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EDITORIAL

April 2018 was a particularly busy month for the Commonwealth Magistrates' and Judges' Association (CMJA). This issue of the Commonwealth Judicial Journal (CJJ) contains a report by Keith Hollis detailing two important, international initiatives in which the CMJA was involved. The first was the launch of the Global Judicial Integrity Network by the United Nations Office on Drugs and Crime. The second was the invitation to the Latimer House Working Group (of which the CMJA is a member) to co-curate a session on the Separation of Powers at the Commonwealth People's Forum which was held in the wings of the Commonwealth Heads of Government meeting (CHOGM) in London.

The CMJA Secretary General, Dr Karen Brewer, was also invited to attend the CHOGM. With the priorities for this CHOGM being a fairer, more sustainable, safer and prosperous Commonwealth, there was a lot covered during the week. In addition, there were a number of Fora held in the wings of the CHOGM, including: (a) The People's Forum – gathering civil society and organised by the Commonwealth Foundation; (b) The Women's Forum - the second to be held and organised by the Gender Section of the Commonwealth Secretariat; (c) The Youth Forum - bringing together youth leaders from around the Commonwealth and organised by the Commonwealth Youth Council; and (d) The Business Forum – bringing together business leaders from around the Commonwealth and organised by the Commonwealth Business Network.

All of these Fora raised a number of important and timely challenges facing the Commonwealth. The Women's Forum, for instance, highlighted LGBTI rights, economic rights, access to sexual and reproductive rights, the importance of having more women in decision making as well as the importance of eliminating all forms of violence against women. The Peoples' Forum focused attention on climate change, the implementation of the Latimer House Principles and access to justice for the disabled. On this latter point, there was

a call for the CMJA to look into access to justice for the disabled especially in relation to their rights at the session on Inclusion of Persons with Disabilities. It emerged clearly that, while the Commonwealth had made progress in this regard, further work was required to address these challenges.

For the first time in many years, we are pleased to include a Letters to the Editor section in this issue. I would like to thank Douglas Allan for his contribution and take this opportunity to encourage other readers to submit Letters to the Editor for publication in future issues. Please submit them to the CMJA email address: info@cmja.org.

This issue opens with a tribute to the life of Sir Henry Brooke QC. This is followed by Kenneth C. Mackenzie's article exploring different approaches to legal reasoning in the case of *Donoghue v. Stevenson*, in an article entitled *Foxes And Hedgehogs – Legal Animals?*. Keith Hollis provides a report on CMJA's international activities in *Judicial Independence and Judicial Accountability: The CMJA Takes an International Lead*. This is followed by an updated version of John Lowndes' article on *Judicial Accountability as an Evolving And Fluid Concept*. In his article on *Poor Public Image: Dealing with Comments by Politicians and the Media*, James Dingemans explores the common law offence of scandalising the Court to see whether this offence could provide the answer to dealing with unfair criticism of judges. It is especially interesting to note in this regard the newly produced "Commonwealth Principles on Freedom of Expression and the Role of the Media in Good Governance" which specifically provides that "the media have a responsibility not to undermine the authority or independence of the judiciary and to communicate judicial decisions to the public fairly and accurately" (Article 5) launched in April 2018 and which was produced by the Working Group on Media and Governance at the behest of the Commonwealth Journalists Association. These can be viewed at: <https://commonwealth.sas.ac.uk/sites/default/files/files/Publications/Commonwealth%20principles%20on%20freedom%20of%20expression%20and%20the%20role%20>

[of%20the%20media%20in%20good%20governance.pdf](#)

Finally, Georgina Wood explores the vexed question of how to attract and retain the right calibre of judges and magistrates suited for this crucial role in her article entitled *Judicial Appointments*.

The Journal has collaborated with LexisNexis to publish two cases from the Law Reports of the Commonwealth (LRC).

There are *Republic v Chengo and Others*, which concerns, *inter alia*, legal aid and the death penalty and *Bano v Union of India; and Other Petitions*, which concerns the practice of triple talaq. These reports have been reproduced by permission of RELX (UK) Limited, trading as LexisNexis. Finally, the issue closes with a book review of *Changing the Law: A Practical Guide to Law Reform*, edited by Richard Percival and Michael Sayers.

LETTERS TO THE EDITOR

Dear Sir,

The December 2017 (Vol 23 No 2) of the Commonwealth Judicial Journal contained, as usual, a number of very interesting articles. I was particularly drawn immediately to Obituaries of two of my very good friends, Kipling Douglas and Robin Millhouse, and it was good to see the very appropriate recognition of their immense contributions not only in the jurisdictions which benefited from their judicial experience but also to the vibrancy and continued well-being of the C.M.J.A.

However, the Article about which I am writing is the one entitled “*Quality of Justice - Myth or Reality*” based upon the paper delivered at the Pacific Judicial Conference at Port Moresby in September 2016 by His Honour Judge William Young KNZM.

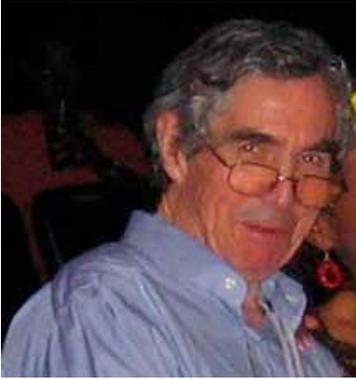
Based upon his long experience as a barrister from the 1970s, as a High Court Judge from 1997, as a member and then as President of the Court of Appeal and, since 2010, a Judge of the Supreme Court of New Zealand, the Article is full of useful, jurisprudential background and thoughts on improving the quality of judicial performance and offering some helpful illustrations on judicial education.

Perhaps, however, based upon his previous judicial writing, it should come as no surprise that I found the most compelling and helpful parts of the Article dealt with assisting Juries in the execution of their task, approaches to sentencing and considering the structured sentencing methodology. His consideration of how judicial approach to sentencing has developed over the last 20 years in New Zealand - and the difficulties which were being addressed through this process - encompassed many difficulties which I experienced in my judicial career.

It is an Article to which I have had occasion to refer more than once and, in thanking Justice Young for this very helpful and informative paper, I commend it as a significant contribution to judicial education and development.

Douglas Allan
Retired Sheriff, Scotland.

OBITUARY - SIR HENRY BROOKE QC



Sir Henry passed away during cardiac surgery on 30 January 2018. Born into a political family, his path led him to study the classics and then the law. He did his National Service with the Royal Engineers, serving in Egypt, Libya and Cyprus. He was called to the Bar in 1963. He became Queen's Counsel in 1981 and was a Recorder from 1983-1988. In 1988 he was appointed to the High Court, Queen's Bench Division. He was Chairman of the Law Commission from 1993-1995 and in 1996 became Lord Justice of Appeal. He retired as Lord Justice of Appeal in 2006. His long and distinguished legal and judicial career provided him with an insight into all aspects of the administration of justice from employment cases to working in the family courts. He championed a more transparent and open justice system mainly through his determination both at the Bar and in the High Court and Court of Appeal to ensure that the English justice system adapted to the information technology age. He was one of the founders of the online database of legislation, case law and other legal resources, the British and Irish Legal Information Institute (Bailli). In 1997, Henry gave the first ruling requiring that "the text of this judgment is to be made available immediately on the internet" and was the instigator of the now normal numbering of paragraphs system used for judgments. Legal Technology News described him as "*one of the most computer literate judges on the bench of any court on either side of the Atlantic*", adding that he was a realist "*rather than a techno-enthusiast forever jumping on to every new gizmo bandwagon that rolls along*". On retirement he started to Blog

and his blog covered everything from current legal issues to his memoirs of cases and legal characters such as Lord Denning. It has been reported that his "Musings, memories and miscellanea" has become required reading for students of the law! He was also a prolific tweeter.

From early on in his career as a barrister he recognised that diversity at the Bar and in the Judiciary were paramount. In 1991, ten years before the law placed a statutory duty on public authorities to promote racial equality, he persuaded his peers of the need to train judges in race awareness, bringing in advisers from beyond the judiciary

He was also a great believer in legal aid and became Vice Chairman of the Bach Commission on Access to Justice (2016-17), drafting significant sections of the resulting report that called for a legally enforceable right to justice and legal aid. He was also a great believer in people seeking mediation before they went running to the courts. In one well-known case (*Dunnett v Railtrack*, *The Times Law Report*, April 3, 2002), he denied Railtrack their costs at the Court of Appeal because they had refused to enter into alternative dispute resolution, even though they won the case. After retirement he practiced as a mediator and enjoyed this work as well as the charitable work he undertook. He chaired the Civil Mediation Council between 2007 and 2011.

Internationally, his contribution was enormous. He was the Executive Vice-President of the Commonwealth Magistrates' and Judges' Association (CMJA) from 2006-2009. His energy, commitment and sheer enthusiasm for the CMJA's work were inspirational. He was an active advocate for the implementation of Commonwealth (Latimer House) Principles in particular the protection of judicial independence, providing support and advice, through the CMJA, to judicial officers under threat. He was especially concerned with threats to the independence of the lower judiciary. He was instrumental in the CMJA's undertaking of a major project on the status of magistrates in the Commonwealth. He described this advocacy and support as the

“core” of the CMJA’s work and the “raison d’etre” (the fundamental reason) of the CMJA. Dr Karen Brewer, the CMJA Secretary General described as a “great supporter of judicial officers under threat and a continual inspiration”.

Those members who attended the CMJA Triennial Conference in Turks and Caicos will recall that he stepped nobly into the CMJA President’s shoes to welcome participants to a CMJA Conference when the then President fell ill. Henry spoke eloquently even though he had to borrow a shirt having lost his luggage on the way. He was an active participant in CMJA training courses and frequent speaker at conferences of Commonwealth judges and magistrates. He was also a regular and active participant in Commonwealth Law Conferences with his wife Biddy. He continued his support for the

CMJA until his death in January 2018.

He also involved President of the Slynn Foundation, Patron of Peace Brigade International amongst other legal and judicial advocacy organisations. He made frequent trips to Eastern Europe to help overhaul post-Communist legal systems and combat corruption.

He was also a great admirer of William Wordsworth and had been a member of the Wordsworth Trust since 1993, visiting Dove Cottage in the Lake District where Wordsworth had lived, on many occasions.

He was knighted in 2012 and in 2017 he was made a knight of the Order of Skanderbeg, Albania’s highest honour for a non-citizen.

DOROTHY WINTON TRAVEL BURSARIES FUND WE NEED YOUR DONATIONS!

This fund was set up in the name of the first Secretary of the Association who died in October 2003. Dorothy’s time as the first Secretary of the Association was a very happy one and she was very concerned that justice (and support for justices) should be available to poor and rich nations alike.

The Fund have been used to assist participation from magistrates from Cameroon, Jamaica, Nauru, Malawi, Solomon Islands, South Africa and Uganda at the CMJA’s Conferences, and will be used to assist participation of judicial officers who would not otherwise have the opportunity to benefit from the training opportunity offered by the educational programme of the CMJA’s Regional and Triennial Conferences.

HOW TO SUPPORT THE FUND

Contributions can be by cheques drawn on a UK bank, bank transfer s-
making clear what the transfer is related to or bankers draft made **payable to CMJA**
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FOXES AND HEDGEHOGS – LEGAL ANIMALS?

Hon. Kenneth C. Mackenzie QC., Retired Justice of the British Columbia Court of Appeal.

Abstract: *The British philosopher, Isaiah Berlin, argued in a well publicized essay that there is an intellectual fault line among luminaries of literature and philosophy between those who proceed deductively from a general proposition and those who begin with particular facts and are suspicious of any general pattern. Prompted by an ancient Greek reference he labelled the first group “hedgehogs” and the second “foxes”. This paper submits that a similar fault line runs through legal reasoning, illustrated by the contrasting opinions of Lords Atkin and Macmillan in the snail in the bottle case, Donoghue v. Stevenson. Some of the tension between trial and appellate courts arguably can be traced to a tendency of hedgehogs to gravitate to appellate courts while foxes are happier at the trial level. The division begins in law school and has been amplified in Canada since the Canadian Charter of Rights and Freedoms was enacted in 1982.*

Keywords: Legal reasoning – *Donoghue v. Stevenson* – deductive v. inductive approaches – *Canadian Charter of Rights and Freedoms* – law schools

“The fox knows many things,
but the hedgehog knows one big thing.”

Archilochus, 7th Cent. B.C.

An obscure 2500-year-old allusion by an ancient Greek poet to the temperament of foxes and hedgehogs seems of little consequence. Yet, according to the noted Oxford political philosopher Isaiah Berlin, it exposes a major fault line running through the entire history of the Western intellectual tradition beginning in classical Greece. Berlin’s famous essay, *The Hedgehog and the Fox* (Isaiah Berlin, *The Hedgehog and the Fox*, Weidenfeld & Nicolson, London, 1953, 1988), contended that between “hedgehogs” and “foxes” lies “one of the deepest differences which divide writers and thinkers, and, it may be human beings in general. For there exists a great chasm between those on one side who relate everything to a single central vision, one system more or less coherent or articulate, in

terms of which they understand, think and feel – a single organizing principle in terms of which alone all that they are and say has significance – and on the other side, those who pursue many ends, often unrelated and even contradictory, connected, if at all, only in some *de facto* way, for some psychological or physiological cause, related by no moral or aesthetic principle...” Reasoning either begins with a general proposition with which particular instances must consistently conform or, alternatively, the process starts with particular facts and is suspicious of any general pattern. In the first approach, the reasoning process is deductive; in the second, it is empirical or inductive.

The basic inclination to be either a hedgehog or a fox may be a matter of temperament but patterns of education or training can either reinforce or discourage the natural tendency. Berlin used the distinction to categorize many of the luminaries of literature and philosophy. The hedgehogs include Dante, Plato, Hegel, Dostoevsky and Nietzsche who seek to relate everything to a single, central vision. An overriding concept is a compulsion that dominates their work. The individual note must be in tune with the general harmony. They are the hedgehogs.

Shakespeare, Aristotle, Erasmus and Joyce are foxes; their thought is scattered and diffuse, moving on many levels without an all-embracing unitary idea. Keats described this quality in Shakespeare as “Negative Capability, that is when a man is capable of being in uncertainties, Mysteries, doubts, without any irritable reaching after fact or reason” (Quoted in David Herbert Donald, *Lincoln*, Simon & Schuster, New York, 1995 p. 15. Donald attributes the same quality to Abraham Lincoln). Insight is singular and contradictions are relished. Berlin’s essay focussed on Tolstoy and his view of history. He argued that at heart Tolstoy was a fox who yearned to be a hedgehog; the contradiction produced enormous tension in his life and work. He was savagely critical of all philosophical views of the historical process – idealistic, Romantic, liberal progressive,

or otherwise. In Berlin's summary Tolstoy is "scrupulously empirical, rational, tough-minded and realistic. But [his] emotional cause is a passionate desire for a monistic vision of life on the part of a fox bitterly intent upon seeing in the manner of a hedgehog."

The thesis of this paper is that law too has its foxes and hedgehogs, although not many of us are as deeply intellectually passionate or conflicted as Tolstoy. The friction between natural lawyers, so-called, and legal pragmatists over the centuries reflects the fundamental division. Continental jurisprudence typically looks first for guidance to a Code replete with general propositions while the Anglo-American common law tradition usually starts with the particular facts and proceeds to a solution by analogy with reported cases. Gerald Beaudoin, a Quebec law professor and later Canadian senator, once recounted to me that he conducted an experimental seminar in torts/delicts with a group of law students from differing common law and civil law backgrounds. He found that they generally all came to similar answers to problems but they started from entirely different premises. The civilians would start with a general proposition in the Civil Code and work from there whereas those with common law training started with the facts and looked for analogous cases.

It may be that some of the tension between the Supreme Court of Canada and trial courts reflects a clash between the differing temperaments. By virtue of its modern role, the Supreme Court has become a natural habitat for hedgehogs while foxes forage best in the factual thickets of the trial courts. Much of the grumbling in the lower courts about the pronouncements of the Supreme Court of Canada after the 1982 enactment of the *Canadian Charter of Rights and Freedoms* may reflect a difference in temperament between the courts, as hedgehogs drift to the highest court by natural inclination. The Supreme Court is not a happy home for foxes.

The Canadian experience is not unique and parallels occur elsewhere in the common law world. As hedgehogs and foxes are both native to England, it is fitting to turn to an English illustration – the familiar case of *Donoghue v. Stevenson* ([1932] A.C. 562), establishing manufacturer's liability for negligence without

requiring a contractual relationship between the parties. Despite its Scottish origins, it was perhaps the most influential case in the English common law in the twentieth century. The case involved a Scottish snail allegedly in a bottle of ginger beer, but it enticed both an English hedgehog and a Scottish fox out of hiding. In the House of Lords it was a 3-2 decision, with each of the three law lords in the majority delivering separate speeches. Two of those three opinions, by Lords Atkin and Macmillan, have reverberated through the years. They reached the same result, but by very divergent routes. Atkin decided the issue as an application of a comprehensive "neighbour" principle. Macmillan in contrast simply saw one more category of negligence to add to those already recognized.

The general proposition expounded by Atkin was sweeping: "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour." Atkin's formulation in its context caught the legal imagination. It has been the dynamic propelling the expansion of liability in negligence ever since.

Atkin did not originate the proposition of course, even in a tort context. The application of the parable of the Good Samaritan, recounted in the gospel of Luke, to the law of negligence can be traced back at least from Brett M.R in 1883 to Chief Justice Lemuel Shaw of Massachusetts in the 1840s and Lord Bathurst in the 1750s. But in law as in life timing is everything, and in 1932 Atkin's timing was exquisite.

The promulgation of the neighbour principle and its application provoked intense hostility from common law traditionalists and so did its later progeny. D.M. Gordon, Q.C. of Victoria B.C. a frequent scholarly contributor to legal publications, fired a salvo at the House of Lords for *Hedley Byrne v. Heller* ([1964] A.C. 465), which extended the principle to economic loss. His denunciation was so intemperate that the Law Quarterly Review, his regular publisher, declined to print it. Undaunted, Gordon sent the article to the Australian Law Journal, which was happy to accept it.

Macmillan's opinion was less controversial.

He rejected any compelling general principle of liability. Simply put: “the categories of negligence are never closed.” Manufacturer’s liability was merely one more category of negligence identified by analogy with existing categories. The approach was characteristic of the man. Macmillan was consistently sceptical of generalizations. His preference for avoiding broad pronouncements and confining reasoning to that necessary to decide the case at hand was underlined in the later case of *Read v. J. Lyons & Co. Ltd.*: “Your Lordships’ task in this House is to decide particular cases between litigants and your Lordships are not called upon to rationalize the law of England” ([1947] A.C. 156, 175). That is the bark of the fox, *par excellence*.

The distrust of generalities is intuitive. Justice Oliver Wendell Holmes summed up the attitude: “General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise” (*Lochner v. United States*, 198 U.S., 45, 78). He put it more bluntly in a letter to Sir Frederick Pollock: “the chief end of man is to frame general propositions and ... no general proposition is worth a damn.”

The natural distrust of generalization has long been characteristic of the English bar. Small, cohesive, anti-intellectual, and self-perpetuating, the bar has maintained its insularity by the system of training in chambers and the Inns of Court, isolated from currents swirling in academia and broader intellectual circles. The English bar rarely paid any attention to case law from beyond the borders of England until recently when European Community conventions have forced a wider view. The technical maze of pleadings, procedure and arcane substantive rules for centuries effectively barred the door to all but initiates. Aspiring barristers advanced in the profession through their ability to persuade their seniors on the bench, who valued proper deportment and adherence to tradition over intellectual flair. Grand unified theories of the legal universe were suspect; for one thing they might be comprehensible to outsiders. There could be no more damning indictment of counsel than “brilliant but unsound”.

In the United States, the imperatives of

geography and multiple jurisdictions precluded evolution of the bar on the English model. Formal legal education in scattered law schools was inevitable. Canada has faced the same exigencies and followed a similar path. Americans have relied on the Socratic or case method of legal education to instill a cast of mind equally as skeptical of generalized theory as the typical English barrister. Professor Anthony Kronman of Yale has written that the case method “tends inevitably to promote a certain skepticism regarding the power of abstract ideas and to encourage a kind of pragmatic gradualism.”

The case method’s originator, Christopher Columbus Langdell of Harvard, had a different objective. Langdell was caught up in the nineteenth century enthusiasm for scientific rationalism. He believed that law was a science and that cases could be used empirically to discover underlying principles of natural law as immutable as the laws of the physical sciences. It was left to the hard headed skepticism of his younger Harvard colleague, Oliver Wendell Holmes Jr., to demolish Langdell’s scientism with the telling axiom: “The life of the law has not been logic: it has been experience.”

Holmes and others borrowed from the insights of psychology and the social sciences generally to expose the “inarticulate major premises” behind the rhetorical appearance of scientific logic in judicial reasoning. Holmes had his own theory, that law was determinable through the predictability of judicial behaviour – a theory that wasn’t any more valid than Langdell’s.

But Holmes was the precursor of the legal realist movement which took the case method to an apogee at Harvard and other leading U.S. law schools in the 1920s and ‘30s. Under the tutelage of the most rigorous exponents of realism, the process of dissecting a case was akin to peeling an onion; the core became smaller and smaller until virtually nothing was left.

According to Professor Kronman, the case method “tends to encourage a preference for narrow justifications over broad ones, and to discourage the belief that hard cases – the ones of greatest professional interest to lawyers – can be decided on the basis of abstract principles that sweep too broadly and omit

too much of the peculiarities that distinguish the specific case at hand. The case method thus undermines students' faith in the power of abstract ideas as instruments of analysis and control and focuses their attention on the details of specific cases instead, ... The student who is given a steady diet of hard cases and is trained to look for small distinctions grows used to the idea that the sorts of conflicts with which he is professionally concerned cannot, in most instances, be sensibly resolved merely by adopting some scheme of general principles and then sticking to it unwaveringly, using the principles he has chosen as a kind of solvent to decide every conflict in which they play a part." This explains why radicals and reformers who seek to remake society to accord with new principles of justice and equity so dislike the case method, and common law lawyers. It also explains why Atkin's neighbour principle provoked so much hostility from many at the bar. Its sweeping generality offended their deepest sensibilities.

The 1973 film *The Paper Chase* portrayed the case method and its protagonist Professor Charles Kingsfield, played by John Houseman, as exponents of a rigorous but essentially sterile intellectual discipline, devoid of human compassion and breadth of vision. It is not surprising that a reaction to the case method arose in that era of idealism. Critical legal studies and the law and economics movement both grew out of the backlash to the sharp, narrow emphasis of the case method.

The Socratic intellectual tradition is normally, but not invariably, conservative. It is no coincidence that as the influence of law school reformers rose, the use of the case method waned. Hence the lament in a Michigan Law School publication entitled "The Frail Old Age of the Socratic Method" by an author who believes "It's still the best method of teaching students to think like lawyers." Of course that is exactly why its detractors don't like it. But if, indeed, the case method is rooted in an intellectual tradition that has been around since the time of Socrates and before, any academic eclipse is likely to be temporary. The tenacious hold of Socratic reasoning on bench and bar reflects the reality that most of their work involves specific disputes – very rarely grand designs.

The case method is unmatched in its ability to teach analytical reasoning and it remains the backbone of North American legal education, particularly in the first year. By second year the case method emphasis produces diminishing returns. "Black letter" law teaching can cover more law as rules in a limited period of time. Socratic teaching leaves little room for general discussion. The pendulum started to swing away from the case method emphasis in the mid-'60s with the introduction of "policy-oriented" materials into the law school curriculum. Policy materials broaden the perspective which, like it or not, is essential to legal life in the post-*Charter* era. A fair-minded observer probably would conclude that legal education today is more well rounded than ever before.

The common law likes to move interstitially, imperceptibly if possible, but occasionally the chasm between contending positions is too wide and too deep to accommodate gradual change. In times of stress, when existing cases do not provide an adequate foundation, common law judges have reached for a general principle beyond the cases, often from Roman or civil law. Typically it is when they are confronted with some defining controversy that cannot be avoided. Chief Justice Coke in his confrontation with James I over the independence of the judiciary turned to Bracton, trained as a civilian in the thirteenth century, for the bold proposition that the king is under the law (Case of Prohibitions del Roy, (1608) 12 Co. Rep. 63, 65). Lord Mansfield, faced in *Somerset's Case* with the issue of slavery he could no longer avoid, refused a common law remedy (trover) to a slave owner on the ground that slavery was so odious that it was "incapable of being introduced on any reasons, moral or political: but only positive law ..." (*Somerset v. Stewart* (1772) Lofft 1, 19). Mansfield stated the proposition without attributing a source but according to Pollock it is taken from a commentary by the Roman jurist Ulpian. At a time when one quarter of the ships trading out of Liverpool were slavers and the slave trade was a large part of Britain's maritime economy, Mansfield needed some psychological support in earlier jurisprudence to take the moral high ground, even if it was impolitic to acknowledge that source.

In a more prosaic context Chief Justice Sir

John Holt, one of the best of the common law judges, felt no compunction in turning to civil law principles in *Coggs v. Barnard* ((1703) B. & M. 370) to sort out the muddle the common law had made of the law of bailment. A persuasive case can be made that much of the intellectual foundation of the modern law of negligence can be traced back to *Coggs v. Barnard* and its civil law antecedents. Atkin's approach in *Donoghue v. Stevenson* is far from unique in the evolution of the common law.

Hedgehogs dominate the civil law intellectual tradition. Paradoxically, however, in *Donoghue v. Stevenson* it is Macmillan, coming from a Scot's civil law background, who champions the classic common law attitude. Atkin, the English jurist, takes the line civilians find more congenial.

Macmillan, like Holmes, was the master of the arresting phrase, and his "categories" remark continues to echo. But it is fundamentally unsatisfying. Why this category and not others? Macmillan's idea of law was fluid, unlike many of his common law predecessors who saw the common law as the timeless embodiment of static rules. But it provided little sense of purpose and direction. Atkin's principle provided the missing ingredient – moral and intellectual support for the extension of liability and a spur to further expansion. It was and still is dynamic, challenging other areas where liability has been denied in a way that Macmillan's approach avoids.

Manufacturers' liability was the largest issue in negligence over the hundred years from 1840 to 1940. Expansion of liability made little headway against the reactionary current of the nineteenth century common law but, in 1932, the tide had turned. And once liability was imposed on manufacturers the extension to landlords in occupiers cases was irresistible. Liability for negligent words followed with *Hedley Byrne*.

Constitutional law is quintessentially the application of general principles. Macmillan's trenchant advice to the House of Lords in *Read v. Lyons*, that judges should confine themselves to deciding particular cases and avoid attempts to rationalize the law, would find little resonance in the Supreme Court of Canada today. Applying the *Charter*, the

Supreme Court is driven to pronouncements of broad application. By the nature of its function it is most congenial for hedgehogs. General propositions are essential conceptual tools that supply the foundation for analysis. Sometimes, like the neighbour principle, they embody moral imperatives that encourage and justify reform. But they should not be applied by ignoring awkward facts.

There is a danger that too much reliance on excursive deductive reasoning can lead to meaningless generalities and soporific platitudes, sometimes expounded at inordinate length. Common lawyers know that general propositions are paper currency, subject to inflation. But it is sometimes the only currency in circulation, and currency is indispensable.

Nonetheless, Holmes was also right – facts resist theory. Their infinite variety defeats the attempt to categorize them by a single rule. This bothers hedgehogs more than foxes. But in a world where there are only foxes and no hedgehogs, lack of principle can lead to a wilderness of single instances and decisions intuitively based on unexamined premises that cannot stand the light of exposure. My torts professor at UBC, Malcolm MacIntyre, made his reputation with a leading article in the Harvard Law Review, *The Rationale of Last Clear Chance*, which exposed the confusion surrounding the last chance doctrine after the enactment of apportionment statutes (the Negligence Act in B.C.). At common law, any contributory negligence, no matter how minor, that was causally related to the accident barred all recovery by a claimant. Judges increasingly recognized that the rule was unfair but under a strict doctrine of precedent, they couldn't meet the problem head on. To get around it they created the last chance doctrine as one of causation not fault and went through intellectual gymnastics to find that the plaintiff's contributory fault was not causally related to the accident so the cases expounded on "causes v. conditions", *causa causans v. causa sine que non*, and so on. The apportionment statutes wiped out the contributory negligence bar and made the last chance doctrine redundant but because judges viewed the doctrine as one of causation rather than comparative fault they failed to appreciate it was obsolete. MacIntyre's article exposed the confusion but thirty years later he

had to follow up with a sequel in the Canadian Bar Review, *Last Clear Chance After Thirty Years Under the Apportionment Statutes* ((1955), (33 Can. Bar Rev. 257), pointing out that it continued to survive in increasingly bizarre decisions. The B.C. Legislature finally put a stake in it with an amendment to the Negligence Act.

MacIntyre was very much a proponent of case method teaching and he was dismissive of Lord Atkin's opinion in *Donohue v. Stevenson*. He thought the neighbour principle had been expressed earlier and better by Brett M.R. in *Heaven v Pender* ((1882) 11 Q.B.D. 503) and it was too broad a proposition to be of any real assistance in deciding cases. But, arguably he failed to recognize the moral support it gave to the change in the law.

A healthy legal ecology requires both stubborn hedgehogs and nimble foxes. An awareness of the nature of the tension between them, and its inevitability, may help to alleviate some of the frustration and encourage a more constructive dialogue. Let me conclude with Berlin again. While he described the differences between foxes and hedgehogs as a "great chasm" later on he conceded "like all over-simple classifications of this type, the dichotomy becomes, if pressed, artificial, scholastic and ultimately absurd." Nonetheless, "like all distinctions which embody any degree of truth, it offers a point of view from which to look and compare, a starting point for general investigation." And let's face it, one of the attractions of the law for its adepts is the inexhaustible flow of opportunities to exercise both fox and hedgehog propensities.

IMPORTANT INFORMATION

CMJA COMPLIANCE WITH GDPR REGULATIONS ON DATAPROTECTION

If you have not already done so, please kindly ensure that you reply to the email/ letter that we sent you regarding the above. This is imperative if you want to continue to receive information from the CMJA. An easy way to give us your consent is to fill in the Membership form online:

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which includes the section on data protection.

JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY: THE CMJA TAKES AN INTERNATIONAL LEAD

His Honour Keith Hollis, former CMJA Director of Studies, Honorary Life Member of the CMJA.

Abstract: *This paper provides an update on the involvement of the CMJA in two important international events which took place in April 2018. The first was the launch of the Global Judicial Integrity Network by the United Nations Office on Drugs and Crime. The second was the invitation to the CMJA to co-curate a session on the Separation of Powers at the Commonwealth People's Forum which was held in the wings of the Commonwealth Heads of Government meeting (CHOGM). Both events demonstrated how the Association is at the forefront of judicial developments internationally*

Keywords: Judicial integrity – separation of powers – *Global Judicial Integrity Network* – CHOGM – *Commonwealth People's Forum*

April 2018 was an exciting month for the CMJA, with close involvement in two important international events, which, as it turned out, were linked. Both events demonstrated how the Association is at the forefront of judicial developments internationally.

On the 10th April, in Vienna, the United Nations Office on Drugs and Crime launched the Global Judicial Integrity Network. The Network builds on the original work of the Judicial Group on Strengthening Judicial Integrity which had led, in 2001, to the Bangalore Principles of Judicial Conduct. The commentary to those Principles itself recites no fewer than 32 earlier codes and international instruments. One of those international instruments was the Latimer House Guidelines for the Commonwealth on good practice governing relations between the Executive, Parliament, and the Judiciary in the promotion of good governance, the rule of law, and human rights. Regular readers of this journal will be familiar with the Commonwealth (Latimer House) Principles on the Accountability of and Relationship between the Three Branches of Government which now form part of the Commonwealth fundamental values and are

included in the Commonwealth Charter

The UNODC Network is the outcome of two years of planning, with seven regional preparatory meetings, and widespread judicial consultations. The CMJA, and a number of our individual members, have been closely involved with the process.

The Network is a platform for judges worldwide to share good practices and lessons learned, to support each other, and to join forces in developing new tools and guidelines for strengthening integrity and preventing corruption in judicial systems. It will also provide access to a large online database featuring thousands of resources, good practices, and other judicial documents for immediate reference.

The Network can support judiciaries in the:

- Exchange of best practices and lessons learned on challenges and emerging issues in judicial integrity and the prevention of corruption;
- A database of relevant resources;
- Development of tools, practical guidance manuals and training programmes to address national challenges;
- Provision of peer-to-peer advisory services, training and other capacity-building support;
- Assessments of integrity risks and in the development of effective responses to the risks identified; and
- Supporting the creation and strengthening of oversight and accountability mechanisms, such as disciplinary procedures, and the drafting of national or regional integrity strategies for judges and courts.

The CMJA was invited to contribute to the finalisation of these documents and to the final launch. I attended, as our former Director of Programmes, together with Justice Mkandawire from Malawi, one of our Council Members and

former Regional Vice President, and the Chair of our Gender Section, Justice Lynne Leitch from Canada. We were generously funded by UNODC. Together we ran a session for delegates on “Balancing Judicial Independence and Judicial Accountability”.

The session was very well attended and led to a lively discussion. We believe that our contributions helped ensure that there was a much stronger emphasis on judicial independence in the final Declaration, and also that there was more awareness of the particular importance of the position of first level judicial officers (both magistrates and judges) in balancing their particular issues of independence and accountability. It was good to have the support of a number of our members and old friends who were also attending.

As a consequence of our involvement Justice Leitch was honoured to be invited to become a member of the Advisory Board. Clearly our Association will continue to be closely involved with this important initiative.

It was quite by chance that the Commonwealth Heads of Government meeting (CHOGM) was held in London in the week following the Vienna Declaration. I have already mentioned the Commonwealth (Latimer House) Principles. The Latimer House Working Group, of which the CMJA is a founder member, was invited to co-curate a session on the Separation of Powers at the Commonwealth People’s Forum which was held in the wings of the CHOGM and organised by the Commonwealth Foundation. The theme of the People’s Forum was: “Inclusive Governance: The Challenge for a Contemporary Commonwealth”, the results of which fed into the deliberations of the Heads of Government.

The Commonwealth Peoples Forum, being a Commonwealth event bringing together civil society and government representatives was of course very different from the UN meeting. It was especially relaxed and friendly, there was much music and good fellowship. As well as Prince Charles (and Camilla), at different stages it was attended by Princes William and Harry. At the Opening Session, the Commonwealth Secretary General commended the Principles. At the Joint Session of all Fora (Women’s Forum, Business Forum and Youth Forum) we were addressed by the Prime Ministers of the

UK and Jamaica, and by Bill Gates, who said many kind words about the strengths of the Commonwealth, we heard too, by video link, from Malala Yousafzai, the world’s youngest Nobel prizewinner.

A similarity to Vienna, was the number who attended our own session and the enthusiasm of the subsequent discussion. The Session was chaired by Mark Guthrie of the Commonwealth Secretariat and included, Lady Brenda Hale, President of the Supreme Court of Hon. Angelo Farrugia, Speaker of the House of Representatives of Malta, Cheryl Dorall from the Commonwealth Journalists Association and H.H. Keith Hollis. The Communique from the People’s Forum includes a reference to the Commonwealth (Latimer House) Principles. We subsequently heard from the Commonwealth Foundation giving us “heartfelt thanks for your valuable contributions” and adding that “the feedback on the Forum as a whole, and on the Separation of Powers session in particular, has been very positive. We sincerely hope that in the coming years, outcomes from the session and the Forum will make a tangible and material difference to the lives of Commonwealth citizens”.

Parallel to this, the CMJA and other members of the Working Group have been pressing for the rollout of the Latimer House Toolkit which was formulated over three years ago and launched last year at the Commonwealth Secretariat.

The CHOGM issued a comprehensive communiqué, considering the great issues facing countries of the Commonwealth. For our purposes paragraph 13 is of huge importance, it reads:

“13. Heads reaffirmed their commitment to the Commonwealth (Latimer House) Principles on the Accountability of and Relationship between the Three Branches of Government (2003) as an integral part of the Commonwealth’s fundamental political values. Heads requested the Commonwealth Secretariat work in partnership with other Commonwealth organisations in promoting dialogue between the three branches of government, including through the full application of the Latimer House Principles Toolkit, which provides a practical guide to enhancing the separation of powers.”

It was twenty years ago this June that the Latimer House Colloquium was held and brought together parliamentarians, judicial officers, lawyers, legal academics and civil society representatives. Throughout the intervening years the Latimer House Working Group has been efficiently run by our secretariat under Dr Karen Brewer's direction. With great patience those on the Working Group have ensured that our work was kept in the public eye. The Guidelines on Parliamentary Supremacy and Judicial Independence drafted at the Colloquium were distilled into the Commonwealth (Latimer House) Principles following a collaborative venture between the four sponsoring organisations, (Commonwealth Lawyers Association, Commonwealth Legal Education Association, Commonwealth Parliamentary Association and the CMJA) and Commonwealth Ministers of Justice. This was the first collaborative venture and remains a model for non- governmental co-operation with governments in the Commonwealth for the realization of the Commonwealth fundamental values. It led to the Commonwealth (Latimer House) Principles being adopted by Heads of Government in 2003 and then becoming an integral part of the Commonwealth fundamental values at the CHOGM in 2005. The CMJA was instrumental in the organisation of the Pan-African Colloquium in 2005 which led to the Nairobi Plan of Action for Africa on the Latimer House Principles. In 2008 in Edinburgh we ran a substantial programme, which led to a "Plan of Action" for driving the Principles forward across the Commonwealth. We have regularly held training sessions on the Principles throughout the Commonwealth. More recently we have developed a substantial Toolkit for use in training not only for judges, but for politicians and administrators, the Toolkit referred to in the Heads of Government declaration.

At time it has been frustrating work, but Karen Brewer has ensured that the issue has been kept on the Commonwealth agenda and our work has borne fruit in this Declaration, which should give not only the Commonwealth Secretariat, but perhaps more importantly Commonwealth governments and aid agencies, the impetus to use our work for the benefit of all our citizens throughout the Commonwealth. Importantly too, the Declaration, I think for the first time, acknowledges the need for the Commonwealth

Secretariat to "work in partnership" with us in carrying out this crucial work.

For my own part, and for the others who have been members of the Working Party throughout its existence, including Colin Nicholls Q.C for the Commonwealth Lawyers Association and Peter Slinn for the Commonwealth Legal Education Association, this is a very satisfying moment. We have been involved for a long time and I hope that this creates an opportunity to pass the Latimer House baton on to a new generation of judges, lawyers, and academics with renewed energy to ensure that these issues are never overlooked.



Justices Mkandawire and Leitch, together with H.H.Keith Hollis at the UNDOC launch in Vienna.



H.H.Keith Hollis, Baroness Brenda Hale, Hon. Angelo Farrugia, Cheryl Dorall, and Mark Guthrie prior to the Commonwealth Peoples Forum session.

JUDICIAL ACCOUNTABILITY AS AN EVOLVING AND FLUID CONCEPT

His Honour Chief Judge Dr John Lowndes, CMJA President and Chief Judge of the Local Court (Northern Territory). This article is based on a paper presented at the CMJA Conference, Dar-es-Salaam, September 2017. This is being republished in the Journal at the request of, and with apologies to, the author.

Abstract This article discusses new and emerging forms of judicial accountability and demonstrates how these forms of accountability are legitimised by a modern model of judicial accountability. As a fluid concept, judicial accountability is evolving in a number of areas, most of which are interrelated, including: (a) accountability for the administration of courts; (b) the societal obligation of the judiciary to engage the community; (c) the duty to improve the quality of justice; (d) the duty to promote and enhance access to equal justice; (e) the duty to enhance the well-being of individuals and the community; and (f) the impact of the concept of sustainable justice on judicial accountability. The article concludes that the judiciary should be held accountable to the public for meeting these obligations in the overall interest of ensuring that the independence of the judiciary as an institution continues to be of worth or value to the public.

Keywords: accountability – administration of courts – judicial independence – quality of justice – sustainable justice

Introduction

Judicial accountability has traditionally been viewed as requiring the judiciary to be accountable to the law and its members to conduct themselves according to certain standards – independence, impartiality and integrity – which are designed “to enhance public respect for the institution of the judiciary, to uphold public confidence in the administration of justice and to protect the reputation of individual judicial officers and of the judiciary” (The Australian Institute of Judicial Administration (AIJA) “Guide to Judicial Conduct” 3rd edition, p 5).

However, as observed by the former Chief Justice of the High Court of Australia, the Honourable Murray Gleeson AC, “the concept

of accountability is flexible and, in its practical application, varies according to the context in which it is being considered” (The Hon Murray Gleeson “Judicial Accountability” (1995) 2 TJR 117). This equally holds true in relation to the concept of judicial accountability.

The concept of judicial accountability is an evolving and fluid concept, the substantive content of which is influenced by societal changes. However, the defining characteristic of judicial accountability is that it is firmly anchored to the principle of judicial independence which ultimately structures and defines the forms and limits of judicial accountability in an ever changing society (The Hon Murray Gleeson, 119-120).

Primarily, the judiciary should be accountable to the extent that is necessary to protect, reinforce and preserve the principle of judicial independence as a core court value, which underpins the ultimate responsibility of the judiciary – that of doing justice according to law. Secondly, it should be accountable to the extent that is necessary to maintain other related core court values – such as equality before the law and access to justice, fairness, impartiality, transparency and timeliness – without which the principle of judicial independence is nothing but a hollow concept, and the judiciary cannot do justice according to law. Thirdly, the judiciary should be accountable to the extent that is necessary to ensure that the principle of judicial independence retains its relevance and value in a modern society, having regard to those values as well as the objectives of the justice system. Finally, but not least, the judiciary should be accountable to the extent that is necessary to ensure that the principle of judicial independence in conjunction with those values and objectives results in an effective judicial system.

The judiciary should be held accountable in all of these respects for the purposes of upholding

public confidence in the administration of justice, enhancing public respect for the institution of the judiciary and protecting the reputation of individual judicial officers and of the judiciary. This model of judicial accountability is entirely consistent with the rationale behind the traditional view of judicial accountability.

This paper discusses new and emerging forms of judicial accountability and demonstrates how these forms of accountability are legitimised by this modern model of judicial accountability.

As a fluid concept, judicial accountability is evolving in a number of areas, most of which are interrelated:

- Accountability for the administration of courts;
- The societal obligation of the judiciary to engage the community;
- The duty to improve the quality of justice;
- The duty to promote and enhance access to equal justice;
- The duty to enhance the well-being of individuals and the community; and
- The impact of the concept of sustainable justice on judicial accountability.

Administrative Accountability And The International Framework For Court Excellence

In recent times courts have become increasingly accountable to the public for the administration and organization of the judiciary. This new form of accountability is generally referred to as “administrative accountability”.

As noted by Chief Judge of the District Court of New Zealand, Her Honour Jan- Marie Doogue, in a paper titled “Accountability and Organisation of the Judiciary” presented at the Asia Pacific Courts Conference, Auckland March 2013, pp 1-3 and 10-11, the administrative accountability of the judiciary has emerged as a result of a number of factors:

- rapid societal change which has led to all democratic institutions (which includes the judiciary) being subject to increasing scrutiny and to the immense importance to contemporary society of having an

independent but modern accountable judiciary (Justice Susan Denham “The Diamond in the Democracy: An Independent and Accountable Judiciary” (2001) 5 *The Judicial Review* 3);

- the democratic principle that “no branch of government should have power without accountability” (see also H Yusuf “Transitional Justice, Judicial Accountability and the Rule of Law” (2010)) and the concomitant requirement for all power, including the exercise of judicial power, to be responsible and responsive to the community; and
- the need for the judiciary, as the third branch of government, “to adapt and respond to the changing demands of the public in an era of unprecedented access to and expectation of information”.

However, these factors alone do not justify making the judiciary accountable for the administration and organisation of its courts. It is the nature of the judicial function and the concomitant principle of judicial independence that legitimises the administrative accountability of the judiciary.

As Sir Anthony Mason explained, judicial independence is “a privilege of, and a protection for, the people: it is a fundamental element in our democracy, all the more so now that the citizen’s rights against the state are of greater value than his or her rights against another citizen” (A Mason “The Independence of the Bench, the Independence of the Bar and the Bar’s Role in the Judicial System” (1993) 10 *Australian Bar Review* 1 at 3). In a similar vein Sir Gerard Brennan, former Chief Justice of the High Court of Australia, observed in his “Judicial Independence Speech” (Australian Judicial Conference, 2 November 1996 at www.law.monash.edu.au/JCA/brennan.html): “Judicial independence does not exist to serve the judiciary; nor to serve the interests of the other two branches of government. It exists to serve and protect not the governors but the governed”. The Hon John Doyle and Chad Jacobi have also highlighted the fact that the members of the judiciary must accept responsibility for the state of the institution of the judiciary and “should see themselves as the custodians of the institution, rather than the owners” (The Hon John Doyle and C Jacobi “Judicial Independence and Public

Sector Accountability” (2002) 11 Journal of Judicial Administration 168).

It follows that the judiciary, as an institution, is responsible to the public for ensuring that the judicial independence it enjoys “serves and protects the governed” and operates for the benefit of the community that it serves. Judicial power is given by society to an independent judiciary on the assumption that this is beneficial to society (The Charter for Sustainable Justice at www.sustainablejusticecharter.com, p 2).

This is a core aspect of the overarching responsibility of the judiciary for the functioning of the institution and its maintenance.

Judicial independence is indispensable to the performance of the judicial function.

As stated by Enid Campbell and H.P. Lee on the dust jacket of their book “The Australian Judiciary” (Cambridge University Press 2001):

The judiciary occupies a very important place in the framework of government. In a society which is regulated by the rule of law, disputants place their faith in the judicial institutions to resolve their conflict.

Disputants place their faith in the judiciary to resolve their conflicts in an independent and impartial manner. They implicitly place their faith in the courts to exercise their independence and impartiality in a way that is beneficial to – and serves the interests of – the community. The judiciary is accountable to the public in this regard.

Furthermore, judicial independence and the administration of justice are connected: as Rafiqui and Solaiman point out, an independent and impartial judiciary is “a means for the administration of justice according to the rule of law” (I Rafiqui and S.M. Solaiman “Public Confidence Crisis in the Judiciary Accountability in Bangladesh” (2003) 13 Journal of Judicial Administration 29). Accordingly, courts and judges, in the exercise of their independence, are “accountable to the public for the manner in which they administer justice” (The Hon John Doyle and C Jacobi at 169). This is a “form of accountability that the system of justice upholds” (The Hon John Doyle and C Jacobi at 169).

It surely follows that the quality of justice administered by the judiciary and its courts in the course of resolving disputes is highly relevant as to whether an independent and impartial judiciary – which is the privilege of the people – is in fact serving the interests of the community.

The importance of judicial independence in the resolution of disputes between the State and its citizens and between citizens cannot be overstated (Campbell and Lee, p 49). However, unless disputes are resolved according to the rule of law in an accessible, procedurally fair, efficient, cost effective and professional manner, the value of the independence of the judiciary – which is “a private right of citizens, who have a vested interest in having a neutral, independent court system to protect their fundamental rights from interference by the State and others” (The Hon Murray Gleeson “Public Confidence in the Judiciary”, JCA Colloquium Launceston 2002) – will be diminished, and judicial independence as a privilege of, and a protection for, the people will gradually be eroded. As neatly put by Chief Judge Doogue in her paper (p 11), “in order for judicial independence to be of any worth or value to the public”, justice needs to be administered in a fair, efficient, accessible and professional manner.

This point was elegantly made by Justice Nicholson almost a quarter of a century ago (Justice Nicholson “Judicial Independence and Accountability: Can They Co-Exist?” (1993) 67 ALJ 404 at 424):

The quality of independence given to the judicial branch is unique in the political spectrum and in turn requires of the branch that it be accountable in the sense that it perform its functions efficiently. A judicial branch which is (for example) years behind in disposal of its caseload may be independent but it has no political relevance. The quality of independence ceases to matter to citizens if they cannot have it applied in prompt resolution of their disputes. The principle of judicial independence requires of the judicial branch that it be efficient in the dispatch of its business for without efficiency the preservation of public confidence necessary to the existence of the principle will not occur.

Public confidence is diminished by delay in the administration of justice.

Chief Judge Doogue has come to this inescapable conclusion regarding the administrative accountability of the judiciary (see page 1 of her paper):

The judiciary is, as an institution, accountable to society to administer and organize itself so as to provide for the resolution of disputes in a way that is not only fair, just and in accordance with the rule of law, but also efficient, cost effective and with a high degree of professionalism and skill.

The fairness, justness, effectiveness, efficiency and professionalism with which disputes are resolved within the judicial system affect the quality of justice that is dispensed by the courts. The judiciary is accountable for the quality of justice it delivers.

The effectiveness and efficiency with which judicial business is conducted is dependent upon the administrative decisions and actions taken by the judiciary as an independent institution – the doctrine of the separation of powers requiring, as pointed out by Chief Judge Doogue, that “the judiciary must be independent in their administration as individual judges are when making decisions in court” (p 8). Given that such independent decisions and actions affect the quality of justice and attendant court services, it follows – as stated by Chief Judge Doogue – that the judiciary should be subject to some form of administrative accountability in respect of such administrative decisions and actions (p 8). The judiciary should be accountable to the public “in an explanatory way” (Chief Judge Doogue, p 1). As the former Chief Justice of the High Court of Australia, the Hon Murray Gleeson, has said: the judiciary must recognise and accept “the right of the legislature, and the executive and the public to know what administrative decisions are being taken by the judiciary and why” (The Hon Murray Gleeson “Judicial Accountability” (1995) 2 TJR 117 at 135).

This form of accountability requires the judiciary to make available to the public such information about the operations of the courts as is necessary to assure members of

the public that in the independent exercise of its administrative functions the judiciary is making decisions or taking actions that maintain the value of the principle of judicial independence as a privilege of, and a protection for the people.

The public needs to have confidence in the independent administrative decisions and actions taken by the judiciary because of the impact of those decisions and actions on the quality of the independence possessed by the judiciary. That public confidence is engendered by the judiciary informing the public about the administrative operation of its courts.

This form of accountability complements judicial independence in that it protects, reinforces and preserves its existence by maintaining public confidence in the judiciary as the guardian and guarantor of the principle of judicial independence.

All courts should aspire to being “excellent courts”, delivering high quality court services to the public that they serve and for whose benefit there exists an independent judiciary that adheres to the rule of law. Excellent courts should embrace core court values, as well as being efficient, effective and accountable. The public deserves no less than an excellent judicial system. The judiciary should be held accountable to the public (in an explanatory sense) for the quality of justice and court services that it delivers.

But what should an “excellent court” look like?

In 2008 an International Consortium consisting of groups and organisations from Europe, Asia, Australia and the United States of America developed the International Framework for Court Excellence (IFCE); see IFCE s 1 cited by J Lowndes “Judicial Independence and Judicial Accountability at the Coalface of the Australian Judiciary”, a paper presented at the Northern Territory Bar Association Conference in Dili East Timor July 2016, p 62.

The IFCE is a framework of values, concepts and tools by which courts worldwide can voluntarily assess and improve the quality of justice and court administration they deliver (IFCE s 1; Lowndes, p 62). The foundation

of the IFCE is “the clear statement of the fundamental values courts must adhere to if they are to achieve excellence” (IFCE s 1; Lowndes, p 62). The Framework provides an invaluable guide and tool kit for those courts that want to embark upon the journey to excellence and become “excellent courts” (IFCE s 1):

The Framework ...represents a resource of assessing a court’s performance against seven detailed areas of court excellence and provides guidance for courts intending to improve their performance. It provides a model methodology for continuous evaluation and improvement that is specifically designed for use by courts. It builds upon a range of recognized organizational improvement methodologies while reflecting the special need and issues that courts face.

The benefits of adopting the IFCE are set out in the Framework (IFCE s 1.2):

Adoption of the Framework will help ensure courts are able to deliver the quality court services essential to fulfilling their critical role and functions in society.

Fair, accessible and efficient courts create positive relations among citizens and the State. Public trust and confidence that a court will provide accessible, fair and accountable proceedings is, in turn, naturally enhanced by an effective and efficient court system. Confidence within the business community and therefore in business investment are likewise heightened. A sound justice system enable positive economic growth and healthy social development.

IFCE recognises ten internationally accepted core values that courts apply in carrying out their role and which are key values to the successful functioning of the courts (IFCE s 1.2; Lowndes, p 62):

- equality before the law;
- fairness;
- impartiality;
- independence of decision making (adjudicative independence);
- competence;
- integrity;
- transparency;

- accessibility;
- timeliness; and
- certainty

As stated in the Framework, these core or key values “guarantee due process and equal protection of the law to all those who have business before the courts” (IFCE s 2). These values also “set the court culture and provide direction for all judges and staff of a proper functioning court” (IFCE s 2). The IFCE provides “a methodology for building a court’s performance on the basis of the internationally accepted court core values and their application to every area of a court’s activities” (IFCE s 3). Acknowledging that there is a “fundamental and clear link between court values and the performance of a court”, the IFCE provides “a clear method for courts to assess whether those values that have been identified as being important are in fact guiding the court’s role and functions” (IFCE s 3).

In order to simplify the process of assessment of performance and identification of areas for improvement, the IFCE divides these area of activity and roles into seven separate categories collectively called the Seven Areas for Court Excellence (IFCE s 3). The Framework goes on to say (IFCE s 3):

Each area conveniently captures an important focus for a court in its pursuit of excellence. Each area has a critical impact on the ability of the court to adhere to its core values and to deliver excellent court performance.

The values should be reflected in a court’s approach to each of the areas of court excellence and, through the Framework process of assessment and improvement, a court can be aware of how well it is promoting and adhering to the values it espouses. It is important for courts to not only publicise the values which guide court performance, but also to ensure those values are built into the court’s processes and practices.

The seven areas for court excellence identified by the IFCE are (IFCE ss 3.1.1-3.1.7):

- court leadership and management;
- court planning and policies;
- court resources (human, material and financial);

- court proceedings and processes;
- client needs and satisfaction;
- affordable and accessible court services; and
- public trust and confidence.

As stated in the IFCE, the framework provides a continuous methodology which ensures that a court actively and continuously review its performance and looks for ways to improve its performance (IFCE s 4). The methodology is based on a four step process (IFCE s 4):

1. a self-assessment, involving an analysis of court performance across all seven areas of excellence, is undertaken;
2. following this self-assessment, an in-depth analysis is conducted to identify those areas of the court's activities that are capable of improvement;
3. an improvement plan is then developed that details the areas identified for improvement and actions proposed to be taken and the outcomes sought to be achieved;
4. through a process of review and refinement the implementation of the improvement plan is closely monitored.

This four stage process is repeated when the court is ready to undertake a fresh self-assessment to determine its progress (IFCE s 4). It is recommended that courts should aim to conduct an annual self-assessment (IFCE s 4).

The central feature of the IFCE is that it offers courts a model for self-reflection and self-assessment in relation to the critical role and functions they fulfil in society. It provides courts with a blueprint for self-accountability, which is alternatively referred to as personal accountability. The Framework enables courts to be honest with themselves and to be answerable and responsible for what they say and do. It gives courts the ability to look beyond the immediate moment to consider the consequences of the administrative decisions and actions they take or fail to take. By these means, it enables courts to cultivate a well-developed sense of self-accountability (see B Benjamin "Ethics and Self-Accountability" where although the author discusses self-accountability in a much broader ethical context, his analysis of self-accountability is

clearly relevant to the judiciary as an important social institution).

The IFCE implicitly recognises that self-accountability is a critical first step towards improving court leadership and in identifying those areas of court activities that the judiciary should be accountable to the public in the interests of building and maintaining public trust and confidence in the judiciary. The judiciary must be accountable for being accountable (Chief Judge Doogue, p 22).

The message conveyed by the IFCE is loud and clear. The judiciary should be personally accountable – and ultimately accountable to the public – for the delivery of quality court services that incorporate the core values of a court and reflect the areas for court excellence that are identified in the IFCE. Without that accountability courts cannot fulfil their critical role and functions in society.

The ten core values that courts apply in carrying out their role are unquestionably vital to the successful functioning of courts. Each value is in some way connected with the principle of judicial independence or its concomitant – the rule of law- and helps to ensure a strong and independent judiciary that adheres to the rule of law (Lowndes, pp 63-65). Unless these core values are adhered to, the independence of the judiciary and the rule of law – which exist for the benefit of the community – are compromised, if not rendered meaningless and valueless in the eyes of members of the community. Consequently, public trust and confidence in the judiciary is eroded.

As the seven areas for court excellence have a critical impact on the ability of courts to adhere to its core values and deliver excellent court performance (IFCE s 3), courts that fail to aspire to excellence run the risk of losing public trust and confidence. The risk of a loss of public trust and confidence in the judiciary is an effective mechanism for ensuring judicial accountability in a free and democratic society.

As made clear in the Framework, courts that aspire to excellence need to systematically measure their performance – that is "the quality as well as the efficiency and effectiveness of the service they deliver" (IFCE s 5.1). In order to

properly undertake that exercise, courts “need to maintain a collection of both [reliable and accurate] quantitative and qualitative data” (IFCE s 5). The IFCE provides courts with performance indicators and tools to assist in “the quantitative and qualitative assessment of the functioning of courts” (IFCE s 5).

The IFCE stresses the need for courts to be accountable to the public for their activities to ensure public respect, trust and confidence in the judiciary and the judicial system (IFCE s 6):

To ensure public respect and confidence a court must be open and transparent about its performance, strategies and its processes... It is important that courts are open about their current position but more importantly publish details of what actions they are taking to address the problems...

By being transparent about its performance, engaging with its users and stakeholders and communicating its reform strategy courts will engender greater confidence and trust in the community and its stakeholders.

The IFCE emphasises the importance of judicial engagement and communication with the public as an integral part of the administrative accountability of the judiciary (IFCE s 6):

A court should communicate widely to the bar, public prosecutors, law enforcement, other governmental and non-governmental agencies, and the general public its commitment to undertaking Framework implementation... Courts should publish the results of its evaluations and its plans for improvement. Annual reports should also contain detail of a court’s role, practice and procedure and performance. Where practical a court throughout the year should keep court users, government and the community informed of its performance and reform initiatives.

An important aspect of an Improvement Plan should be the development of a Communication Plan identifying how a court intends to inform its users and the community. The plan should include not only strategies for publishing material and information but also outline other forms of appropriate communication, including:

- *regular meetings with key users and legal groups*
- *the provision of information to the media*
- *assistance provided to litigants in person or disadvantaged groups*
- *feedback and complaint processes*

Finally, but not least, the IFCE imposes an obligation on courts to “manage all available resources (human, material and financial) properly, effectively and proactively” (IFCE 3.1.3; Lowndes, p 67). As pointed out by Lowndes (p 67):

This is a reflection of the modern view of judiciary accountability referred to by Popovic – according to which courts should be accountable for the application of the substantial resources made available to them. And there is no reason why courts should not be accountable to the public (in the explanatory sense) for their use of court resources, particularly as courts progressively move away from the traditional model of court governance towards more autonomous systems of court administration.

As stated by the Honourable Marilyn Warren, former Chief Justice of Victoria, the IFCE provides a means for “court accountability through self-assessment and self-improvement without compromising judicial independence”(The Hon Marilyn Warren “The Aspiration of Excellence”, Judiciary of the Future – International Conference on Court Excellence, Singapore, January 2016, p 13). Consistent with the philosophy and objectives of the ICFE, the Chief Justice reported (p 7):

Under the rubric of the IFCE the Supreme Court of Victoria has developed a strategic statement aspiring to be an outstanding superior court. We define our purpose as safeguarding and maintaining the rule of law, and ensuring:

- equal access to justice;
- fairness, impartiality and independence in decision-making;
- processes that are transparent, timely and certain;
- accountability for the court’s use of public resources; and
- the highest standards of competence and

personal integrity.

Together, these elements are all part of the Supreme Court's ongoing improvement of its transparency and accountability.

Judicial Independence And The Societal Obligation Of The Judiciary To Engage The Community

It is readily apparent that the developing administrative accountability of the judiciary to the public it serves entails a high level of communication with the community in relation to the performance of courts. The IFCE encourages this interaction by stressing the importance of strong leadership in ensuring a court is “not operating in isolation from the broader community and external partners” (IFCE 3.1.1; Lowndes, p 66).

However, communication between the courts and the community should be more generalized and commonplace. As Bookman has recently put it, the judiciary as an institution and a collective entity has an ethical obligation to engage—and communicate with—the community in a much broader sense (S Bookman “Judges and Community Engagement: An Institutional Obligation” (2016) 26 Journal of Judicial Administration 3 at 5).

Bookman's definition of community engagement is pivotal to understanding the nature of this ethical obligation. He defines “community engagement” in these terms (Bookman at 5):

A relationship between judges and their local communities, whereby each party imparts information to, and learns from, the other. This relationship may take different forms, but its ultimate objective is to promote the understanding of each party to the other.

The “community” includes court users, stakeholders and the general public (Bookman at 5).

The judiciary clearly has an ethical obligation – indeed a societal obligation - to engage the community in the manner suggested by Bookman because as an important social institution the judiciary needs to impart

information to the public concerning its role, functions and activities in order to sustain its legitimacy – which is derived from the community it serves – and to maintain public confidence in it as a branch of government (Bookman at 6). This societal obligation to engage the community gives rise to a legitimate form of public accountability (of the explanatory type) which is entirely consistent with the principle of judicial independence and which is an essential condition for ensuring the legitimacy of the judiciary and public trust and confidence in the judicial system.

Judicial engagement “provides an opportunity for education about the court system” (Bookman at 9). As noted by Bookman (at 9), “the justice system cannot operate effectively unless the public understands how it works”. In particular, the judiciary needs to explain the sentencing process which is an important aspect of the judicial function. The imparting of such information enables members of the community to contextualize and understand sentencing decisions (Bookman at 9). It also promotes and enhances public confidence in both the judiciary and the judicial system (Bookman at 9).

Given that judicial independence underpins the justice system and an independent judiciary is a privilege of, and protection for, the people, the public needs to understand the workings of the justice system in order to have trust and confidence that the independence of the judiciary is in fact operating in the best interests of the community. The judiciary is accountable to the public in this very fundamental respect.

Improving The Quality Of Justice And Judicial Accountability

As discussed earlier, the IFCE is a quality management system that assist courts in improving and enhancing the quality of justice they deliver. As pointed out by Richardson, Spencer and Wexler, the Framework “promotes innovation and reform with the aim of creating excellent courts that are fair, efficient, effective, impartial and that enable access to justice for their users” (E Richardson, P Spencer and D Wexler “The International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Courts and

Enhancing Well-Being” (2016) 25 Journal of Judicial Administration 148).

As stated by former Federal Attorney General Robert McClelland, “an effective justice system must be accessible in all its parts”, and “without this, the system risks losing its relevance to, and the respect of, the community it serves” (see the Foreword to “A Strategic Framework for Access to Justice in the Federal Civil Justice System”: A Guide for Future Action, Access to Justice Taskforce Attorney General’s Department September 2009).

In a similar vein, Justice Nicholson has commented on the relationship between the core values of access to justice and the principle of judicial independence (Justice Nicholson at 424 cited by Lowndes, p 64):

...judicial independence is of no political importance to a citizen of a country where it is economically impossible to access the use of the judicial power. The principle of independence of the judiciary requires that the court system be economically and procedurally accessible so that the courts are resolving disputes of relevance to the polity.

Furthermore, access to justice is an essential element of the rule of law and therefore of democracy (Strategic Framework, p 1). It is also a matter that goes to the quality of justice (M Galanter “Justice in Many Rooms” in M Cappeletti (ed) “Access to Justice and the Welfare State”1981, pp 161-2):

Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged.

Finally, but not least, “improving access to justice is a means of promoting social inclusion” (Strategic Framework, p 1).

As former Chief Justice Murray Gleeson of the High Court of Australia persuasively stated, access to justice is a core aspect of a functional and effective judicial system (see Chief Justice Warren, p 21):

For courts, effective functioning includes dealing with the business of the court with due dispatch and by procedures which are fair and which serve the ends of justice and which allow for reasonable access to the court by citizens. For the judiciary as an institution, effectiveness includes the maintenance of the rule of law and the preservation of a just society.

Just as the judiciary should take a leading role in protecting its independence and upholding the rule of law, it should take a leading role in promoting access to justice (A Ngulube “The Role of the Judiciary in Safeguarding and Ensuring Access to Criminal Justice: The Case of Zambia”, a paper presented at a Judicial Colloquium titled “Working Towards Just, Peaceful and Inclusive Societies: Promoting the Rule of Law and Access to Justice”, Lusaka April 2016, p 1). In addition, it should be proactive in enhancing access to justice.

The IFCE emphasises that “fair, accessible and efficient courts create positive relations among citizens and between the individual citizen and the State” and that “public trust and confidence that a court will provide accessible, fair and accountable proceedings is, in turn, naturally enhanced by an effective and efficient court system” (IFCE s 1.2). It follows that an accountable, effective and efficient judiciary needs to promote and enhance access to justice.

A recent and prime example of this form of judicial accountability is the judiciary- led National Framework to Improve Accessibility to Australian Courts for Aboriginal and Torres Strait Islander Women and Migrant and Refugee Women (the National Framework).

In 2014 the Australian Council of Chief Justices endorsed the formation of the Judicial Council on Cultural Diversity (JCCD) for the purposes of assisting Australian courts, judicial officers and court administrators to positively respond to the changing needs of Australian society and ensure that all Australians have equal access to justice (The National Framework p 2). The Framework acknowledges that Australia is “one of the most ethnically, culturally and linguistically diverse countries in the world” and that “in a multicultural, multilingual and multi-faith society, it is fundamental that strategies are put in place to ensure

the accessibility of the courts” (p 2). The Framework believes that “both Aboriginal and Torres Strait Islander women and migrant and refugee women require the development of a national framework to improve access to justice, particularly in the context of family violence and family breakdown” (p 2).

The JCCD has used the IFCE as the key organising structure for the National Framework (p 3). Using that structure, the National Framework is put forward as (p 4):

a national approach to improving access to justice and achieving equality before the law for Aboriginal and Torres Strait Islander women and migrant and refugee women.

The National Framework is “intended to serve as an aspirational set of principles and best practice guidelines for Australian courts around operational actions they can take to improve accessibility” (p 4).

The key features of the National Framework are:

- it embraces all of the core values of a court as identified in the IFCE (p 5);
- its underpinning value/principle is the achievement of equal justice for all court users – regardless of their sex, race, religion, language or national or ethnic origin (p 5);
- it emphasises the point that “equal justice requires that courts are free from unconscious bias and discrimination and that proceedings are fair and impartial” (p 5);
- in implementing these underlying principles and values, it aligns itself with the seven areas of court excellence outlined in the IFCE (p 7);
- it stresses the importance of leadership from senior judicial officers and court administrators in demonstrating “a court’s commitment to providing equal justice for Aboriginal and Torres Strait Islander women and migrant and refugee women” (p 7);
- it attaches equal importance to the need for “a more uniform and systemic approach to the complexity of cultural and linguistic issues facing the courts”, as well as to the need for courts to adopt

measures to modify structures and policies throughout the court system in order to tackle “the distrust and poor familiarity with court processes that exist amongst such diverse court users” (p 7);

- it stresses the need for courts to meaningfully engage with local communities to develop and implement the framework and to “ensure that courts and their staff are open and accountable around their operations” (p 7).

The National Framework points out that “rigorous planning and policies are required for courts to continuously demonstrate that they are responsive to the needs of diverse court users” (p 11). The Framework also recommends that courts develop clear plans to implement the framework and formulate strategies for working with diverse groups (p 11). Accordingly, in furtherance of its objectives, the Framework recommends (pp 7-11):

- the establishment of cultural diversity committees within the courts;
- partnerships and co-operation with other organisations;
- community education forums;
- regular meetings with key stakeholders;
- working with the legal profession;
- community visits;
- court open days and tours; and
- celebrating diversity.

Again in alignment with the IFCE, the National Framework emphasises the need for courts to:

- “efficiently and proactively manage their resources to meet the demands of the justice system and address the needs of court users” (p 11);
- review their judicial education and professional development programs in light of the objects of the framework (p 11);
- ensure that court staff are “trained to understand the needs of diverse court users so they can respond appropriately”(p 12);
- employ indigenous court liaison officers and cultural liaison officers to further the objects of the framework (p 13);
- ensure that all court users are able to understand the processes in which they are participating and to contribute fully to

the proceedings so that courts can operate fairly, effectively and efficiently (p 14);

- seek to improve the collection of data concerning the cultural, linguistic and gender diversity of their court users in order to advance the objects of the framework (pp 15-16);
- introduce or enhance mechanisms to assess satisfaction levels among diverse court users (p 16).

As stated in the National Framework, a key objective of the framework is to promote higher public trust and confidence in Australian courts and the judiciary (p 21). The framework seeks to make the judiciary accountable to the community it serves in a fundamental and significant respect (p 1):

Courts need to demonstrate that they are aware of the barriers faced by diverse court users, that they are attempting to address these barriers, and that they are responsive to honest feedback about the justice system and its impact on Aboriginal and Torres Strait Islander women and migrant and refugee women.

The Framework recommends that courts meaningfully engage with diverse communities in the development and implementation of the matters and measures outlined in the framework with a view to building that all important public trust and confidence in the judiciary as a responsive social institution (p 21) - whose independence is a privilege of and a protection for the people. The independence of the judiciary is of little value to an ethnically, culturally and linguistically diverse community unless there is equality before the law and equal access to justice.

The Framework concludes on this fitting note (p 22):

Managing responsibility and accountability within the court system for the introduction and maintenance of measures to ensure equality before the law and access to justice for Aboriginal and Torres Strait Islander women and migrant and refugee women is critical.

Enhancing The Wellbeing Of The Community And The Individual And Judicial Accountability

As pointed out by Richardson, Spencer and Wexler (at 148) there is “a growing emphasis on the role of justice systems to improve the wellbeing of individuals and the communities that justice systems serve. As mentioned by the authors (at 149):

As the Productivity Commission in Australia has highlighted in its 2014 Inquiry Report on Access to Justice Arrangements, the overriding objective of any civil justice system (and we would argue, criminal justice system) is to enhance community well- being or quality of life: Access to Justice Arrangements: Productivity Commission Inquiry Report Vol 1 (Canberra 2014), p 6.

In that regard, King has convincingly argued that an “ethic of care” is an important judicial value that should be added to the traditional values of judicial conduct of independence, impartiality and integrity (M.S King “Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts, Indigenous Sentencing Courts and Mainstream Courts” (2010) 19 Journal of Judicial Administration 131 at 154). King describes an “ethic of care” as an “approach that is mindful of the effect of judicial action on the well-being of those taking part in or otherwise affected by judicial processes” (at 151).

In a broader vein, Richardson, Spencer and Wexler argue that the promotion of wellbeing is another goal that excellent courts should ideally strive for; and that this goal can be achieved by using the principles of therapeutic justice (TJ) and the IFCE (at 148). As the authors point out, both TJ (a field of interdisciplinary discourse that involves the study of the law as a therapeutic agent) and the IFCE (a quality management system for courts) are “complementary in that both are directed at improving the quality of justice” (at 148). We are reminded by the authors that the IFCE acknowledges “the role of a sound justice system not only for positive economic growth but also for healthy social development” (at 156 citing the IFCE s 1.2): see also the Productivity Inquiry Report cited by the authors.

Relevantly, Richardson, Spencer and Wexler point out that the core court values identified in the IFCE are all aspects of “the justice system that encourage social and economic growth” and “enhance the wellbeing of those who come into contact with the court and the community in which a court sits” (at 156). Furthermore, TJ, which has the primary goal of maximising the wellbeing of individuals and communities, intersects with many of the core court values identified in the IFCE, and therefore the promotion and enhancement of the wellbeing of individuals and communities should be included as a core value of court excellence (Richardson, Spencer and Wexler at 157).

As noted earlier, the judiciary is responsible and accountable to the public for the quality of justice it administers and delivers, and in the performance of that role its courts should aspire to “court excellence”. Given that responsible and accountable courts should adopt the IFCE – which in part acknowledges the role of the judicial system in facilitating healthy social development – and the intersection between this aspect of the IFCE and TJ’s emphasis on enhancing wellbeing, the judiciary should therefore be responsible and accountable for maximizing the wellbeing of the individuals and the communities it serves. The IFCE and TJ provide the analytical tools by which the courts can achieve this objective (Richardson, Spencer and Wexler at 149).

Judicial accountability for enhancing the wellbeing of individuals and communities is a form of “societal accountability” that stems from the principle of judicial independence, which is not a privilege of the judiciary – but a privilege of, and a protection for, all members of the community. If that privilege and protection is to be of any relevance or value to the community the judiciary must ensure that it embraces the wellbeing of individuals and the community as both a core court value and objective of the justice system. This is so because the primary purpose of the judicial system is to maintain social harmony (Dr A Cannon “Sustainable Justice: A Guiding Principle” (2017) 27 *Journal of Judicial Administration* 45 at 47) and the maximization of the wellbeing of individuals and the community is an integral part of that

objective. Unless courts do everything they can to maintain social harmony the independence of the judiciary will cease to be relevant to, or of value, to the community.

The Concept Of Sustainable Justice And Judicial Accountability

It is important not to overlook the fact that courts play an important role in maintaining peace and harmony within our society (Chief Justice Warren p 3). Professor Hazel Genn in the 2008 Hamlyn Lectures spoke about the role of the civil law and civil justice as a public good (Chief Justice Warren p 4):

My starting point is that the machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, or enforcing legal rights and for protecting private and personal rights.

A similar view was expressed in the Productivity Commission Inquiry Report on *Access to Justice Arrangements* (pp 138-139):

Well-functioning justice systems can also promote social order and facilitate social order and facilitate the peaceful resolution of disputes.

This view of the aim of the justice system is echoed by Dr Cannon when he says that “the primary purpose of courts is to maintain social harmony and holding people to account for wrongdoing is only a part of what is necessary to achieve that purpose” (at 47). The author points out that the use of State power through the court system “to hold people accountable is not sufficient to ensure social harmony” (at 47). As the use of such power may “exacerbate conflict not resolve it”, in order to be “accepted and effective in their role courts must proceed with care and fairness and respect and uphold the individual rights of the citizen, at the same time as authorising the use of State power to hold them accountable for their wrongdoing” (Dr Cannon at 47).

Dr Cannon proposes that “the principle of sustainability is a useful guiding aim to ensure that court systems perform their original and primary purpose of maintaining social

harmony” (at 49). He advocates a “sustainable justice approach” (at 50), resulting in a “sustainable justice system”.

The concept of sustainable justice, which is a powerful example of the growing example of the role of justice systems to improve the well-being of individuals and the communities that justice systems serve, finds its most powerful expression in the Charter for Sustainable Justice.

The Charter for Sustainable Justice is a document co-produced by Alexander F De Savornin Lohman (former legal attorney, Rotterdam-Utrecht, the Netherlands) and Jaap Van Straalen (entrepreneur and editor, Amsterdam, the Netherlands) and written in close co-operation with Dr Andrew Cannon (Deputy Chief Magistrate in South Australia and Professor of Law at Flinders University). The Charter is written as a brief, clear and sound basis for the sustainability movement – one of the most influential trends in law and justice of the 21st century - describing basic principles of socially sustainable justice (J Lowndes “Delivering Justice in the Lower Courts on the Sniff of an Oily Rag”, a paper presented at the Criminal Lawyer’s Association of the Northern Territory 16th Bali Conference, June 2017, p 19).

As stated in the Charter (www.sustainablejusticecharter.com, p 1):

Sustainable justice is the approach to justice that aims to improve social harmony, wellbeing, the general feeling of safety within society, and furthers personal and societal development within a framework of human rights and principles securing legal uniformity and equality. In order to enable the justice system to intervene effectively, justice is vested with power and independence and acts in the pursuit of social sustainability of society and its members.

The Charter is a response to recent and growing criticisms that existing justice systems “do not appropriately and effectively meet societal needs” (p 1). It follows upon the heels of various justice innovations which have been aimed at serving values of social sustainability – like different forms of problem solving courts, restorative justice, intercultural

justice, procedural justice and therapeutic jurisprudence (p 1).

The Charter makes it clear that the “main goal of Sustainable Justice is increasing the quality of life by improving the quality of relationships and social networks” (p 1). Values of social sustainability “complement judicial values and contribute to the effectiveness of the justice system” (p 2).

As stated in the Charter, sustainable justice views “conflicts and criminal acts as opportunities to restore and improve social harmony” (p 2).

It is also made clear in the Charter that “judicial power is given by society to the justice system on the assumption that this is beneficial to society” and that “judicial officers using judicial power are societal change agents, who act as a catalyst for a better society” (p 2). The Charter acknowledges the very special position occupied by judicial officers (p 2):

Prestige, independence and the position as ultimate decision maker drapes judge with a kind of magic that enables them to accomplish outcomes that others cannot achieve.

The Charter further acknowledges that judicial officers are in “a key position to procure socially sustainable outcomes” (p 2).

The Charter points out that the “general principle of sustainable judging is to turn bad into good, contributing to social harmony and personal and societal development” (p 2). The Charter reflects the changing perspective of justice (p 3):

Social sustainability provides valuable guiding principles to justice systems encouraging them to gradual change so that they contribute to social harmony more effectively...

Justice systems based on principles of social sustainability are role models guiding people in the best way to manage conflicts and other challenges constructively without harming others.

A core responsibility of courts is to resolve conflicts in the exercise of their adjudicative independence. They must also do justice

according to law. However, in exercising these functions courts must have “an eye for innovation and a proactive response to changes in society” (IFCE 3.1.1). Courts need to bear in mind that their primary purpose is to maintain social harmony, and in order to be part of an effective and accountable judiciary they must respond to changing perspectives of justice. As the custodian of the principle of judicial independence, the judiciary must ensure that its independence works in the best interests of the community that it serves, and is obliged to administer justice in a constructive manner that produces socially sustainable outcomes.

Conclusion

The principle of judicial independence is the pivot upon which judicial accountability turns.

The independence of the judiciary places the judiciary in a unique and powerful position in modern society. Consistent with the democratic principle that no branch of government should have power without accountability, the judiciary should be held accountable for the ways in which it wields - in the exercise of its independence from the other two branches of government - the judicial power given to it by society. In the exercise of its independence, the

judiciary has a societal obligation to:

- embrace the core court values (which include independence of decision-making);
- deliver quality justice in accordance with the rule of law;
- ensure that court proceedings are dealt with in an effective and efficient manner;
- provide such information relating to the administration and organisation of the courts as is necessary to ensure public confidence in the judiciary and the judicial system;
- engage the community to the extent that is necessary to uphold public confidence in the administration of justice and to enhance public respect for the institution of the judiciary;
- promote and enhance access to equal justice;
- do justice according to law in order to maximise the wellbeing of individuals and the community, and to the best of its ability to maintain social harmony by producing socially sustainable outcomes.

The judiciary should be held accountable to the public for meeting these obligations in the overall interest of ensuring that the independence of the judiciary as an institution continues to be of worth or value to the public.

POOR PUBLIC IMAGE: DEALING WITH COMMENTS BY POLITICIANS AND THE MEDIA

His Hon. Mr Justice James Dingemans, Judge of the High Court of England and Wales. This article is based on a paper presented at the CMJA's Annual Conference in Dar Es Salaam, Tanzania in September 2017.

Abstract: *This paper addresses the problem of how the judiciary should deal with adverse comments by politicians or the media. In particular, it looks into the common law offence of scandalising the Court to see whether this offence could provide the answer to dealing with unfair criticism of judges. Although in England and Wales the common law offence of scandalising the court has been abolished, its continued existence in other Commonwealth jurisdictions has been declared to be compatible with the fundamental rights and freedoms provisions. However, the paper concludes that the common law offence of scandalising the court is unlikely to provide a practical remedy when dealing with unjustified and unfair comments about judges made by politicians or the media.*

Keywords: Adverse comments by politicians and media – unfair criticism of judges – scandalising the Court – law of contempt

The problem of how the judiciary should deal with adverse comments by politicians or the media is not new. For as long as there have been judicial decisions there have been criticisms of lawyers and judges. Solomon's first ruling (before it was revised) provoked a distraught response from the real mother. One of Shakespeare's characters in Henry IV, Part II who was intent on overthrowing the state said that the first thing to be done was to kill all the lawyers. Criticism varies from uncomplimentary jokes to more serious criticism. I suspect we can all live with the jokes, but serious criticism of judges raises different issues. Recent serious criticism of judges around the Commonwealth has included: criticisms about judges and their role in society in Bangladesh following a decision quashing a recent amendment to the Constitution; and criticism of the Courts in Australia in a manifesto by a political party, which led to a response from the Judicial Conference of Australia. In this paper, I will look at the common law offence of scandalising the Court to see whether this offence will provide the answer to dealing with unfair criticism of judges. The common law offence of scandalising the Court forms part of the law of contempt.

This common law offence was considered to have been discovered or invented by Wilmot J. in *R v Almon* in a draft judgment which was not delivered because the prosecution was discontinued. The draft judgment was published in the nominate reports (1765) Wilm 243 because it was said to contain so much legal knowledge that it was worthy of being preserved. The existence of the offence recognised the truism that criticism of the judiciary can undermine public confidence in systems of justice to the detriment of all society.

The elements of the offence of scandalising the Court were defined by Lord Russell CJ in *R v Gray* [1900] 2 QB 36 who said: "*any act done or writing published calculated to bring a Court or a judge of the court into contempt, or to lower his authority, is a contempt of court ... subject to one and an important qualification. Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court*". It might be noted that the journalist, the editor of the Birmingham Daily Argus, in that case had described Darling J. as "*an impudent little man in horsehair, a microcosm of conceit and empty-headedness*". The journalist had noted that "*no newspaper can exist except on its merits, a condition from which the bench is exempt, happily for*" the Judge. The editor was fined £100.

This meant that an act done or writing "calculated" to lower the authority of a judge or court was an offence, save where there was "reasonable argument or expostulation" that the judicial act was contrary to law or the public good. On the face of it the Courts and Judges were very well protected from criticism. It might have been thought that they were too well protected, but at least it was recognised that if there was a reasonable argument or expostulation that the judicial act was contrary to law there would be a defence. This meant that if a Judge was rightly identified as corrupt, proceedings could not be brought.

In *Ambard v Attorney General for Trinidad and Tobago* [1936] AC 322 Lord Atkin commented on and expanded the defences to the offence by holding that “*no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice*” recording that “*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 ...*”. The extent to which truth was a defence was an issue of controversy.

In England and Wales the last successful recorded prosecutions were in 1930 and 1931, although there had been some attempted prosecutions since that time. Even by the end of the 19th century Lord Morris, when giving judgment in the Privy Council, said that “*committals for contempt of court by scandalising the court itself have become obsolete in this country*”, see *McLeod v St Aubyn* [1899] AC 549 at 561. Lord Diplock repeated the comment about the offence being “*virtually obsolescent*” in *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339. Indeed in 1987 the Daily Mirror published an upside down photograph of 3 Judges with the caption “You Fools”. The Judges had granted an injunction on appeal preventing publication of the Spycatcher book.

It was against this background that in March 2012 the Attorney General for Northern Ireland obtained leave to prosecute Peter Hain MP for statements in his book “Outside In” in which Peter Hain criticised Lord Justice Girvan’s handling of a judicial review claim when sitting as a trial judge. An appointment to a committee made by Mr Hain had been quashed. Mr Hain spoke of “*high-handed and idiosyncratic behaviour*” and said that the Judge was “*off his rocker*”, claiming that the then Lord Chancellor had agreed with his assessment in a private conversation. The prosecution was discontinued after Mr Hain issued a statement clarifying his intention behind the remarks.

There had long been calls for the offence to be abolished. Arguments for abolition were

made in a number of different ways. First it was said that the offence was based on dubious assumptions as to its necessity. For example if confidence in the judiciary was so low that statements by critics would resonate with the public, such confidence would not be restored by a criminal prosecution. Secondly the existence of the offence would have a chilling effect on freedom of expression. Thirdly the modern offence recognised that some of criticism of the judiciary was lawful, and it was difficult to draw the line between lawful and unlawful criticism. Finally where criticism merited a response there were other public methods of answering it for example a public statement by the Lord Chancellor (in England and Wales) or libel proceedings.

During the passage of the Crime and Courts Bill in England and Wales amendments were tabled seeking the abolition of the offence of scandalising the Court. These were withdrawn because the Government undertook to review the matter. The Law Commission produced a consultation paper (“Contempt of Court: Scandalising the Court”) which concluded that the offence was probably compatible with the provisions of the European Convention on Human Rights but which recommended abolition of the offence. At paragraph 49 of the report it was noted that in England and Wales it was customary to emphasise that the offence of scandalising the court was not to protect the personal dignity of the judges, but the administration of justice as a process, whereas the offences upheld by the European Court of Human Rights had mainly been offences akin to criminal defamation designed to protect individual judges. This was because attacks on individuals were less worthy of respect than political free speech.

In the final event the common law of offence of scandalising the courts was abolished in England and Wales by section 33 of the Crime and Courts Act 2013. This provided that “(1) Scandalising the judiciary (also referred to as scandalising the court or scandalising judges) is abolished as a form of contempt of court ...”. However subsection (2) made it plain that if the actions would also have amounted to another offence, proceedings for that other offence could continue. This means that judges will still have the protection of the criminal law for harassment or public order offences.

It was against this background that in November 2016 the Daily Mail greeted the judgment of the Divisional Court ruling in *Miller v Secretary of State for Exiting the EU* [2016] EWHC 2768 (Admin; [2017] 1 All ER 158 (since affirmed by the Supreme Court [2017] UKSC 5; [2017] 2 WLR 583) with the headline “Enemies of the People”. As is well known the absence of an immediate response and the absence of a strong statement in support of the judiciary by the then Lord Chancellor, the Right Honourable Liz Truss MP, was said to be incompatible with her duties under the provisions of the Constitutional Reform Act 2005. Comments have been made that there are principled differences between adverse and public comments on the decision on the one hand and abuse of or attacks on individual judges on the other hand, which comes closer to reflecting the jurisprudence of the European Court of Human Rights.

However although in England and Wales the common law offence of scandalising the court has been abolished, its continued existence in other Commonwealth jurisdictions has been declared to be compatible with the fundamental rights and freedoms provisions.

In *Dhoobarika v DPP of Mauritius* [2014] UKPC 11; [2015] AC 875 the Privy Council held that the offence of scandalising the courts was compatible with the right to freedom of expression, provided that the restriction on free speech was proportionate. In that case the criticisms of the Chief Justice of Mauritius by a “highly controversial” unsuccessful litigant had been prominently reported in a newspaper. The DPP had brought proceedings for contempt and the editor had been sentenced to 3 months’ imprisonment. The editor’s appeal was allowed on the basis that the editor had not been given the opportunity to give oral evidence but had been restricted to adducing affidavit evidence, and oral evidence might have led to a different result where there were issues of good faith of the individual editor.

Lord Clark, who gave the judgment of the Privy Council specifically approved the earlier judgment of the Privy Council in *Ahnee v DPP* [1999] 2 AC 294 in which Lord Steyn had noted that the offence was “*narrowly defined. It does not extend to comment on the conduct of a judge unrelated to his performance on the bench. It exists solely to protect the administration of justice rather than the feelings of judges.*”

There must be a real risk of undermining public confidence in the administration of justice.” In these circumstances, it appears that the common law offence of contempt of court by scandalising the courts will continue, unless specifically abolished, in commonwealth jurisdictions. However the practical objections to the use of the offence of scandalising the court, including the objection that if the administration of justice is so adversely affected by criticism it is unlikely that its reputation will be restored by a prosecution before Judges, remain.

In these circumstances the common law offence of scandalising the court, assuming that it continues to exist in the relevant jurisdiction, is unlikely to provide a practical remedy when dealing with unjustified and unfair comments about judges made by politicians or the media.

Individual Judges will continue to be best advised to consider their own remedies. Although individual judges have in the past brought proceedings for libel in England and Wales, there are different views about whether that is a well-advised step for a judge. Judges might also, having considered them take the advice of a former judge which was to note the criticism, give a wry smile, and carry on which mirrors the advice of Mr Justice Bamwine of Uganda to have a thick skin.

It might be thought that the administration of justice is likely to be best defended by other constitutional protections. One of these protections include comity between the branches of Government. Comity requires respect between the different branches of Government. Comity should prevent unjustified and unfair public criticism of the judiciary by members of the legislature and executive (although everyone will recognise that unjustified and unfair criticism may continue to be made). Other relevant constitutional provisions include, in England and Wales, the constitutional obligation of the Lord Chancellor in the Constitutional Reform Act 2005 to uphold the rule of law, with all that is required by that. The role of judicial associations (including international associations such as the CMJA) in providing a short reasoned rebuttal should not be underestimated. Analysis of those other protections is for another day, but it seems safe to conclude that the answer to unfair criticism of judges from politicians or judges does not lie in proceedings for scandalising the Court.

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JUDICIAL APPOINTMENTS

Her Hon. Justice Georgina Wood, former Chief Justice of Ghana. This article is based on a paper presented at the Commonwealth Law Conference, Melbourne, March 2017.

Abstract: *This article focuses on judicial appointments and, in particular, on the vexed question of how to attract and retain the right calibre of judges and magistrates suited for this crucial role in governance. The article considers that African Judiciaries should develop and grow credible internal systems for appointments and promotions in a manner that minimizes legislative and executive roles and accusations of bias by member of the judiciary and the general public. In the long run, whichever appointing body outside of the main political actors we may decide on, the efficacy of the entire process rests wholly on the integrity of the judicial leadership, the legal community, particularly the Bar, and indeed the entire citizenry.*

Keywords: Judicial appointments – Africa – recruitment and retention of the right calibre of judges and magistrates – integrity of judicial leadership

This topic presents arguably the most important question for an understanding of the evolution of strong judiciaries around the world. It also projects the commonality of the challenges of judiciaries of the developing world, in particular, as I gathered from the Regional Conference for Chief Justices and Heads of Constitutional Courts in Africa, held in Cairo in February, this year.

The truth is that the well-established courts of the matured democracies had some of the most turbulent developmental experiences and their lessons learned are worth following if we, on this side of the developmental divide, must expedite the maturity and growth of our judicial systems.

The topic is yet extremely important for another reason. Indisputably, the judiciary plays a pivotal role in the advancement of the rule of law rule. Indisputably, this crucial constitutional mandate can only be effectively discharged by a truly independent, fair and impartial judiciary. What continues to attract debate therefore is the vexed question of how to attract and retain the right calibre of

judges (generically used to include magistrates) suited for this crucial role in governance. Thus, in my jurisdiction, as indeed I believe obtains in some others, the modalities for the appointment of competent persons to the courts continue to attract considerable interest, and understandably, heated debate, not only among the legal community, but the general polity.

From time past, in quite a number of our countries of the commonwealth, judges and whole judicial systems have been indicted for being either agents of retrogression or political actors and framed in partisan modes. It appears that Judges from developed democracies have not been spared this agony either and had sometimes been subjected to highly offensive attacks for simply carrying out their judicial functions. Not too long ago, it was reported of one such country, that “elements of the press and some politicians” had subjected judges who ruled on an important national matter, to vitriolic personal attacks, with one tabloid, it was alleged, branding them as “enemies of the people.” (See the Times of UK, published on Saturday November 5 2016 at page 7). And so the fact remains; the tensions that regrettably exist between the courts and other branches of government is neither of recent origin nor a peculiarity to emerging democracies.

For us in the African developing world however, judicial appointments and the general operations of the courts remains highly topical for many reasons, not least are the following:

First, a number of us on the continent, regrettably, practice highly divisive and polarized politics. Political fragmentation aside, tribalism, ethnicity, nepotism, cronyism and other negative tendencies run deep into the social fabric and every act of governance and to a significant extent constitutional justice and other court cases in which the State’s interest is quite high, (for example in human rights, commercial or investment related cases) are read through the prism of political factionalism, or other divisions.

And yet, in this highly globalized and competitive world, a country's ability to attract foreign direct and even domestic investment is dependent primarily, inter alia, on a robust, credible and well functioning judiciary. It is therefore worth emphasising that not only does an independent, and a non-partisanship judiciary, which is not beholden to the executive branch of government, bolster confidence in the credibility of a country as a safe destination for international investment, but it also reinforces the security of foreign investment relative to fears of expropriation and other seizures. Significantly in this regard, the mechanism of appointment represents a strategic tool for attaining these developmental goals, bearing in mind that far from being insular, judges are very much a part of us, a veritable group of the social strata. For these and other reasons, the importance of reviewing the nature and dynamics of judicial appointments for an effective regime of the rule of law cannot be over emphasised.

In a number of countries, including my own, appointment to the courts, per the constitutional arrangements, is vested in either the executive branch or shared between the executive and the legislative branches. The ostensible reason for this has been the concept of checks and balances. I will not bore anyone by attempting a full justification of this tendency except to ask the critical question whether this justification is feasible and whether it has been borne out by experience. But does this assure a truly strong and independent third branch of government?

A brief overview of the modalities for appointments from the Ghanaian perspective should bring some clarity to my thoughts on the issues raised in this presentation. The power to appoint judges to the Court of Appeal and the High Court is vested in the President (Executive) acting on the advice of the Judicial Council, while the power to appoint to the Supreme Court is vested in the President acting in consultation with the Council of State and with the approval of Parliament (Legislature). On the other hand, the power to appoint the Chief Justice resides in the President acting in consultation with the Council of State, but is again subject to parliamentary approval. However, the appointment of Judges to the Lower Courts, namely, the Circuit and District Courts, is vested in the Chief Justice, acting

on the advice of the Judicial Council and with the approval of the President. It is to be noted that the President's power of appointment to either the Superior Courts or approval of appointment by the Chief Justice to the Lower Courts, is preceded by a selection process undertaken by the Judicial Council, the highest advisory body of the Judiciary, on which body the Executive is fairly well represented. Thus, what activates the exercise of their respective powers is the advice of the Judicial Council, expressed in the form of recommendations to the appointing authority, as to the suitability or otherwise of a nominee in question.

The ambit of the President' power of appointment vis-à-vis the function of the Judicial Council as the body duly clothed with authority to advise or make recommendations, has been the subject of constitutional litigation in Ghana and The Republic of Kenya. Admittedly, the two actions were based on different facts, but for our purposes, both courts were invited to rule on the critical question of whether or not the President's power to appoint is merely formalistic and ceremonial, and a fortiori, whether or not the President is mandatorily required to accept and act accordingly on the advice or recommendations of the appropriate authority, without any right whatsoever to neglect or refuse to appoint a recommended candidate. The two jurisdictions, whose constitutional texts governing the appointment of Judges of the High Court by the executive, are not in substance dissimilar, resolved this critical issue differently.

In the case of *Law Society of Kenya v Attorney –General & 2 Others* [2016] eKLR, the Kenyan Constitutional Court answered this question in the affirmative, thereby ousting executive interference at that stage of the appointment process, through a willful neglect or plain refusal to appoint, once the Judicial Service Commission, the equivalent of Ghana's Judicial Council, has recommended a candidate's suitability and other constitutional criteria have been met. Pertinently, the court ruled:

“9. Upon the finalisation of the nomination process ...the President had no other role to play in the matter apart from putting in place the formalities of appointing the nominees as

Judges of the High Court.

10.....the role of the President in the process of appointment of the Judges of the High Court was purely facilitative as the Head of State and must be in accordance with the recommendation of the Judicial Service Commission.”

The Supreme Court of Ghana thought otherwise, arguing that a recommendation of the Judicial Council and the Council of State, as the case may be, that a nominee qualifies for appointment, constitutes a non-binding advisory opinion. By parity of reasoning then, the Chief Justice is equally not bound to follow the advice of the Judicial Council, in relation to recommendations for appointments to the Lower Courts. This fully implies that a President may well reject Council’s advice that a particular person was best suited for appointment and so decline to appoint him or her. And so may a Chief Justice in any given instance.

The stare decisis principle in relation to the Supreme Court of Ghana empowers the court for good legal and sufficient reasons, to depart from its previous decision and not follow it. Critics of the court’s decision are therefore at liberty to invite the court to rethink its position, at the earliest opportunity.

Judicial Council recommendations, it must be understood, are based on a fairly rigorous selection process undertaken by the Council, a process in which the President’s nominees actively participate. The mechanics include ‘advertising’ the vacant positions, inviting nominations from the Judiciary and the Bar, inviting qualified applicants from the Bench, and Legal Practitioners from the public and private sectors, as well as academia, background checks from relevant bodies and agencies, competitive open book written examinations in which candidates are permitted to carry along basic legal texts such as the Constitution, Court’s Act, 1993 (Act 459), Criminal Offences Act, 1960, (Act 29), Criminal and Other Offences (Procedure) Act, 1960 (Act 30), Evidence Act, 1975, (N.R.C.D.323), Companies Act 1963, (Act 179), Matrimonial Causes Act, 1971, (Act 367) and the High Court (Civil Procedure Rules, 2004 (C. I. 47). Successful candidates are thereafter subjected to rigorous interviews, at which stage of

the process their written judgments, written addresses or statements of cases, or other legal publications or legal opinions, as the case may be, would also be assessed. The purpose of these exercises is to test nominees’ intellectual competence, general proficiency in the law, communication, analytical and other technical skills, professionalism and integrity, fairness and efficiency, broad leadership and management skills including courtesy, in short, all the hard and soft skills and fine qualities required of adjudicators in a constitutional democracy. Appointments to the Supreme Court and the Court of Appeal do not include written examinations, with the nominees being engaged in law-based intellectual discussions, rather than formal interviews strictly so called. Additionally, the names of nominees to be interviewed are published in a widely read newspaper and the general public invited to submit memoranda on any of them. This practice, which was hitherto reserved for appointees to the Chief Justice and Supreme Court positions, is now applicable to all potential appointees.

Some have argued against the writing of examinations to the High Court. I hold a contrary opinion. The Ghanaian experiment which I inherited from my predecessor has proven that more often than not, the best candidates have emerged from private legal practice and not the Bench. In any event, the objective is for applicants to put into writing the knowledge they profess and which in any event they practice in the court room or in their chambers, offices or impart to their students in the classrooms on daily basis. Without claiming perfection, this system, might perhaps, be likened to democracy. With all its imperfections perceived or real, this, in my opinion works out as the best procedure in terms of its equality of opportunity, inclusiveness, objectivity, transparency and fairness; values cherished by all advocates of the rule of law. Additionally, this procedure insulates the judicial leadership- and this includes Judicial Council Members, senior judges, members of the Bar- against harassment from lobbyists and other favour seeking pressure groups, given that the written examinations threshold is a pre-condition to any further considerations on suitability. The discussion is however is not closed and remains open to further discussion. The Ghana Judiciary has indeed over the years made some

progress, but there certainly is more room for improvement. For example, in Kenya, all vacant positions on the bench, from the lowest court to the highest, including the Chief Justice position are publicly and widely advertised, whereas in my jurisdiction, this is limited to vacancies on the Lower Bench. I think we will do well to examine the effectiveness of the Kenyan model.

Be that as this may, without frontally answering the question, I invite all of us to consider the fact that in truth, the more political branches of government in their nomination and vetting of potential appointees may not necessarily be motivated by a desire to appoint persons of merit but may so be inspired to appoint persons with coincidental values and ideals. In other words, some have argued that executive branches and legislatures are mainly likely to pay scant attention to merit and appoint judges who share their political ideologies and philosophical leanings than those who do not. This has many negative effects, it has been urged. Not only does it undermine the projected neutrality of judges; it simply encourages politicians to want to fill vacancies on courts with a desire to get “their” judges on the bench for obvious and expected reasons. But others are of the opinion that politicians should not bear the full blame, in so far as some judges throw their neutrality and fair-mindedness overboard, and allow their political persuasions to becloud their judgment.

Others further argue that another dangerous aspect of this mode of appointing judges is the tendency to use appointments as a means of politically compensating perceived favourable judges. Admittedly, this mode of appointment may largely reflect in promotions rather than fresh appointments under which some judges deemed favourable to particular governments are promoted without considerations of merit. But, the real danger inherent in this, Chair is the prospect of a race to the bottom mentality under which judges will begin acting with a view to catching the eyes of the appointing authority.

I am hereby advocating that, the practice of vesting the appointment and promotion of judges in the hands of political external agents may not have necessarily promoted the

intended goal of ensuring checks and balances but may have unwittingly been producing the negative outcome of tying the courts to the apron strings of the political branches.

For us in countries with high levels of political sensitivity such as is in the developing world, judicial appointments have on occasion, become utterly contentious and unnecessarily embroiled in needless politicking and partisanship. From the standpoint of institutional neutrality, this has significantly eroded notions and ideals of independence and contributed to the de-legitimization of our work as judges and bearers of justice. The consequence of this reality has been that judges have been tagged and called out as being pawns for political actors and vested interests, especially when adjudicating sensitive cases, such as constitutional cases, election related cases, etc. in which political parties have an interest or in which the stakes are high.

The traditional reaction has been to reject and to ignore accusations of such manipulations. Yet I dare say that not only is this response inadequate, but that moving forward, judiciaries cannot turn blind eyes to these accusations however unfounded. For in the main, the work of judges implicitly implicates a degree of “responsibility” to those over whose interests and liberty they preside. Interrogating the mechanics and dynamics of judicial appoints presents us with the critical toolkit for confronting the vice of bias and accusations thereof in the administration of justice and introducing critical changes in process and procedure that would enhance our credibility both nationally and internationally.

I do think however that overcoming the above challenges would remain a mirage, if other difficulties facing our Judiciaries remain unaddressed. Let’s examine this stark reality. Our judiciaries do not enjoy real financial autonomy or independence, a most critical component of an independent judiciary within the context of the rule of law. Neither are they adequately funded. And so I ask, would vesting appointments in wholly independent bodies outside of the Executive, cure the mischief which I have highlighted, given that the public purse is controlled by the Executive and also that no Judiciary is enjoys being financially handicapped?

Nonetheless I come back to the more fundamental question: into whose hands then do we entrust this rather sensitive and delicate task of appointing disciplined and incorruptible individuals of infinite courage, intellectual ability and unblemished character who will protect democracy and the rule of law in our respective countries?

African Judiciaries should develop and grow credible internal systems for appointments and promotions in a manner that minimizes legislative and executive roles and accusations of bias by member of the judiciary and the general public. In the long run, whichever appointing body outside of the main political actors we may decide on, the efficacy of the

entire process rests wholly on the integrity of the judicial leadership, the legal community, particularly the Bar, and indeed the entire citizenry. The integrity of the individuals into whose hands we shall entrust this sacred responsibility of ensuring that appointment to these positions of trust are based on systems and procedures that assure credibility – openness and transparency, and open competitiveness which are not in any manner compromised, is equally critical.

I accordingly recommend in conclusion that we must forge a radical change in the traditional focus and appointment systems reformed in our countries. I am aware that this would necessarily involve constitutional changes in many cases.

REPUBLIC V CHENGO AND OTHERS

26 May 2017

Supreme Court of Kenya [2017] 4 LRC 423

Maraga CJ and P, Mwilu DCJ and VP, Ibrahim, Ojwang, Wanjala, Njoki and Lenaola SCJJ

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In an effort to deal with the backlog of criminal appeals in the High Court, the Chief Justice declared a ‘judicial service week’, dedicated to the hearing of criminal appeals in the High Court. Section 359(1)^a of the Criminal Procedure Code required appeals from the subordinate courts to be heard by two judges of the High Court. The Chief Justice, by way of Gazette Notice, empanelled judges of the Environment and Land Court (‘ELC’) and the Employment and Labour Relations Court (‘ELRC’) to sit with judges of the High Court. The ELC and the ELRC were established under art 162^b of the Constitution, and consequently were superior courts which had ‘the status of the High Court’. Over 400 criminal appeals were disposed of by mixed benches during the judicial service week, as were some civil appeals. In one case, a judge of the ELC, A, sitting with a judge of the High Court, heard and dismissed the appeals of the respondents, each of whom had been convicted in a magistrates’ court of the offence of robbery with violence and sentenced to death. The respondents appealed to the Court of Appeal, which held that notwithstanding that the High Court, the ELRC and the ELC were courts of equal status, they were different courts and only the High Court had jurisdiction to hear and determine criminal appeals from the magistrates’ courts. It concluded that as A had been appointed as a judge of the ELC, he had no jurisdiction to sit on the respondents’ appeals. Consequently, the Court of Appeal declared the proceedings a nullity and directed that the respondents’ appeals be re-heard. The Director of Public Prosecutions appealed against that decision. He contended that as the Constitution of Kenya 2010 did not contemplate a specialised cadre of judges for the specialised courts and did not provide a distinct procedure for the appointment of judges to those courts, a judge so appointed might be assigned to hear a criminal appeal in the High Court. The respondents countered that as A had been specifically appointed to

the ELC and took the oath of office for that court, he could only perform functions and duties reserved for that court and not those of the High Court, which included criminal appeals. The Court of Appeal further held that the right to legal representation at state expense as required by art 50(2)(h)^c of the Constitution applied only where substantial injustice would otherwise be occasioned in the absence of such legal representation, such as in a case where a person was charged with an offence punishable by death and such person was unable to afford legal representation. The Court of Appeal further stated that the right to legal representation at state expense under art 50(2)(h) was to be progressively realised. Consequently, though the respondents had been entitled to legal representation at state expense, as Parliament had not enacted legislation to actualise that right and the respondents had actively participated in their trials, they suffered no substantial injustice and their right to legal representation was, in the circumstances, not violated. The first and third respondents cross-appealed against that decision, contending that the right to legal representation at state expense where substantial injustice might be suffered flowed directly from the Constitution. The appellant submitted, inter alia, that the respondents’ constitutional right to legal representation was not violated as the Legal Aid Act 2016, which was enacted to actualise the right to legal representation at state expense, came into operation long after the respondents’ trial before the subordinate court and the hearing of their appeals before the High Court.

HELD: Appeal dismissed; cross-appeal allowed; matter remitted to High Court for the appeals to be heard afresh.

(1) The Constitution was drafted with the intention of clearly demarcating the jurisdictions of the various courts so as to pre-empt lacunae and conflicts. The ELC and

the ELRC were established under art 162 as specialised courts and were superior courts which had the same hierarchical status as the High Court; their decisions could not be the subject of appeal to the High Court, nor were they subject to supervision or direction from the High Court. However, their jurisdictions, the spheres of their operation and powers to entertain, hear and determine disputes, were different. From an analysis of the Gazette Notices notifying appointment of judges to the High Court, the ELC and the ELRC, it was clear that judges were appointed judges separately and not on the basis of a general scheme covering judges of the superior courts. The appointing mandate and the empanelling mandate were to be distinguished. It was only after the appointments had taken place that the Chief Justice exercised his general administrative powers over the judiciary such as the empanelling of judges within the courts to which they belonged. The judicial oath of allegiance taken by a judge on appointment, which reflected his or her constitutional mandate, was not a general oath as a superior court judge but as a judge of the specific court to which he or she had been appointed. It followed that although the High Court and the specialised courts were of the same status, they were different courts, and the judges appointed to those courts exercised varying jurisdictions. As the exclusive jurisdiction to hear criminal appeals had been conferred on the High Court and A had been appointed as a judge of the ELC and not as a judge of the High Court, he had no jurisdiction to determine the respondents' criminal appeals,

and the Gazette Notice purporting to empanel him was unlawful and unconstitutional. Lack of jurisdiction rendered a court's decision void as opposed to it being merely voidable. This meant that, despite the backlog of cases in the courts, there was no choice but to remit the respondents' appeals to be reheard afresh in the High Court. Further, such lack of jurisdiction would have a similar effect on all the appeals that were determined by similarly empanelled High Court benches.

(2) The right to legal representation at state expense, where substantial injustice would otherwise result, guaranteed by art 50(2)(h) of the Constitution, was a fundamental ingredient of the right to a fair trial to be enjoyed pursuant to the constitutional edict without further legislative steps being taken, such as the recent enactment of the Legal Aid Act 2016. While it was undeniable that a person facing the death penalty and who could not afford legal representation was likely to suffer substantial injustice during his trial, the protection embedded in art 50(2)(h) went beyond capital offence trials. Now that there was in operation an elaborate legal aid scheme that was in the process of implementation, the respondents' right to legal representation at state expense was a matter which fell to be determined by the High Court at the hearing of the appeals afresh within the criteria laid out by the Legal Aid Act 2016 and the constitutional right.

BANO V UNION OF INDIA; AND OTHER PETITIONS

22 August 2017

Supreme Court of India [2017] 5 LRC 486

Jagdish Singh Khehar CJI, Kurian Joseph, Rohinton Fali Nariman, Uday Umesh Lalit and S Abdul Nazeer JJ

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The petitioners petitioned the Supreme Court, under art 32^a of the Constitution of India, for a declaration that talaq-e-biddat ('triple talaq'), a form of divorce within the Hanafi school of Sunni Muslims (the predominant group of Muslims in India) practised for many centuries, was void ab initio and unconstitutional. Triple talaq was a form of divorce whereby a husband, typically by pronouncing the word 'talaq' three times, could divorce his wife instantaneously, unilaterally and irrevocably. Triple talaq had been accepted as lawful in the Privy Council decision of *Rashid Ahmad v Anisa Khatun* AIR 1932 PC 25, in which the Board held that the pronouncement of triple talaq caused an immediately effective divorce, and upheld as valid a divorce by triple talaq pronounced by a husband in the absence, and without the knowledge, of his wife. The practice was also seen as protected by s 2^b of Muslim Personal Law (Shariat) Application Act 1937 ('the 1937 Act'), which provided that, where the parties were Muslims, Muslim personal law (Shariat) should be applied in certain situations, including the dissolution of marriage. Since that time a number of High Courts had questioned the validity of triple talaq, and those decisions, the petitioners asserted, had been affirmed by the Supreme Court in *Shamim Ara v State of Uttar Pradesh* AIR 2002 SC 3551. The petitioners further challenged the practice of triple talaq on a number of grounds, including the following. (i) Triple talaq was not part of Shariat and consequently not protected by s 2 of the 1937 Act or by the Constitution. (ii) Alternatively, if s 2 were interpreted as sanctioning triple talaq, that aspect of the section should be declared as constitutionally invalid; as a 'law in force' at the time of the creation of the Constitution in 1949, it should be treated as void in so far as it was inconsistent with the fundamental rights guaranteed under the Constitution (see art 13(1))^c. Further, triple talaq could not be protected as an aspect of personal law; rather, as it had been statutorily declared a 'rule of decision' by s 2 of the 1937 Act, it became

part of public law which could be challenged as violating the Constitution. (iii) Triple talaq violated fundamental rights guaranteed under arts 14^d (the right to equality), 15^e (the prohibition of discrimination) and 21^f (the protection of life and personal liberty) of the Constitution. (iv) It could not be protected by art 25(1)^g (the right to freedom of religion). (v) The practice was denounced internationally and many Muslim countries had legislated to forbid it; further, it ran contrary to a number of international treaties and covenants protecting women's rights to which India was a party. The respondents' submissions included the following. (i) Triple talaq was an aspect of Muslim personal law. Personal law could not be assailed on the basis that it was in conflict with fundamental rights protected by the Constitution. (ii) The provisions of art 13 of the Constitution did not include matters of personal law, which was excluded from the definition of 'laws in force' in art 13. Consequently matters of personal law did not have to satisfy arts 14, 15 and 21. Further, the object^h of the 1937 Act had not been to enforce Muslim personal law but to end customs and usages contrary to Muslim personal law. Therefore, it could not be said that the 1937 Act gave statutory status to Muslim personal law. Consequently, arts 14, 15 and 21 were not applicable, as a breach of fundamental rights under the Constitution could only be invoked with reference to state action. (iii) As an aspect of personal law, triple talaq was constitutionally protected under art 25 of the Constitution. (iv) It was not appropriate for the court to attempt to interpret matters of faith, which should best be left to be interpreted by the community itself. If triple talaq were to be removed, such reform should emerge from the community concerned or from the legislature which was empowered to interfere on the grounds of social welfare and reform under art 25(2)(b). (v) A reliance on international conventions was inappropriate as India had made a commitment not to interfere with the personal affairs of any community

without the consent of that community. The court also gave consideration to art 142¹ of the Constitution, which concerned the powers of the Supreme Court to pass decrees or make orders as was necessary for doing complete justice in any cause or matter before it.

HELD: (R F Nariman, UU Lalit and Kurian Joseph JJ (Jagdish Singh Khehar CJI and S Abdul Nazeer J dissenting)) The practice of triple talaq would be set aside.

Per RF Nariman J (with whom UU Lalit J agreed) (Kurian Joseph J concurring in the result for different reasons). (1) The question before the court was in a very narrow compass: whether the 1937 Act could be said to recognise and enforce triple talaq as a rule of law and, if not, whether authority which stated that personal laws were outside art 13(1) of the Constitution was correct. The 1937 Act was a pre-constitutional legislative measure which fell directly within art 13(1) of the Constitution. The objects and reasons of a statute throw light on the background in which a statute was enacted but it was difficult to read the non-obstante clause of s 2 ('Notwithstanding any customs or usage to the contrary...') as governing the enacting part of the section. All forms of talaq recognised and enforced by Muslim personal law were recognised and enforced by the 1937 Act, including triple talaq when it came to the Muslim personal law applicable to Sunnis in India. Section 2 of the 1937 Act clearly and obviously recognised and enforced triple talaq because the section made triple talaq 'the rule of decision in cases where the parties are Muslims'. The 1937 Act came with the purview of art 13(1).

(2) Only an essential religious practice was protected under art 25 of the Constitution. Triple talaq was a form of talaq which was permissible in law but at the same time was stated to be sinful; accordingly it would not form part of any essential religious practice. Equally, the fundamental nature of the Islamic religion, as seen through an Indian Sunni Muslim's eyes, would not change without triple talaq. Triple talaq therefore formed no part of art 25(1) which would only apply if a particular religious practice was covered under the article.

(3) When petitions had been filed under art 32 of the Constitution it was not permissible for the court to state that it would not decide an alleged breach of a fundamental right but would send the matter back to the legislature to remedy such a wrong. *Prem Chand Garg v Excise Comr, Uttar Pradesh* (1963) 1 Suppl SCR 885 applied. *Obergefell v Hodges* (2015) 41 BHRC 160 adopted. *Ahmedabad Women Action Group (AWAG) v Union of India* (1997) 3 SCC 573 doubted.

(4) Applying the test of manifest arbitrariness to the instant case, it was clear that triple talaq was a form of talaq which was considered to be an irregular or heretical form of talaq. It was clear that it was manifestly arbitrary in the sense that the marital tie could be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation. Triple talaq was, therefore, violative of the fundamental right contained under art 14 of the Constitution. The 1937 Act, in so far as it sought to recognise and enforce triple talaq, was within the meaning of the expression 'laws in force' in art 13(1) and had to be struck down as being void to the extent that it recognised and enforced triple talaq. Since s 2 of the 1937 Act had been declared to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, it was not necessary to go into the ground of discrimination.

Per Kurian Joseph J. (1) The Supreme Court in *Shamim Ara v State of Uttar Pradesh* had held, though not in so many words, that triple talaq lacked legal sanctity; therefore *Shamim Ara* was the applicable law in India. *Shamim Ara v State of Uttar Pradesh* AIR 2002 SC 3551 applied.

(2) The 1937 Act was enacted to put an end to oppressive and discriminatory customs in the Muslim community in India. Section 2 made Muslim personal law (Shariat) the law applicable to questions concerning marriage and the dissolution of marriage, including talaq. It was not legislation regarding talaq; it simply made Shariat applicable as the rule of decision in the matters enumerated in s 2. Therefore, while talaq was governed by Shariat, the specific grounds and procedure for talaq were not codified by the 1937 Act. Consequently, as the 1937 Act was not legislation regarding talaq, it could not be tested on the anvil of art 14 of the Constitution.

(3) Sources other than the Quran, such as hadiths, could only supplement it; they could not conflict with what was expressly stated. The Quran permitted talaq only after an attempt at reconciliation. In triple talaq that door was closed; hence triple talaq was against the basic tenets of the Quran and violated Shariat. *Shamim Ara v State of Uttar Pradesh* AIR 2002 SC 3551 applied.

(4) Freedom of religion was guaranteed under the Constitution. However, triple talaq was not an integral part of religious practice. The mere fact that a practice had continued for a long time could not, by itself, make it valid if it had expressly been declared to be impermissible. The whole purpose of the 1937 Act had been to declare Shariat as the rule of decision and to discontinue anti-Shariat practices with respect to the subjects enumerated in s 2, including talaq. Therefore, after the introduction of the 1937 Act, no practice against the tenets of the Quran was permissible. Hence there could not be any constitutional protection to such a practice.

Per Jagdish Singh Khehar CJI (with whom S Abdul Nazeer J agreed) (dissenting). (1) (i) Despite the earlier Privy Council decision on the subject of talaq-e-biddat, the issue needed a fresh examination in view of subsequent developments. (ii) All the parties had been unanimous that, despite the practice of talaq-e-biddat being considered sinful, it had been accepted amongst Sunni Muslims belonging to the Hanafi school as valid in law, and had been in practice amongst them. (iii) It was not appropriate for the court to record a finding on whether the practice of talaq-e-biddat was, or was not, affirmed by hadiths in view of the enormous contradictions in the hadiths that had been relied upon by the rival parties. (iv) Talaq-e-biddat was integral to the religious denomination of Sunnis belonging to the Hanafi school; it was a part of their faith, having been followed for more than 1,400 years, and, as such, had to be accepted as being constituent of their personal law. (v) The contention of the petitioners that the questions/subjects covered by the 1937 Act had ceased to be personal law and had been transformed into statutory law could not be accepted. (vi) Talaq-e-biddat did not violate the parameters expressed in art 25 of the Constitution. The practice was not contrary to public order, morality and health.

The practice also did not violate arts 14, 15 and 21 of the Constitution, which were limited to State actions alone. (vii) The practice of talaq-e-biddat, being a constituent of personal law, had a stature equal to other fundamental rights conferred in Pt III of the Constitution. The practice could not therefore be set aside, on the ground of being violative of the concept of constitutional morality, through judicial intervention. (viii) Reforms to personal law in India, with reference to socially unacceptable practices in different religions, had come about only by way of legislative intervention. It was that procedure that needed to be followed if talaq-e-biddat were to be set aside. (ix) International conventions and declarations were of no avail in the controversy because the practice of talaq-e-biddat was a component of personal law and had the protection of art 25 of the Constitution. *Rashid Ahmad v Anisa Khatun* AIR 1932 PC 25 not followed.

(2) The legal challenge raised by the petitioners failed on the judicial front. However, it was a fit case for the court to exercise its jurisdiction under art 142, 'for doing complete justice' in the matter, because all concerned were unequivocal that, besides being arbitrary, the practice of talaq-e-biddat was gender discriminatory. Talaq-e-biddat had been ended by way of legislation in a large number of egalitarian states with sizeable Muslim populations, and even by theocratic Islamic states. It had been acknowledged even by the All India Muslim Personal Law Board that the legislative will could salvage the situation. There could be no doubt that the position could only be salvaged by way of legislation. Accordingly, the court should exercise its discretion to issue appropriate directions under art 142 of the Constitution and direct the Union of India to consider appropriate legislation, particularly with reference to talaq-e-biddat. Until legislation in the matter was considered, Muslim husbands should be enjoined from pronouncing talaq-e-biddat as a means for severing their matrimonial relationship.

BOOK REVIEWS

Changing the Law: A Practical Guide to Law Reform

Richard Percival and Michael Sayers (eds.)

Commonwealth Secretariat, 2017

pp ix+240.

ISBN: 978-1-84929-174-3; ISBN (e-book): 978-1-84859-966-6.

This volume, the product of collaboration between the Commonwealth Secretariat and the Commonwealth Association of Law Reform Agencies (CALRAS), is edited by Richard Percival of Cardiff Law School, with Michael Sayers, Hon General Secretary of CALRAS. The editors have been assisted in their task by members and staff of many law reform agencies throughout the Commonwealth. This, the first general guide to conducting law reform in Commonwealth countries, thus draws on a wealth of experience of practitioners in the art of law reform and serves to illustrate the value of Commonwealth co-operation in the legal sphere.

There is general appreciation of the vital role of law reform in the promotion and protection of the rule of law. The law must constantly be adapted to meet the changing needs of society, to enhance justice and legal efficiency and to contribute to socio-economic development. Yet the statute books of many Commonwealth jurisdictions are still littered with the legislative debris of Empire and there is an urgent need to reform the law in a way which reflects the contemporary needs and aspirations. This guide is not concerned with the substance of reform but seeks to provide practical step-by-step guidance as to how to carry out a law reform project, drawing on best practice from a cross-section of Commonwealth jurisdictions.

The first two chapters provide background material exploring the nature of law reform, distinguishing it from other processes such as revision and consolidation. Various categories of law reform vehicles are considered with the emphasis on the independent, government-funded, statute-based law reform agency. However, there is also discussion of the 'institute model', where the entity is established by agreement between stakeholders, for example, government, the legal profession and academia.

The heart of the volume consists of chapters 3 to 8, the step by step practical guide to the carrying out of a typical law reform project, following

a 'road map' of the various stages; initiation, planning, pre-consultation, consultation, policy-making and finally publication and implementation. The chapters are replete with boxes copiously illustrating examples of practice and documentation on such crucial topics as project selection and management. As there is an on-line edition of the Guide, it might be considered feasible to include a fully documented example of a small law reform project.

Chapter 9 considers the substantive issue of compliance with international obligations, standards and human rights, together with the role of law reform in the implementation of sustainable development goals. The chapter contains useful basic guidance on the need to take account of international legal obligations and norms in the law reform process, particularly in the field of human rights. Treatment of specifically Commonwealth standards is included, as is to be expected in a Commonwealth publication. Sadly the normative value of such standards is generally neglected in wider international discourse. Also acknowledged are the Latimer House Principles on the Separation of Powers and the wide range of Commonwealth model laws of material assistance to the law reform process. Law reform practitioners may be surprised at the emphasis on the 2030 Development Agenda and Sustainable development goals. The Guide proclaims that 'every law reform entity has the opportunity to contribute to the realisation of the whole range of sustainable development goals and targets' (p.195). The examples given, however, suggest that many of these goals represent a re-statement of familiar and non-controversial objectives such as the 'provision of legal identity for all, including birth registration'.

The final chapter 10 deals with the specific problems of law reform in small states, now comprising 31 of the 53 members of the Commonwealth. When the value of the Commonwealth as an organisation is called into question, critics overlook the vital role of the Commonwealth in sustaining small states and

giving them a voice rarely heard in other fora. As well as discussing the obvious difficulties confronting small states in terms of retention of staff and other resource issues, the Guide pays tribute to the contribution of small states law reform agencies to the development of the law. Among the examples given include the work of the Namibia Law Reform and Development Commission in eliminating discriminatory

concepts embedded in customary law.

This Guide to law reform may be read with profit not only by law reform practitioners, the principle target audience, but also by all those concerned with making and applying the law.

Dr Peter Slinn

Chair of the CJJ Editorial Board

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