

Chapter Eleven

Accountable Government

A freely elected government and the separation of powers do not alone guarantee that the government is accountable to the people by whom they are elected. The Government is held to account by the electorate in elections every five years or sooner but accountability is an ongoing responsibility and should not have to await an election.

The purpose of ongoing accountability is to establish and maintain public confidence in government performance and to deter corruption. It involves the obligation by public officials to act in accordance with the law and their duties, to work efficiently and fairly and impartially, to disclose information to which the public is entitled by law and to explain their decisions. It also requires actions and legal measures that enable the public to enforce accountability.

Government accountability is achieved in a true democracy through the use of a variety of mechanisms - political, legal, and administrative. Legal accountability mechanisms include the constitution, legislation and other legal instruments that govern actions that public officials can and cannot take. The mechanisms define in some instances how citizens may take action against those officials whose conduct is considered illegal or unsatisfactory.

Just as important are the unwritten rules which integrity and honesty and the pride of public service should lead public officials to demonstrate.

Accountability mechanisms include:

- Parliamentary oversight;
- Laws with codes of conduct for public officials;

- Conflict of interest and financial disclosure laws, requiring public officials to divulge the source of their income and assets;
- Procurement legislation establishing processes for the award of government contracts;
- Freedom of Information laws, providing the press and the public access to most government records and information;
- Judicial review, providing courts the power to review the decisions and actions of public officials and agencies;
- Laws to impose fiscal responsibility;
- The Ombudsman, responsible for hearing and addressing citizen complaints;
- The Auditor General who scrutinizes the use of public funds for signs of misuse and issues an annual report;
- Laws protecting so-called whistleblowers, those within government who speak out about corruption or abuse of official authority, from reprisals.

I will consider in this chapter and in later chapters if and how the above mechanisms apply in our government system.

Parliamentary Oversight

An important oversight role of the National Assembly in providing checks and balances on the Executive is intended to be carried out by the Public Accounts Committee of the Assembly. The Committee is intended to comprise of five members three from the Government side and two from the Opposition benches. If the Leader of the Opposition is one of the two appointees from the Opposition he can opt to be Chairman of the Committee. If not the Committee elects its Chairman.

The powers and duties of the Committee are to examine the reports of the Director of Audit tabled in the Assembly, to inquire into and report to the Assembly on any items or matters in that report. The Committee has power to subpoena the Financial Secretary, any

other Permanent Secretary and the Accountant General to give evidence on oath before it on any matter under investigation by the Committee. The Committee is intended to table an annual report in the Assembly and any member of the Committee can table a dissenting report.

This Committee is a key mechanism for accountability of the government in many democratic countries but it is virtually non-existent in ours. Although the Opposition is in a minority on the Committee the rules applicable to it provide an ideal opportunity for the Opposition to investigate and hold the Government to account and to expose lack of accountability and wrongdoing of the Government. The access to the Opposition of the chairmanship of this Committee also gives the Opposition strength in its function.

However, the Committee has never functioned as intended. Governments have frustrated its appointment and opposition parliamentarians have shown no real interest in the analytical work involved in making the committee effective. They prefer simply to oppose everything the government does. They prefer to talk generally and campaign in the National Assembly. The National Assembly cannot therefore be relied on to carry out its oversight role in this area.

Fiscal Responsibility

Fiscal responsibility is pursued widely in countries across the world by legislation establishing a rules-based framework to guide the conduct of Government spending and borrowing and other financing activities. The framework usually sets out the principles in the form of fiscal rules and targets that the Government is expected to adhere to except in instances where the laws are suspended in emergencies such as natural disasters, Covid and worldwide recessions. The legislation sometimes establishes independent bodies to monitor, provide oversight and report to Parliament on Government compliance with the rules.

The purpose of this system is to ensure that the country's financial affairs and government borrowing are conducted in a transparent and prudent manner. It enables the country to maintain public sector debt at prudent and sustainable levels. In simple words this system is intended to stop governments from spending and borrowing more than the country can afford.

These rules can include caps on the growth of public expenditure, ratios on expenditure on the Government wage bill to GDP and ratios on debt to GDP. Some countries even require balanced budgets by their constitution. St. Kitts and Nevis has no such legislated framework with measurable standards and targets for fiscal responsibility.

This country almost fell off the cliff in debt under Douglas and was saved only by the timidity of its creditors in going into Douglas' barber's chair and taking a haircut. A country will not get away many times with that type of shenanigan and should not boast of it as happened here.

St. Kitts and Nevis needs comprehensive fiscal legislation and a law which imposes direct personal liability on any Government Minister or official who participates in the infringement of the fiscal limitations.

Director of Audit

I look now at the role of the Director of Audit as another of the accountability mechanisms. The office of Director of Audit is governed by the Constitution. The Director is appointed by the Governor General on recommendation of the Public Service Commission (PSC). The Constitution says that the Director of Audit shall not be subject to the direction or control of any other person. The Director may only be removed from office for inability to function or misbehavior and only on recommendation after an inquiry of a tribunal appointed by the Governor General comprising three judges or former judges (from any Commonwealth jurisdiction) selected by the Chief Justice. The position of Director of Audit is as independent

as you can get in our system for any officer in the public service excluding Judges of the Supreme Court.

The role of the Director of Audit is

- to express an opinion as to whether the annual accounts submitted by the Accountant General represent fairly the financial position and results of operation of the government;
- to satisfy himself or herself that all monies appropriated by Parliament and disbursed have been applied to the purposes designated on appropriation and in accordance with the authority governing it;
- to audit and report on the public accounts of the government.

The report of the Director of Audit for the year 2022 is very instructive. It was made available only in December 2023 after the Budget sitting. In it the Director describes her role as primarily to promote *'better governance, transparency and accountability in the public sector.'*

It is interesting to consider some of the reservations and comments made in the report which incidentally covered two governments as there was an election on August 5, 2022 in which the incumbent government was defeated.

The Director drew attention in her report to the law that when a budget is approved by the National Assembly the Government can exceed the amount approved for expenditure to cover unforeseen and urgent spending by up to 25 per cent. But in 2022, in breach of the law, the Government spent 45 per cent more than budgeted exceeding the limit of 25 per cent by 20 per cent. In dollars and cents the Government spent more than \$190 million dollars above the amount allowed by law.

The Director also reported what the Ministry of Finance said about her complaint.

'The Ministry notes the observation and will put systems in place to adequately monitor the

level of expenditure authorized by special warrants and to inform the Executive arm of the Government so that the appropriate action may be taken.'

That means that the Government didn't care about the law and there was no system in place within the Ministry of Finance to monitor the illegality.

The Director of Audit also commented as follows: '*The credibility of the budget is at stake if programmes continue to be implemented year after year without inclusion in the budget.*' That suggests that the overspending in 2022 was not a one-off abuse.

The report of the Director of Audit did not separate the amounts overspent by each of the two governments. I simply note that 2022 was an election year with money being spent like crazy before the election.

This shows graphically the need for taxpayers whose money is being abused, civil society, the media and the public in general to pay greater attention to the report of the Director of Audit. Unfortunately very little public attention is paid to abuses of this type. That is sadly because of the immaturity of our people in their lack of concern for their money and their democracy. If that happened in the USA you would hear it a hundred times per day on CNN. We need as a people to hold our governments accountable. The report of the Director of Audit is an excellent mechanism and it should be regarded as such.

Judicial Review

As most people know or should know the Court plays an important role in holding the Government to account. Government can be held accountable in the courts where a decision, act or failure to act is a breach of a person's constitutional right or a right given by statute or other law. Claims can also be brought under the process of judicial review. By that process a Court can on application by an affected party review the decision of a public official body or authority and can overturn the decision, prevent implementation and make related orders.

Such orders include an injunction stopping the offensive action and an order of mandamus compelling the public official to take specific action as directed by the Court.

The main grounds on which a person can invoke the process are illegality because the decision maker abused his/her or its power; procedural unfairness for example bias or improper procedure or lack of due process; irrationality which means that the decision was irrational in that no reasonable person acting reasonably would have come to that decision.

The Court here has not had to handle as many such cases as in the other Caribbean countries but the numbers are growing as awareness increases. I will give some examples of important judgments holding Governments to account under the process of judicial review.

Commercial Contracts

The Privy Council has decided that the Government is accountable for commercial contracts made by it. The Courts can review such contracts and overturn them if the government acted in excess of its statutory or other authority or where there is fraud, corruption or bad faith or favoritism in the making or terms of the contract. Individuals or companies affected by the contract can challenge it in the Courts. Contracts made by Government by way of political favoritism may be subject to challenge under this jurisdiction if such favoritism amounts to corruption as is often the case.

Environmental matters

The Court has also intervened in planning and environmental matters. On February 27th, 2024 the Privy Council advanced the rights of citizens to challenge Government decisions by judicial review in a landmark case in Antigua and Barbuda. The case arose out of a decision of the government to build an airport in Barbuda. The Government took advantage of the destruction of Barbuda by Hurricane Irma which left the island uninhabitable. The Government rushed to build the airport while the island was abandoned. When work began in September 2017 no planning approval had been granted. Two Barbudans

took the Government to Court claiming among other things that the airport as designed posed a danger to the environment and the decision to build it as planned was a breach of environmental principles. The Government disputed the applicants' right to bring the claim on the ground that they did not have the expertise or standing to challenge the decision and could not do so simply as citizens. The Court of Appeal found in favour of the government. The applicants appealed to the Privy Council.

The Privy Council overturned the judgment of the Court of Appeal and clarified the law with these important words *'Where an application for judicial review involves issues of environmental concern it is not necessary that the applicant demonstrates some knowledge or concern for the subject. So an amateur ornithologist or bird-watcher might raise a concern about the potential loss of a bird's habitat; or a fisherman about the effect of a hydro-electric scheme on fish; or a local historian about the effect on an archaeological or historical site; or a local resident on the loss of a local beauty spot frequented by the local community.'*

That means that you don't have to have a doctorate in environmental science as the government was trying to argue to challenge a decision of the government which has a negative impact on the environment. You just have to be a well intentioned citizen or resident.

That judgment brought to mind the Privy Council judgment in 2001 in the famous Observer Radio case in Antigua when they ordered that a radio broadcast licence be issued to the Observer radio station which had been denied a licence for over five years because of politics. In that judgment The Privy Council disagreed strongly with the suggestion made by one of the Court of Appeal judges that the constitution is secluded behind closed doors or that it is aloof. The 2024 Barbuda case marks a great advance in the jurisprudence of judicial review and expands the accountability of government.

Use of Ports

In 2014 The High Court struck down a decision of The St. Christopher Air and Seaports Authority prohibiting the offloading of commercial cargo at the Basseterre Ferry Terminal. The case was brought by the owners of the MV Sea Hustler which had been offloading cargo at the Basseterre Ferry Terminal for 20 years. The Court exercised its power of judicial review to quash the notice. The judge held that the Port Authority had exceeded its statutory authority and its decision was made in breach of the principles of natural justice, it was irrational and unreasonable and was not proportionate to the objective of protecting public safety.

Ombudsman

The office of Ombudsman was established by the Ombudsman Act of 2006. The Act says that the Office is established for the purpose of protecting and enforcing the rights of citizens. The Ombudsman is appointed by the Governor General after consultation with the Prime Minister and the Leader of the Opposition. The Ombudsman is intended to investigate allegations of maladministration or unreasonable delay or abuse of power or unfair or illegal or discriminatory or mistaken action taken by government departments or public authorities or government boards or government corporations.

The Ombudsman is required at all times to act independently and impartially and to take no side in the process of investigating a complaint.

The Ombudsman can play a useful role in pressuring public officials to be accountable for their decisions or lack of decisions and their actions or inaction but the office has no real teeth as the Ombudsman can only make recommendations and cannot direct or order anyone to do or refrain from doing anything.

The natural question is if Ministers of Government complain about their inability to change attitudes in the public service what do you expect from an Ombudsman.

It will take substantial maturity in our political culture to persuade citizens aggrieved to avail themselves of the services of the Ombudsman to investigate their complaints and to make public officials respect the role of the Ombudsman. At present most people are afraid of the adverse consequences of challenging public officials and too many public officials will ignore the Ombudsman or find ways around his recommendations. That accounts for the very limited effect of the office in its 18 years of existence. Reform and depoliticization of the Civil Service are required to make this a useful mechanism of accountability of government.