

Unless I'm discussing sex, I try to avoid the term "everyone", so instead I'll just say that nearly everyone who is criticising Chief Justice Ivor Archie and the Judicial and Legal Service Commission would probably have done exactly the same thing in their position. This doesn't mean that the CJ and the JLSC didn't err but, in my view, they are being taken to task by their critics for the wrong errors.

To start with, it is a basic principle of law that laws cannot cover all eventualities. Were that the case, there would be no need for judges or, for that matter, politicians.

But human society is too complex, and spoken languages too nuanced, for legal writs to settle all the conflicts and conditions that are part and parcel of our existence.

That is why humans have evolved or invented other mechanisms for managing families, villages, tribes and nations.

One of those key mechanisms is trust. No matter how detailed a contract, lawyers and businessmen both know that formal arrangements can only function effectively if there is good faith on both sides.

In this context, it was not at all unreasonable for the JLSC board to take at face value the statement from Marcia Ayers-Caesar that she had completed all the substantial cases on her docket.

Consider the situation: (1) the JLSC was interviewing the chief

WHY THE JLSC ERRED

magistrate, a post which requires a high level of probity; (2) the question about her caseload was a quite basic condition for her elevation; and (3) any prevarication would be sure to come out once she assumed her new position as a High Court judge.

In its after-the-fact explanation to the public released last Tuesday, the JLSC said: "Reasonable 'due diligence' is satisfied by seeking an assurance that the appointee has done all that is required with respect to his/her professional obligations to put themselves in readiness to assume duty."

The issue of due diligence has been the key point raised by the JLSC's critics, yet surely asking the question is sufficient, for the three reasons I have listed.

The inherent incoherence of the JLSC's critics is most clearly exemplified by attorney and UNC Senator Gerald Ramdeen, a glasshouse dweller who first questioned Ayers-Caesar's elevation but who is now defending her against the JLSC which he blames for ruining her career.

But a similarly contradictory response came from Senior Counsel Ivory Sinanan, who complained to the Guardian that the JLSC's media release "was scripted in an attempt to answer the questions (compiled by 11 senior counsels) beforehand. It was clearly a pre-emptive manoeuvre on the



KEVIN BALDEOSINGH

kevin.baldeosingh@zoho.com

JLSC's part."

So Sinanan's real beef is that the eminent attorneys who submitted the queries didn't get a response before the hoi polloi.

Yet for the past few weeks, the commission has, quite rightly, been criticised for its lack of transparency and silence on this matter. The other point raised by critics is that Ayers-Caesar's side should be heard.

That is a given but, in light of the claims made by the board, what could her rebuttal be, except that the JLSC members are either being disingenuous or lying outright? Yet, even if she makes such an assertion, it wouldn't be a matter of he-said-she-said, but she-said-they-said. And the

incontrovertible fact at the centre of this mess is, as Ramdeen and others first complained, that Ayers-Caesar was leaving cases that would have to be re-started once she was appointed as a judge.

Could this situation have been avoided? Hardly likely, given the players' relationships, assumptions, and the managerial defects of the judicial system.

The errors, therefore, were fundamental. The very composition of the JLSC, for example, lends itself to such deficiencies.

As interpreters of the law, the JLSC members may have a perspective, unconscious or otherwise, that they are above the law.

Thus, they conducted themselves autocratically and did not think it necessary to respond in timely fashion once concerns were raised in the public sphere. This reflexive secrecy only exacerbated the matter.

In his book *Why Societies Need Dissent*, American legal scholar Cass Sunstein writes: "Well-functioning boards contain a range of viewpoints and encourage tough questions, challenging the prevailing orthodoxy," adding, "Judges are not lemmings, but they certainly follow one another (and) are highly vulnerable to the influence of one another."

The JLSC thus makes itself more prone to error because it lacks members versed in psychology, or economics, or history or

The inherent incoherence of the JLSC's critics is most clearly exemplified by attorney and UNC Senator Gerald Ramdeen, a glasshouse dweller who first questioned Ayers-Caesar's elevation but who is now defending her against the JLSC which he blames for ruining her career.

some field that would provide a non-legalistic perspective.

Because they considered Ayers-Caesar a legal colleague—and, perhaps, a spiritual one as well—they were blind to the possibility of prevarication.

This in turn suggests that the judiciary learned nothing from the tenure of a previous chief magistrate, the late Sherman McNicolls, who famously refused to testify in the case against then-chief justice Sat Sharma.

What the JLSC and other key institutions in this place need is a devil's advocate—ie, people whose function it is to argue against conventional wisdom, not reflexively, but sceptically.

However, people who hold office or power don't like to be told that they might be wrong: which is why they so frequently are.

KEVIN BALDEOSINGH is a professional writer, author of three novels, and co-author of a History textbook.

CONSTITUTIONAL CHALLENGES FOR JUDICIAL COMMISSION

With the recent Privy Council decision in favour of Reginald Dumas and his challenge to the appointments made by the President to the Police Service Commission after parliamentary ratification, the spotlight has now turned to whether or not the Judicial and Legal Service Commission (JLSC) is properly constituted.

The JLSC is established by section 110 of the Constitution and it "shall" consist of (i) the Chief Justice, (ii) the Chairman of the Public Service Commission; and (iii) three appointed members who shall be (a) a sitting or former judge, and (b) two persons who have legal qualifications at least one of whom should not be in active practice.

In recent times, the issue of the age of the members of the JLSC has arisen in the context of whether or not the commission is properly constituted.

The chairman of the Public Service Commission (PSC) is listed there in an ex-officio capacity with no requirement for legal or age qualifications because the tenure of the PSC chairman is governed by the provisions of section 126, while the Chief Justice has a retirement age set at 65 by sections 106(1) and 136(1) of the Constitution.

The wording of section 110 of the Constitution may lead one to believe that the framers of the Constitution only envisaged that there should be one sitting or former judge on the JLSC because no specific provision is made otherwise.

For the remaining two members, "legal qualifications" are required for anyone being appointed to those positions.

This may require some interpretation in respect of whether being called to the Bar is all that is required or whether having an LLB and/or an LLM and/or a PhD/D Juris in Law (without being called to the Bar) will suffice as "legal qualifications" seeing that there is no definition.

In other words, is being qualified as an advocate or instructing attorney the only consideration with respect to "legal qualifications" or would someone who is qualified to understand the law (as opposed to practicing it) be considered to have "legal qualifications"? There is the presumption that being called to the Bar is what having "legal qualifications" means.

One of the two remaining members of the JLSC is permitted to be in active legal practice which suggests that they must have been called to the Bar. The other member may have "legal quali-



DR HAMID GHANY

hamid.ghany@sta.uwi.edu

cations" however defined and may not be in active legal practice. The three appointed members are required to hold office in accordance with section 136 of the Constitution (which is the same section that applies to the Chief Justice), but subject to section 126(3)(a).

Section 126(3)(a) proposes that the term of the appointment of these appointed members could range between three and five years which could imply that such variation is required in order to satisfy the possibility of a person so appointed avoiding exceeding the age of 65 specified in section 136(1).

Section 136(3) specifies that nothing done by the officer who has attained the age of 65 "shall be invalid" if he attains the age at which he is required to vacate his

office (presumably 65 or such other age as may be prescribed).

It is obvious that subsections 136(1) and (3) relate to making appointments of people who are under the age of 65 as both subsections speak to the future of "attaining" the age of 65 or such other age as may be prescribed.

As a consequence, section 110(3)(a), envisages a sitting judge being appointed who is under the age of 65 or a former judge who is no longer on the bench and who is under the age of 65 when the simple wording of the subsection is cross-referenced against subsections 136(1) and (3).

Section 110(3)(b) envisages two people who are under the age of 65 when cross-referenced against subsections 136(1) and (3).

In respect of the three appointed members, it would appear that successive presidents may have erred in appointing people to the JLSC who have already retired from the bench after they had turned 65.

Seeing that there is a vacancy on the JLSC for one more member, it will be necessary to determine which category is missing after determining the categories into which the other two appointed members actually fall.

Based on the length of time that such a vacancy has existed, it is possible that there might be the

One of the two remaining members of the JLSC is permitted to be in active legal practice which suggests that they must have been called to the Bar. The other member may have "legal qualifications" however defined and may not be in active legal practice.

need to interpret what is a reasonable period of delay between the creation of a vacancy on the JLSC and the appointment by the President to fill the vacancy. Perhaps, the more compelling questions are how long has a vacancy existed on the JLSC and why has it not been filled?

It is true that the JLSC can function with only a quorum of three however, that is determined on the basis of a membership of five. The spotlight has suddenly been shone on the JLSC because of the recent controversies related to appointments made to the judicial bench from the magisterial bench.

The Dumas Privy Council judgment opens the door to this scrutiny of the membership of the JLSC.