead this exercise, hire regional social scientists and statisticians to develop the methodologies, secure the cooperation of the JLSCs in the individual territories, and obtain the funding to get this critically important work done.

While it is important for judges to understand and connect with their communities, they must avoid ‘descending into the arena’. The myth and mystique of judicial office must be maintained. It was clearly right to dispense with the wigs, but it would be a mistake for judges to comport themselves in

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<sup>60</sup> By accident or design, the CCJ model of having some of its judges from outside the region is an excellent approach since these judges would be able to discern certain attitudes and behaviours more clearly than local judges could.

<sup>61</sup> The recent judgment of the UK Supreme Court, *Gilham v Ministry of Justice* [2019] UKSC 44 is likely to be precedent setting in deciding that a judge, though an ‘office-holder’, is also a ‘worker’ who can obtain whistle-blower protections under the Employment Rights Act, 1996.

<sup>62</sup> In this regard, the section 137(3) provision of the Trinidad and Tobago Constitution which gives a quasi-judicial role to the Prime Minister in the removal of the Chief Justice has now shown itself to be inappropriate and problematic.

<sup>63</sup> See Janeille Zorina Matthews, (2019, 99)

<sup>64</sup> Since 2013, the European Union has developed and published a Justice Scorecard which produces data on (a) spending (b) standards applied to improvement of the quality of judgments (c) the prosecutorial services (d) disciplinary proceedings regarding judges and (e) standards and practices on managing caseloads and backlogs in courts.



our societies as if they were like anyone else.<sup>65</sup> They do not need to be aloof or ‘stush’ in modern slang, but they must be reserved in dress, speech and deportment in public. I advocate this, not because I am concerned about the behaviour of judges, but I am concerned that the ‘egalitarian impulses’ of the people in our societies, the frequent failure to recognise and respect boundaries, will cause people to treat judges as ‘one of the boys’ or ‘one of the girls’, open to casual regard if not disrespect, and being seen as open to the extraction of favours and the ‘contact’ which is part and parcel of life here in these small West Indian societies. This is challenging! How to be reserved without appearing arrogant; how to be part of social and community occasions without compromising one’s integrity. Some judges may elect to become reclusive, but that is not optimal. It makes sense to choose one’s friends and associates wisely, friends and associates who understand the constraints you face as a judge and respect the boundaries.

There is probably also a need for greater collegiality among judges. The work of a judge might be somewhat lonely and may not afford the daily interaction which corporate life offers to business executives. It therefore may not offer opportunities for judges to discuss personal problems and issues with fellow-judges and to get advice. The Judicial Conduct guidelines do speak to this and to the extent that it is not, it perhaps needs to be put into practice.

The job of a judge is difficult anywhere. In our small post-colonial West Indian societies, with cultures which express our unique values, attitudes and behaviours, the job of the judge is even more difficult. The work of reform needs to accelerate or else we will continue to see the breakdown and erosion of confidence so evident in Trinidad and Tobago and perhaps elsewhere in the region.

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<sup>65</sup> Sir Alan Moses, *The Mask and the Judge*, *Southern Cross Law Review*, vol. 12, 2008.

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**Title of Session: Keynote address**

**Session Chairperson: Justice Courtney Abel, Supreme Court of Belize**

**Session Panellists : Keynote Address – Dr. Terrence Farrell, Trinidad and Tobago**

Introduction of the Keynote speaker was done by the Hon Mme Justice Maureen Rajnauth – Lee

**Objectives of Session:** To explore judicial conduct in its ethical, political and social dimensions.

**Key points from presentations (state who presented and their key points):**

1. Judicial conduct is critically important, especially considering topical in events in Trinidad and around the Caribbean. Rumbblings are high on the reciter scale in Trinidad and judicial conduct is also a sensitive topic and an uncomfortable one for professionals to engage with.
2. Over the last 30 years there has been a significant increase in the governance of judicial conduct. Guidelines have been created in several jurisdictions including developed countries where incidences of misbehaviour have been infrequent since the 17<sup>th</sup> and 18<sup>th</sup> century. The Caribbean has had disproportionately more incidents which also require some explanation. Why is this disproportionately high incidence of judicial controversy?
3. Judges are social actors which are neither above society or outside society. Their behaviour is influenced by the social and cultural factors within society. Therefore, we need to take a look at the society and cultural dynamics to understand how the judiciary functions. Our post-colonial and monarchies may not function like English society who gave birth to our societies and maintained order by institutionalised violence. So our institutions are mostly inherited but how they operate is determined by a culture which does not belong to any of the colonial masters but is our own, it is West Indian. This is the tension that needs exploring to see if it explains what we observe in our territories.
4. The litmus test of judicial conduct is the actual or likely impact on public confidence in the administration of justice. Is public confidence maintained or increased. The test is not whether you are a good judge or give landmark judgements. How do we know if this confidence is high or low? There have been few resources and studies on public confidence in the Caribbean. The data is sketchy and inadequate but the Selwyn Ryan research on governance in TT and Guyana concluded that people did not have a lot of confidence in the judiciary.
5. One 2010 survey done of Trinidad indicated that 31.2% of respondents had quite a great deal of confidence in the courts. Almost 60% of respondents indicated that they did not have confidence or had very little confidence in the courts. The Caribbean's ranking in the World Justice Project Index 2019 shows that we as a region do not to very well in justice.

6. The 2019 Global Competitiveness Report which surveys business people has a number of different components including the institution's pillars and relates to judiciary and justice system. In 2018, Jamaica ranked 4.8 , Trinidad- 4.5 and the UK- 6.3. In 2019, the ranks in the Caribbean have in fact declined.
7. Some commentators including CCJ President, Justice Adrian Saunders. have claimed that the referendums in Grenada and Antigua and Barbuda in which they refused to ascend to the CCJ are indicators of lack of public confidence of Caribbean Judiciaries.
8. Some of the issues that give rise to concerns about conduct are delay, bias and to a lesser extent conduct in the court such as falling asleep and conduct out of courts.
  - a. Bias
    - Impartiality is the bedrock principal of judicial conduct and therefore any issues related to this are strikes at the bedrock. This includes issue bias- judge might be faced with a specific issue. For example, ethnic bias- may be irrelevant in Commonwealth Caribbean, notion that a judge of a particular ethnicity may be unconsciously influenced by the ethnicity of a claimant before them being more favourably disposed to a coethnic or less favourable to a different ethnicity. This may also be compounded by elite bias or class bias.
    - "...judges may not appear to be neutral because they will almost always be seen, normally rightly, to come from a more privileged sector of society, in both economic and educational terms, compared with the many of the parties, witnesses, jurors in court. ...Thus a white male public school judge presiding in a trial of an unemployed traveler from Eastern Europe accused of assaulting or robbing a white female public school woman will, I hope, always be unbiased."
    - Lord Neuberger, Fairness in the courts: the best we can do, Address to the Criminal Justice Alliance, April 2015.
  - b. Personal Conduct
    - Public confidence in the judiciary is also influenced by opinion conflict; dissent between judges which comes into the public domain. There is not much occurrence of this within the Caribbean region. Internal administrative conflict has to do with matters which are internal to the judiciary but spill over by accident or design into the public domain.
    - The spilling over is the problem and may undermine the institution of the judiciary. "A judge's duties go beyond his work in and around the courts and reach into his private life and dealings. The suggestion that duty is no higher than that of abstaining from committing offences is a heresy and needs to be laid to rest."
    - Judges need to be mindful of what they say on and off the bench. When internal issues are leaked to the public, the public confidence of the judge is undermined. The notion that a judge's private life should become grounds for finding of misbehaviour may be far-fetched even if conduct is different to or far-fetched from main standards but the relevant test is whether this conduct unfairly affects public confidence. E.g. domestic violence "...promiscuity is not a criminal offence, but a judge who continually flouted community standards of sexual morality to the extent that it became a public scandal may well reach the position that members of the public would have little confidence in his sitting in judgment on them. In such a situation misconduct or misbehaviour could be found against the judge."
    - Justice J.B Thomas, *Judicial Ethics in Australia*, 12.O. Since JB Thomas wrote this in the 1980s, community standards have evolved and what may have scandalised a society then

may provide little adverse comment then but some things for example standards of sexual behaviour have become wider. Therefore what level of behaviour must attract misbehaviour. The Privy Council would have looked at this in the seminal case of Gibraltar.

- Wilson also commented on a judge's conduct in public, writing: "If a judge behaves badly in public, if he is crude, arrogant, unmannerly, intemperate, the ordinary observer might well think, 'What manner of justice can we expect from that man?' From this may follow not only distrust of the work of that particular judge but some loss of faith in the whole judiciary."  
Wilson, J., *A Book for Judges*, 4.
  - c. There are 3 factors which lead to the rise of governance of judicial conduct:
    - Abolishing of the Kilmuir rules in the 1980s which banned judges in England from talking to the media by Lord McKay. This led to the individual judges being able to speak to the media without being cognisant of how their individual rules impacted the institution.
    - The expanding empire of law – the customs and conventions that regulated life up to the 19<sup>th</sup> century and when law re-evaluated narrow issues from welfare of children, it now governs most aspects of life and there is the exercise of certain powers. Matters that would have previously been left up to families, doctors and politicians are now placed before judges for decisions but judges are unelected and unaccountable.
    - The global push for greater accountability and greater transparency in business in the 1980s. Since the 1980s there have been numerous scandals which have led to the regulation of behaviour and ensuring that there is ethical conduct in the boardroom but over the last 20 years, boardroom conduct has changed and now includes peer accountability and evaluation procedures as well as formal processes. In respect of politicians, there has been judicial review and legislation to hold people who wield power accountable.
  - d. In last 4 decades there has been a growing impetus towards more accountability in business, politics and the judiciary. Judges must be made more accountable without trashing on judicial independence. Protocols were preferred. In the English speaking Caribbean we are subject to the same forces and have promulgated guidelines based on the Bangalore principals in almost all of our territories. However, the drive to accountability has not always been reviewed favourably by local Judges who view it as an attack on judicial independence and a removal of their privacy.
9. Judges arguably emanate from these societies, grew up here and form a part of the society. Cultural sociologists and anthropologists have used comparative analysis to see how various attributes and cultural issues vary across societies to determine culture. The World value survey is one such tool.  
According to this survey, Trinidad reflects traditional values and emerges as a low trust society. 96.3% of respondents indicated that one had to be very careful in dealing with people. Scholars have found that there is a relation between trust and economic growth and

economic development. Another example of this is that writing contracts looks very different between the UK and Scandinavian countries when compared to the US.

10. According to the Hofstede website, the descriptions of the cultural dimensions of countries are as follows:
  - a. **'Power Distance'** expresses "the degree to which the less powerful members of a society accept and expect that power is distributed unequally. It assesses how a society handles inequalities among people. People in societies exhibiting a large degree of Power Distance accept a hierarchical order in which everybody has a place, and which needs no further justification. In societies with low Power Distance, people strive to equalise the distribution of power and demand justification for inequalities of power.
  - b. **'Individualism'** is a preference for a loosely-knit social framework in which individuals are expected to take care of only themselves and their immediate families whereas Collectivism represents a preference for a tightly-knit framework in society in which individuals can expect their relatives or members of a particular in-group to look after them in exchange for unquestioning loyalty. A society's position on this dimension is reflected in whether people's self-image is defined in terms of "I" or "we."
  - c. **'Masculinity'** represents a preference in society for achievement, heroism, assertiveness, and material rewards for success. Society at large is more competitive. Its opposite, Femininity, stands for a preference for cooperation, modesty, caring for the weak and quality of life. Society at large is more consensus oriented.
  - d. **'Uncertainty Avoidance'** expresses the degree to which the members of a society feel uncomfortable with uncertainty and ambiguity. The fundamental issue here is how a society deals with the fact that the future can never be known: should we try to control the future or just let it happen?
  - e. **'Long term Orientation'** expresses the disposition of the society towards pragmatism, thrift and preparing for the future versus holding on to tradition and viewing change with suspicion.
  - f. **'Indulgence'** allows relatively free gratification of basic and natural human drives related to enjoying life and having fun. Restraint stands for a society that suppresses gratification of needs and regulates it by means of strict social norms.

Using these descriptors and the results of Trinidad and Jamaica, these countries do not accept hierarchal society without reason. There is a hierarchy in the Caribbean but people are prepared to challenge society and authority. Caribbean territories are also more masculine in that they are more open to conflict than cooperation and Trinidad like the UK rates high on indulgence and are known as work hard- play hard societies.

These statistics can to some extent be helpful but do not account for ethnic or tribal differences not historical contexts etc.

11. Farrell's 8 cultural attributes
  - a. Ambivalence and Masquerade - we as the elite are torn or move between two standards of behaviour. First, the metropolitan standard- values, knowledge and appreciation for things like classical music as evidence of good taste and secondly, the creole standard which approves of Anansi the trickster who is able to use trickery to dodge the system and succeed thorough cunningness because we understand that systemically the society is unfair. This idea comes from Colonialism. . Metropolitan standards elevates in judiciary's appearances before the Privy Council and using English jurisprudence etc. as markers for success.

Masquerade asks people to do what is contextual in the situation because everyone knows that everyone else can engage in masquerade we use other reasons to determine what people do.

- b. Status, Respect and Respectability - positions in society are largely ascribed by culture and complexion, ethnicity and then by wealth, wealth does not automatically mean status in Caribbean. In the post-independence period, the idea of who is an elite has become contested. Some people lay exaggerated claims to lower class roots as they enjoy higher statuses. Status being confirmed by proximity to political power plays an issue for judiciary because of need for judicial independence etc. High status does not confer immunity from prosecution but could initiate it and attempt to promote leniency.
  - c. Rules and Authority- In formal procedures in post-colonial society there is one set of rules for more status. Contingent role following – rules apply except where it concerns me or where my co-ethnic are involved et. Adaptive response is to result to adaption and trickery. In our society, relationships may trump rules. Loyalty to friends, family and co-ethnics have precedence over rules. Power and authority may be autocratic an can be challenged even overtly leading to violence or passively leading to sabotage. Resistance to authority can be punished in ways that are disproportionate to infraction. Authority may also be interpreted first and foremost through racial lens. Conflict is normal and normalised. Your position or office automatically confers on you high status. Status and power are both open to challenge.
  - d. Amusement
  - e. Risk-taking and Non-possession
  - f. Intergenerational Thinking
  - g. Corruption and Trickery, and
  - h. Conflict and Cooperation
12. Citizens are suspicious of and exhibit low trust in institutions and suspect that they will be biased against them.
13. Naipaul observed: “Power was recognised, but dignity was allowed to no one. Every person of eminence was held to be crooked and contemptible. We lived in a society which denied itself heroes.” - Vidia Naipaul, *The Middle Passage*, 43
14. Judicial Conduct in the Caribbean
- a. Sir Fred Philips (1978) in a book on the evolving legal profession in the Caribbean mentioned that, “ There can be no doubt that more and more pressure will inevitably be brought to bear on the judicial department in the exercise of its functions in developing countries. The suggestion is not made because of any noticeable change or deterioration in the conduct of judges, but because the pressures of modern life may in time bring about such deterioration.

As the pressures increase, there are bound to be lapses and judges will, no less than the public, find it useful to have such a reminder of the principles which should govern their conduct. Such a Code would in fact be supportive of the provisions in the various Constitutions purporting to proclaim the independence of the judiciary and the absence of



political control.” This was before anyone contemplated or advocated for the implementation of a Code of Judicial Conduct and Sir Fred Philips argued that it was necessary and will be needed.

- b. Delay – courts are notoriously slow but there have been instances of egregious delay in getting judgements.
- c. Contempt of the Court- we are taught that the contempt of the court has to do with preserving the judiciary etc. Lord Morris in *McLeod v St Aubyn*, Privy Council Appeal July 1899 said:

“ Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, *consisting principally of coloured populations*, the enforcement in proper cases of committal for contempt of Court for attacks on the court may be absolutely necessary to preserve **in such a community** the dignity of and respect for the Court.” (my emphasis)
- d. Bias – Rees v Crane – the significance of this case is that the public would be entitled to wonder how judges can adjudicate fairly in a society based on class, ethnic bias etc. There is not too much evidence of political bias in the region as it is difficult to prove but in Barbados and Jamaica there have been instances of politicians moving into the judiciary or vice-versa.
- e. Personal conduct- In more recent times, matters relating to the judiciary have been venerated in the public. There have been two cases concerning personal conduct – Awich and Meerabux cases.
15. “ The picture presented to this Tribunal almost defies belief. ...The air was full of rumour, innuendo and gossip, around and across deep political (*and, we are forced to say, ethnic*) divides. At least within this narrow field of view, the concept of the separation of powers seems to have been ignored. We need not go on. The picture is “troubling” indeed, both for the Tribunal and for the peoples of Trinidad and Tobago.” (my emphasis) - Mustill Tribunal Report, 2007

#### Conclusions

1. Public confidence – the litmus test of judicial conduct -- is low for historical reasons, remains low, and arguably, is declining. How societies were created and characterised by inequalities, lack of conflict management skills, punitive measures etc.
2. Our judges are members of the social elite and must unlearn those elite behaviours, they must behave ‘ counter-culturally.’ Standards of appropriate conduct are understood intellectually but may be practiced culturally.
3. Corporatisation of the judiciary is necessary and inevitable. The judiciary must be accountable for its performance and its conduct in and out of court. It needs to be embraced along with codes of conduct and accountability. Does not move away from individualist y and independence of judge in his/her courtroom but fits judge within that space.
4. Accountability in that sense for what needs to be delivered is not inconsistent with appearing before a parliamentary committee and explaining what you are doing about the administration of justice. It is an organisation of written descriptions and delineations of restrictions. There must be restrictions on how judges speak of the judiciary.
5. Needs to give the legal services committee the means to impose intermediate sanctions such as de-rostering and suspension and create some kind of counselling all within confines of the judiciary without involving executive and legislature.
6. Aspiring judges should be required to do tests for ethnic bias and inconspicuous bias.

7. There must be regular measurements of public confidence in the judiciary – needs regional project that defines public confidence accurately and measures on an annual basis in a way that is consistent and aimed towards establishing public confidence
8. Judges must avoid descending into the arena. The myth and mystique around the judiciary must be maintained. Don't need to be aloof but have to be reserved in dress, speak and deportment in public. Concerned about egalitarian impulses of societies and frequent failures to recognised boundaries leaving judges open to casual disregard and if not disrespect along with the requesting of favours. Challenge is how to be reserved without acting stoosh, how to become a part of social events without descending Judges any need to choose friends and associates widely from those who respect boundaries.
9. Needs to be greater collegiality among judges – need to have opportunities to discuss personal behaviour and commonly, Actually mentioned within guidelines and needs to be put into practice.

The job of a judge is difficult but the reform work must begin or the judiciary will break down and these erosions will create more dire consequences.