

**ADDRESS DELIVERED BY
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TO THE ANNUAL CONFERENCE OF JUDGES
OF THE
EASTERN CARIBBEAN SUPREME COURT
HELD AT THE JUNGLE BAY RESORT
ON
MONDAY, 31ST JULY, 2006**

- Honourable Chief Justice, Brian Alleyne
- Honourable Chief Justice, Christopher Gardner of the Turks and Caicos Islands
- Honourable Justice Adrian Saunders of the Caribbean Court of Justice
- All other Judges and Judicial Officers,
- Mrs. Brenda Alleyne.

I wish to express my thanks to Chief Justice Alleyne for the kind invitation to address you today. I feel completely at home among so many familiar faces.

I note the theme of your conference "The evolving Jurisprudence in the Caribbean", and wondered whether those who chose this theme had a premonition of the events which are now unfolding in another jurisdiction in the southern Caribbean.

INTRODUCTION

Mr. Chairman, what started off, as some observers conceived, to be a simple matter - namely - whether the relevant provision of the constitution of Trinidad and Tobago was the only mechanism through which a Judge could be disciplined, soon expanded into the power of the President to suspend the Chief Justice if he is "unable to perform the functions of his office", and when indeed it can be said of a Judge that he is unable to perform the functions of his office. These two delicate matters have spawned a third, which is, - can the President consult the Leader of the Opposition other than by way of a formal meeting, within the meaning of the Constitution.

These matters will doubtless occupy the attention of the Trinidad judiciary and Caribbean academics for a very long time to come, and hopefully some new jurisprudence will arise from the ashes. Today, however, I intend to discuss the independence of the judiciary, since in my view current events strike at the very core of the basic principles of the independence of the judiciary, a judiciary which continues to face tremendous difficulties in these our modern times.

Those principles were formulated against the following background:

- (a) Judges possess awesome power when they care to use it, but that this power must be exercised with great responsibility and with prudence, but without cowardice.
- (b) Decisions should be handed down in accordance with the law and the rules of practice. The Judge should be careful to ensure that the judgment which he delivers is "fair", but this concept of fairness must be in accordance with the law and practice.

Let me illustrate this point by giving two practical examples-

Judge A made an order that certain widows should be permitted to remain in rented property because he considered it unfair that they should be turned out into the streets with their children, contrary to the clear provisions of a statute. Subsequently there was a demonstration, outside of the Judges Chambers, of a group of widows who wished to speak to the Judge. He invited them into his Chambers under the erroneous impression that they wished to congratulate him. He discovered, however, that the opposite was the case because they were protesting that because of his judgment no landlord would rent to widows with children.

The second example is that of a mother who transferred the document containing the legal lease of her land to a daughter in order that she could obtain a loan to build a concrete house on the land. The mother already had a wooden house erected on the land. The daughter later felt secure enough to attempt to obtain an order for the removal of the wooden house from her property. In this case, however, despite her legal entitlement to the lease, it was possible using the rules of equity in addition to the doctrine of the *bona fide* purchaser for value without notice, to be fair to both parties and confer a status of irremovability on the mother.

- (c) The Judge should be prudent, good-mannered and impartial. Like Caesar's Wife his (or her) conduct should be beyond reproach. He must, however, as part of the state apparatus be aware of what is happening in the society in which he lives – of the realities of the day.

- (d) Judicial independence must be accompanied by positive action. The Judge must constantly remember that it is the victim, not the oppressor who needs the protection of the court.
- (e) The Judge should be responsible, he should not act with impunity, but he certainly should not be silent when it is perceived that human rights are being trampled upon.
- (f) The dignity of those who appear before the court should always be preserved. Scathing comments about litigants and witnesses should be used only in unavoidable circumstances.

INDEPENDENCE OF THE JUDICIARY

The United Nations Basic Principles on the Independence of the Judiciary were formulated in 1985. They are general principles which contain certain specific provisions relating to Freedom of Expression and Association; Rules relating to the Qualifications, Selection and Training of Judges; conditions relating to Professional Secrecy and Immunity; and provisions for their Discipline, Suspension and Removal.

Those principles were considered at a Seminar on the Independence of Judges and Lawyers in the Commonwealth Caribbean which was held in Tobago in September, 1988.

This Seminar was convened on the occasion of the annual meeting of the Council of Legal Education which was attended by the Chief Justices, Attorneys-General and representatives of the Bar Associations of the Region. Papers which were presented by the Chief Justices of Barbados and Belize form the basis of the contents of this address. The following

conclusions and recommendations were adopted and they are as relevant today as they were almost twenty years ago. I reproduce them here for your general information.

- “1. The independence of the judiciary is the firmest guarantee of the Rule of Law and shall be jealously protected.
2. The U.N. Basic Principles on the Independence of the Judiciary represent minimum standards of judicial independence and should be fully implemented in all countries.
3. Experience, particularly of recent events in other parts of the Commonwealth, has shown that Judges cannot ultimately rely on constitutional safeguards to protect them from executive interference. Judges should recognize that the strength of the judiciary lies in their own integrity and in the respect and prestige the judiciary secures in the public mind over time.
4. In many countries, the mandatory retirement age of Judges may be extended by the executive, sometimes on the recommendation of a judicial service commission. This can have the effect of making the Judge dependent on an outside authority and undermining his independence. Consideration should therefore be given to abolishing such extension provisions and raising the mandatory retirement age to at least that to which the Judge’s term would previously have been extended. In any event, however, such extensions should be made for one time only and on the advice of a judicial service commission rather than the executive.

5. The practice in some states of appointing judicial officers on renewable contracts has the potential of undermining their independence and should be discontinued or reduced to a minimum.
6. Magistrates, as a distinct group of Judges of lower courts, ought to be protected from the executive by constitutional provisions for independent and impartial judicial service commissions to determine matters of appointment, tenure of office, discipline and other matters.
7. Adequate remuneration, conditions of service and pensions for Judges, within the economic context of the country, are important in attracting suitable persons to staff an independent judiciary. In particular, pension arrangements should not be such as to discourage lawyers in private practice from accepting judicial appointment. The practice in some states of allowing to the Judges tax-free salaries and pensions equivalent to their full retirement salaries might merit consideration as a further means of preserving and promoting the independence of the judiciary.
8. There should be an independent body given the responsibility of receiving representations from the judiciary with regard to amendments of terms of service and making recommendations to the executive on the matter.
9. The obligation of the State to provide adequate resources to enable the judiciary to properly perform its functions includes the duty to provide a comfortable working environment and appropriate equipment and competent staff to facilitate the recording of evidence and the production of judgments. Failure to do so produces another disincentive to the acceptance of judicial appointment by lawyers in private practice.

10. Judicial independence as a feature of the actual life of a community and its institutions depends substantially on the real and perceived ability of Judges to resist all improper external pressures and influences and to give decisions which, irrespective of the parties involved, they honestly and genuinely believe on the facts presented and on the relevant law to be right. Judges should therefore be mindful of their conduct while in office; and as a matter of principle should not do anything after they leave office which can either adversely affect the assessment of what they did in office or call into question their independence when in office. There should be guidelines as to what Judges should or should not professionally do after they cease to hold office.

11. Judges and former Judges, when asked to preside over Commissions of Inquiry, should carefully consider the nature and terms of the inquiry before accepting appointment in order to avoid or minimize the risk of embarrassment to the individual and collective independence of the judiciary”.

In June this year the Judicial Council of Barbados approved and published a “Guide to Judicial Conduct” which contains detailed rules of conduct which are expected of Judges.

In his introduction to the “Guide” the Chief Justice stressed that those guidelines were ethical rules and not legal rules, and that they were not backed by sanctions; but he hoped that judicial officers would find in them useful and practical guidance about the conduct expected of them. I suggest strongly that you may wish to obtain and study a copy of this guide. It contains chapters on the values of Propriety, Independence,

Integrity, Impartiality, Equality, Competence and Diligence and Accountability.

In simple terms “Independence of the Judiciary” is used to refer to a doctrine that Judges, in the exercise of their judicial functions ought to be free from external pressure. In determining matters which are brought before him a Judge ought not to feel pressured to decide in a particular way on account of –

- fear of the Government in power;
- a desire to please the Government in power;
- fear of resulting prejudice to his livelihood;
- ideological, religious or sectarian interests; or
- public opinion.

In other words, as a feature of the actual life of a community and its institutions, judicial independence depends on the perceived ability of the Judge to isolate himself from external pressures and influences when in the seat of judgment and to give decisions which, irrespective of the parties involved, he honestly and genuinely believes to be the right ones in the particular circumstances. A Judge should not be silent when the human rights of the individual are being trampled upon.

It is the duty of the State to provide adequate resources to enable the judiciary to properly perform its functions. Examples abound of instances in which the executive has sought to make life uncomfortable for Judges. They include delay in the payment of salaries and allowances, the failure to pay for the accommodation of Judges on time and the failure to provide for essential items of stationery. However, this should not deter the Judge from acting fearlessly at all times.

At a recent Commonwealth Law Conference in held Vancouver, it was revealed that in India the judiciary controlled its own budget; and that moves were afoot to ensure that judicial expenses were guaranteed to form a fixed percentage of the national budget. This is not the situation in other parts of the Commonwealth, but that should not make the Judge any less independent. In fact an invitation to the courts in Canada to declare unconstitutional the provision which requires the legislature to vote funds for the Judiciary on an annual basis, failed on appeal.

Please permit me to add a few words on the issues of Competence and Impartiality.

COMPETENCE

The competence of a Judge will often be reflected in the manner in which he has been chosen and this also depends on the body which has been charged with the functions of selecting Judges. Most Caribbean jurisdictions have managed in some degree to have depoliticised the method of selection of Judges. So that once proper care is taken in selecting the persons who recommend the appointment of the Judges, there should be every expectation that only those who merit appointment will be favoured, and that once the correct choice is made, there should be every confidence that judicial integrity and impartiality will be maintained.

Competence includes not only the immediate ability of the Judge to handle his judicial duties effectively, but also the acquisition of information to enhance his judicial knowledge. Thus the Judge should keep himself (or herself) informed about relevant developments in the law.

IMPARTIALITY

Little need be said about impartiality. Even the most strident critics of judicial decisions have generally failed to prove that a decision which has not gone the way in which the critic expected can be traced back to the personal partisan feelings of the particular Judge.

However, the Judge must, both in and out of court ensure that his conduct maintains and enhances the confidence of the public. He should try to minimize the occasions on which he could be called on to disqualify himself in a cause or matter; and should be very careful not to make any comment that might reasonably be viewed as likely to affect the outcome of a matter before him. He certainly should not make any comment that might affect the fair trial of any person or issue.

CONCLUSION

Mr. Chairman, in conclusion I ask the important question, who is to Judge the Judges?

Should it be the Executive? Probably not. We are already exposed to the subtle methods used to attempt to undermine the independence of Judges. Nor does the Executive miss an opportunity to comment adversely on decisions which do not meet with their favour.

Can it be the Bar? Perhaps the legal profession should have a role to play. But not if the various Bar Associations remain as divided and polarised as they now are in most of our jurisdictions.

Should the public be the Judge? In the long run it is the public which is best able to defend the independence of the judiciary, but that will depend

on the manner in which Judges discharge their duties. Public respect for the judiciary and the administration of justice depends to a very great extent on how the public perceives that the Government evaluates their importance. Dilapidated court buildings and inadequate physical facilities neither earn the respect of the public, nor enhance the independence of the judiciary.

It seems to me, Mr. Chairman that in the final analysis, the real barometer of a Judge's ability to be independent in the seat of judgment must lie in the Judge himself. I adopt here a quotation from a judgment of Venkataramiah J. in *S. P. Gapte and others V. Union of India* [1982] A. I. R. 149:

“But if the judiciary should be really independent, something more is necessary and that we have to seek in the Judge himself, and not outside. A Judge should be independent of himself. A Judge is a human being who is a bundle of passions and prejudices, likes and dislikes affection and ill-will, hatred and contempt and fear and recklessness. In order to be a successful Judge these elements should be curbed and kept under restraint and this is possible only by education, training, continued practice and cultivation of a sense of humanity and dedication of duty. These curbs can neither be bought in the market nor injected into the human system by the written or unwritten laws. If these things are there even if any of the protective measures provided by the Constitution and the laws go, the independence of the judiciary will not suffer. But with all these measures being there, still a Judge may not be independent. It is the inner strength of the Judges alone that can save the judiciary”.

In the words of Williams C J of Barbados “A reputation for judicial independence does not come overnight or by a handful of decisions. It is an assessment made over the long term by public opinion”, and he quotes the following words of U.S. Supreme Court Justice William O. Douglas in his 1956 Tagore Law Lectures at page 345:

“ The judiciary has no army or police force to execute its mandate or compel obedience to its decrees. It has no control over the purse strings of government. These two historical sources of power rest in other hands. The strength of the judiciary is the command it has over the hearts and minds of men. That respect and prestige are the product of innumerable judgments and decrees, a mosaic built from the multitude of cases decided. Respect and prestige do not grow suddenly. They are the products of time and experience. But they flourish when Judges are independent and courageous.”

Mr. Chairman, I think that I have said enough to stimulate discussion during your week long discussions. It only remains for me to wish that you have a successful and fruitful meeting.