

## **Strengthening Judicial Ethics**

**Jamaica**

**25<sup>th</sup> November, 2018**

Salutations

I am very pleased to have been invited to deliver this address today. As you all know, I wear several hats but the one I proudly wear today, the capacity in which I address you now, is as a member of the Advisory Board of the Global Judicial Integrity Network. The Global Network is an arm of the United Nations Office on Drugs and Crime and the UNODC has been providing assistance to UN Member States in enhancing judicial accountability and professionalism. The Network helps judiciaries across the globe to strengthen judicial integrity and it does so through a variety of measures including the sponsoring of programmes such as this one and also in the creation of useful tools for use by judiciaries across the world. I urge you all to visit the Network's website from time to time.

When the details of this weekend's programme were shared with me, they brought to mind the CJEI's Train the Trainer ISP programmes in Halifax which some of you have attended. That programme also invests heavily in pedagogical training because training judges is a very unique form of adult education. At the ISPs in Halifax, one of the assignments we give to the participants is to have them make a very short film for judicial education purposes. One of the better such films that were made was about a disorderly court bailiff and the complicity of the Bench in allowing that bailiff to terrify witnesses and litigants. The whole point of the film was that it was important for judges to control what happened in their courtrooms so that public confidence in the courts is not diminished by the conduct of the court staff. I must say that as a young trial judge I was sometimes

Guilty of allowing too much latitude to my much older and far more experienced court bailiff. But, there was an occasion in St Lucia when I was compelled to rein him in.

Without an independent and impartial body interpreting and applying the law and resolving legal disputes, society will be dysfunctional. The State will ride roughshod over the citizenry. Minorities and vulnerable groupings will be at the mercy of the majority and the powerful. Civilised society absolutely requires a justice system that is fair, independent, efficient and effective. Since society is dynamic, that justice system must continually keep pace with developments in the rest of the society.

Essentially, I view the court as a service provider. For me, the court is not a place. It's not a building. It is a service. The general public are our customers. It is their expectations and needs that the justice system must aim to satisfy. The critical yardstick for measuring the effectiveness of the service we supply is the degree to which the needs of the public are satisfied and the extent to which trust and confidence are reposed in us. The public wishes to see judges that are impartial, ethical, competent, effective. They desire a justice system that is accessible, efficient, modern, one that produces fair and reasonably predictable outcomes. Most of all, the public wishes to see judges of unimpeachable integrity.

The question is, How do we produce and guarantee high quality judges? The calibre of our judicial complement is conditioned firstly by the nature of the judicial appointments process. Ideally, the appointments process should be competitive, transparent and merit-based. It should yield skilled judges of diverse backgrounds. But an excellent appointments process is not enough. After

appointment, judges must be enabled and encouraged, some may say mandated, to participate in ongoing judicial training. And the responsibility for organising such training falls squarely within the lap of the judicial branch.

Jamaica's judiciary took a major step forward in its judicial education thrust when the JEI was launched last year. This was a significant milestone because, to be effective, Judicial education must be carefully planned. It must be directed at meeting clear needs and objectives and the Programmes that are implemented must be monitored and evaluated.

I spent a few years as Chair of the ECSC's Judicial Education Institute (JEI) when it was in its formative stages. I don't envy you, Vinette. The Chair of a fledgling JEI is expected to carry a full caseload as a judge and still, as a judicial education Chair, perform miracles with meagre resources; to be a kind of judicial Rumpelstiltskin. In the real world, of course, no one can turn straw into gold. Appropriate resources must be made available to the JEI for ongoing judicial training and administrative assistance should be afforded to those who have responsibility for leading the efforts of the JEI. And so, I trust that appropriate resource adjustments are made to enable Jamaica's JEI to function at optimum capacity.

What I would like to do today is to say a few words about judicial ethics. We all appreciate that the office of Judge carries with it a range of responsibilities that include restrictions on one's conduct. Some of these restrictions might be viewed as burdensome by an ordinary citizen, but that's what we sign up for when we take the judicial oath of Office. Increasing media pressure and public scrutiny further constrain judicial conduct on and off the bench. This level of attention to

the conduct of judges is understandable. Even in our private capacity, the conduct of a judge can have serious effects on the public's perception of our impartiality. Public confidence in the administration of justice can only be achieved if we consistently conduct ourselves in an ethical manner in both our judicial and personal lives.

In my view, in the English speaking Caribbean, training in judicial ethics is particularly important. 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.

How do we go about addressing this situation? First of all we have to recognise the problem. And then I believe we should intensify training in this area. Training helps because some, if not most judges who violate judicial ethics do so through inadvertence, through failure to recognise the relevant ethical issue or from ignorance of the existence of particular rules of judicial ethics. I noticed on the internet that the Jamaica judiciary adopted comprehensive judicial conduct guidelines that were revised in 2014. What is excellent about these guidelines is that they contain commentaries explaining and developing the essential canons of good judicial conduct. The UN Commentary on the Bangalore Principles of Judicial Conduct also provides extremely useful guidance on how common ethical dilemmas should be resolved. I keep a copy of that document on my desk.

I have recourse to it from time to time, whether to advise myself about a particular course of conduct or to respond to an inquiry that is made of me.

There are no bright red lines so far as judicial ethics are concerned. That which constitutes abominable behaviour and that which is patently morally just and ethical, fair is easily capable of recognition. The problem lies in the wide expanse of grey in the middle. Let us look at an issue that arises from time to time, for example.

Suppose my faithful helper, who has worked with me for several years, wants to move on, with my full blessings. She asks me for a letter of reference. Do I give it? And, if I do, do I write it on judicial stationery? Or do I otherwise indicate in the letter that I am a Judge? The Commentaries in the Jamaican Conduct Guidelines and in the UN Commentary on the Bangalore Principles help a judge to navigate tricky issues such as these. But if they don't, then whenever we are presented with ethical dilemmas, rather than take matters for granted, we should seek counsel and discuss the matter with one or more colleagues.

There are at least four areas where I believe the Bangalore Principles, and other judicial codes of conduct, can perhaps be strengthened and today I would like to speak briefly about these four areas. The first area is judicial accountability. Most codes or guidelines speak at length about judicial independence, but judicial independence is not intended to be a shield from public scrutiny. Judicial independence must go hand in hand with judicial accountability and I believe that in codes of conduct or ethical guidelines judicial accountability should be addressed in a discrete and more fulsome manner. I think more emphasis could be placed on judicial accountability. Often when the issue of judicial accountability is raised with judges, you get two stock answers. The first is that judges are *not* accountable to any official in the Executive, whether the Prime

Minister, the Attorney General or the Minister of Justice. And that is perfectly true. The other stock answer judges will give when tasked with the notion that they must be accountable is that judges already have several built-in accountability mechanisms. So, for example, for the most part, judges conduct their business in the full glare of the public. We call that Open Court, where the public can see what we do and how we go about deciding cases. We also give reasons for our decisions, usually in writing. And dis-satisfied litigants can appeal against the decisions we render so that mistakes can be corrected. These are all solid accountability measures. But it would be an excellent thing if we could go further by way of accounting to our customers. Some judiciaries, for example, formulate, publish and monitor appropriate performance standards so that they and the public alike can measure their performance against those standards. Take for example, time standards. If we categorise the cases that come before us as fitting into the categories of simple, average or complex, can't we publish time standards in relation to each category for such matters as a) the length of time that should ordinarily elapse between the filing of the case and its final disposition and/or b) if the case goes to trial, the length of time that should elapse between the close of the submissions from counsel and the handing down of the judgment? The publication of performance standards help to strengthen judicial Accountability and promote public trust and confidence.

The second area where existing codes of conduct can be beefed up in my view is that they can highlight the importance of judicial courage. This is a matter that former Australian Supreme Court Judge Michael Kirby discussed with a group of us in the Judicial Integrity Group. Neither in the UN Commentary on the Bangalore Principles nor the Jamaica Guidelines is the word courage explicitly referenced. But, it seems to me, it is critical that judges demonstrate a high degree of courage in the performance of their duties. The judicial oath requires us to do right to all manner of people, without fear or favour, affection or ill, requires

courage. But I think judges often need to go further than simply being “without fear”. This is naturally the case when we are trying high profile criminal cases; where notorious and well-connected criminal elements appear before us. But even more telling are those instances when we are called upon to engage in constitutional or human rights adjudication; when we are called upon to fulfil the promises laid out in the Charter by responding to a human rights claim; when we are asked to make appropriate declarations and orders which we know will be deeply unpopular; orders which we know will be derided by the majority or by the government or by influential interest groups. In such moments, it is temptingly convenient to take the easy way out by resort to sophistry or to duck uncomfortable issues by declaring that, for example, it is the Parliament and not us that should provide the relief the citizen is crying out for.

In the year 2000 I had been on the Bench for just 4 years and I was asked to make up an appellate Panel in the case of *Spence*. In that case the panel was faced with the then novel question of whether the mandatory death penalty was inhumane and therefore unconstitutional. Unsurprisingly, one of the arguments made by counsel for the State was that this question was a matter for Parliament and not for the courts. I disagreed with that view. At [219] of the court’s judgment I stated:

... the granting of appropriate remedies to persons who complain of a violation of their fundamental rights is neither the duty of the executive nor the legislative branches of government. It is a specific, unqualified constitutional obligation of the judiciary. It would be equally remiss of the court to permit this task to be laid at the feet of the Mercy Committee or to sit back and await possible Parliamentary intervention.

There is a reason why the tenure of judges is as protected as it is. It is to facilitate judges to demonstrate Courage without any possibility of adverse consequences relative to your job security.

The third area where I believe codes of conduct and ethical guidelines need greater elaboration lies in our approach to issues of gender. Paragraph 6.2 of your Judicial conduct guidelines boldly proclaims:

Judges should strive to be aware of and to understand diversity in society and differences arising from various sources, including, but not limited to gender, race, colour, national origin, religious conviction, culture, ethnic background, social and economic status, marital status, age, sexual orientation, disability and other like causes.

Wow! These are impactful words! I applaud the drafters for them. The question is, how do we actually *encourage* judicial officers to become aware of and understand that rich form of diversity? It seems to me that it would be an excellent thing if the Guidelines helped us further in that regard. Judicial training and proper guidance are critical because we have to learn to tap into and recognise our biases and consciously cater for them. We have to acknowledge our social, cultural and religious pre-dispositions and firmly set them aside so that we may do right by all manner of people who are different from us or from what we regard as being wholesome.

I am particularly concerned with gender as a source of discrimination because gender, gender expression, gender identity, these are areas that I think are often not well understood. At the CCJ, a few weeks ago we gave a decision in a case called *McEwan*. This was a case in which 4 transgender persons were arrested and charged with cross dressing in public for an improper purpose. In Guyana, there was a law that declared that to be a criminal offence. When they appeared in the Magistrate's Court, the presiding Magistrate fined the trans persons and then proceeded to make some extraordinary comments. The Magistrate told them that they must go to church and give their lives to Jesus Christ; that they were confused about their sexuality; that they were men, not women. In subsequent

constitutional proceedings, the High Court and the Court of Appeal upheld the constitutionality of the law and excused those comments of the magistrate.

The CCJ's judgment reversed the lower courts. We set aside the law in question. We held it to be unconstitutional. We began our judgment with the following two paragraphs:

Difference is as natural as breathing. Infinite varieties exist of everything under the sun. Civilised society has a duty to accommodate suitably differences among human beings. Only in this manner can we give due respect to everyone's humanity. No one should have his or her dignity trampled upon, or human rights denied, merely on account of a difference, especially one that poses no threat to public safety or public order. It is these simple verities on which this case is premised.

The appellants are, or are perceived to be, different. They are transgendered persons. Their sense of personal identity and gender does not correspond with their birth sex. As a result, their appearance, mannerisms and other outward characteristics are not consistent with society's expectations of gender-normative behaviour. That is their reality. It is a reality that is different from the one experienced by most persons. Unfortunately, it is a reality that, for whatever reason, confuses many and frightens, even disgusts, some in Caribbean societies often leading to derision of, and sometimes violence against those who are different. It is for courts to afford the protection of the law to those who experience the brunt of such behaviour.

Later in the judgment we stated that:

A society which promotes respect for human rights is one which supports human development and the realisation of the full potential of every individual. The hostility and discrimination that members of the LGBTI community face in Caribbean societies

are well-documented.<sup>1</sup> They are disproportionately at risk for discrimination in many aspects of their daily lives, including employment, public accommodation, and access to State services.

The appellants here, by choosing to dress in clothing and accessories traditionally associated with women, are in effect expressing their identification with the female gender. And the expression of a person's gender identity forms a fundamental part of their right to dignity. Recognition of this gender identity must be given constitutional protection.

Now, these are hard truths for some to deal with. Some of us are uncomfortable with them. They might challenge our values, our morals, our religious views. But, commendably, your Judicial Conduct Guidelines call upon you precisely to strive to be aware of and to understand diversity in society and differences arising from gender. I would suggest that we need to go beyond being aware of and understanding diversity. We must promote equality rights and encourage the adoption of a substantive approach to equality. Ensuring substantive equality might require equal treatment for those equally circumstanced, different treatment for those who are differently situated, and special treatment for those who merit special treatment.<sup>2</sup> A substantive approach requires us to examine not just the words of a statute but the impact or effect of the statute.

Over the last 4 years CAJO has been doing a considerable amount of work in this area of Gender in partnership with UN Women and with the JURIST project. To this end, we have produced a draft Gender Protocol for judicial officers, engaged in training on the protocol and we have invited judiciaries in the region to mould and enrich and make the draft their very own. Next week, Trinidad and Tobago

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<sup>1</sup> See for example: "*I have to leave to be me.*" Discriminatory Laws against LGBT People in the Eastern Caribbean, <https://www.hrw.org/report/2018/03/21/i-have-leave-be-me/discriminatory-laws-against-lgbt-people-eastern-caribbean>; accessed 2 September, 2018.

<sup>2</sup> See, for example, Constitutional Court of Colombia Case C-862/08.

will be launching their Gender Protocol. I believe that codes of Conduct, including the Bangalore Principles, could do more to inculcate in judges their special responsibility to protect the rights of minorities and vulnerable groupings.

The final area which I believe ethical guidelines or codes of conduct must address is the issue of the appropriate and responsible use of social media by judicial officers. I won't spend much time on this, but, let me ask this. How many of you are on Facebook? How many of you on Facebook have a lawyer appearing before you who is a Facebook friend? If I am a litigant before you, what perception will I have if I am aware that opposing counsel is your Facebook friend but my lawyer is not? Social media is a great way to re-connect and stay in touch with friends and family. Judicial officers should not be deprived of these opportunities. But judges have to be astute to ensure that their use of social media does not diminish public trust and confidence. CAJO and the JEITT are cooperating with the Global Integrity Network in the development of an appropriate set of Guidance for judicial officers on the use of social media. This is an area that is not currently addressed in the Bangalore principles for obvious reasons as those principles were crafted well before the explosion of social media. I certainly look forward to the Guidelines that will be prepared by Global Integrity Network as I am sure they will help us all to navigate potentially tortuous waters.

I end by emphasising that the strengthening of Judicial integrity should never be taken for granted. We exercise judgment over our customers. Make no mistake, our customers also exercise judgment of us. And this is an important realm in which they do so. It is a useful measure periodically to re-visit and review our ethical codes or guidelines. The benefit to be derived from this lies not just in the updating of the code but even moreso in the discussions that ensue when embark on this task.

For the sake of completeness, I wish to return to the hypothetical I posed earlier. How many of you would think it ethical to provide the faithful helper with a job reference? Are you interested in the guidance from the Bangalore Principles on that question?

This is what the Bangalore Principles state at [148]:

There is no objection to a judge providing a letter of reference, but caution should be exercised, for a person may seek such a letter not because he or she is well known to the judge but solely to benefit from the judge's status. In relation to letters of reference, judicial stationery should generally only be used when the judge has gained personal knowledge of the individual in the course of judicial work.

I always enjoy reasoning with the judges of Jamaica and this occasion has been no exception. Thank you so much for inviting me to address you and for your attentiveness.