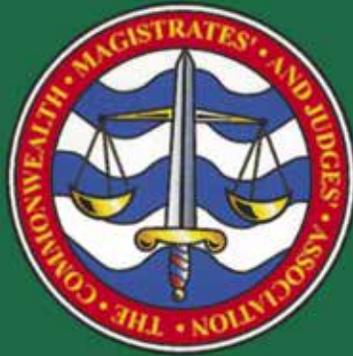


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EDITORIAL

PROMOTING PUBLIC LEGAL LITERACY: A JUDICIAL RESPONSIBILITY

In a calmer and, one might say, more decorous and hopeful time in America, Thomas Jefferson famously declared, ‘A well-informed citizenry is the best defence against tyranny’. Jefferson could not have anticipated in the early 19th century the renewed relevance those words would attain two hundred years later.

Since Jefferson’s day, the apparatus for getting information out to the citizenry has evolved beyond all imagining; paradoxically however, with technological evolution has come a loss of integrity in much of what is disseminated. The citizenry thus now finds itself awash in ‘information’ whose reliability and provenance are often not easily gauged. Worse still, the crosscurrents in that ocean of ‘information’ increasingly reflect a myriad special interests—political, commercial, you name it—which vie to shape and mould public opinion to serve their own particular ends. There seems little doubt that this glut of questionable material, coupled with the seeming inability of legitimate purveyors of news and thoughtful and informed commentary to keep up, has accentuated the deep divisions that are now evident everywhere—divisions on subjects as important as whether global warming is attributable in part to human activity and as trivial as whether pineapple belongs on a pizza.

Recall that Jefferson spoke of a ‘*well-informed citizenry*’ (emphasis added). Thanks largely to the aforementioned exponential growth in electronic communications and social media, we undoubtedly have a *more* informed citizenry in 2022 than what existed in Jefferson’s time; whether it is a *more well-informed citizenry* is a question for this editorial. The answer to that question would seem to be ‘no’.

Hyper-partisan media outlets and users of social media now routinely flood the public square with self-interested releases that are replete with distortions and misinformation. Among the worst in recent memory is the craven mischaracterisation by the Republican National Committee of those involved in the storming of the US Capitol on 6 January 2021 as being nothing other than ‘ordinary citizens

engaged in legitimate political discourse’. Could anything be more inimical than that to the preservation of the Rule of Law in a democratic state? That kind of revisionism-on-the-fly, emanating *ex cathedra* from elected lawmakers no less, can rapidly gain traction in a world where untruths can propagate easily through the almost infinite network of communication channels supplied by the Internet. Those members of an increasingly divided population who choose to curate their consumption of information in accordance with individual, echo-chamber parameters will happily like, re-tweet, share, post and forward content of this kind and, thus, exponentially extend its reach. Democratic institutions are wobbling visibly in some regions across the common law world and as some citizens uncritically embrace manifest untruths and the ‘influencers’ and demagogues who utter them, the risk of a rise in the tyranny that Jefferson’s maxim foretold cannot be discounted.

Courts, judicial officers and other justice system players are not immune from hyper-partisan attacks, or from being caught in the misinformation/disinformation crossfire. Indeed, they are increasingly becoming favoured targets. We must not forget, of course, that there is an expectation that in any functioning democracy there will be vigorous public debate—both within the media and generally—about the way courts and judicial officers do their work. Hard-hitting journalistic and other public questioning of court decisions and rulings—where it is unsullied by partisan, pecuniary or other improper motives—is indeed not only expected but encouraged. Protecting a strong, persistent and tenacious press is a cherished norm in constitutional and parliamentary democracies. But, in today’s world, the Internet is minimally regulated and the standards of practice of some media outlets are in serious decline. Thus—to borrow a phrase from the Canadian law governing the admissibility of hearsay evidence—the ‘circumstantial guarantees of trustworthiness’ of much of what circulates now in the public square are scant. Only in such an environment could we see the editors of a major British newspaper conclude in 2016 that it was acceptable and part of their remit to publish, in the wake of the decision of the High Court

in *Miller*, a stentorian newspaper headline declaring Thomas LCJ, Etherton MR and Sales LJ ‘enemies of the people’—incendiary words that were printed directly overtop large photographs of all three, clothed in their judicial attire.

This kind of unhinged and damaging rhetoric reflects not only a wholesale lack of civilised self-restraint, but almost always a lamentable poverty of understanding of legal processes and the facts and law that are in play in polarising cases like *Miller*. To call such stories ‘journalism’ is to demean the calling of the great majority of genuine journalists whose diligent and thoughtful investigative work is the engine that drives the legitimate and constitutionally protected Fourth Estate.

Some governments, too, do not shrink today from issuing barbed broadsides against courts and judicial officers when, to their disappointment, executive action is ruled unlawful by judges exercising their judicial review jurisdiction. Staying with *Miller* for a moment, it will perhaps be remembered that government house leader Jacob Rees-Mogg MP publicly characterised the UK government’s defeat before a unanimous, eleven-member panel of the UKSC in the *Miller No. 2* decision—where the court declared illegal the government’s attempt to prorogue parliament to preclude it from debating Brexit—as a ‘constitutional coup’ and ‘the most extraordinary overthrowing of the constitution’ ever seen.

In a 2017 article in the *Guardian*, Lord Neuberger (then President of the UKSC) was quoted as having commented that ‘some of the vitriol directed at the high court judges after they ruled against the government in November [in *Miller*] was “undermining the rule of law”’. He further asserted that ‘[p]oliticians “could have been quicker and clearer” in their defence of the judiciary’. Who can fairly disagree with those assertions?

In such circumstances, *some* more informed, thoughtful and measured voices can be counted upon to offer helpful correctives. As Prof Mark Elliott observed in his influential *Public Law for Everyone* blog:

It is no secret that the Government regards the courts, and their judicial review function in particular, as a thorn in its side—which is precisely as it ought to be in a constitutional democracy that respects the rule of law and the separation of powers. Within such a system, holding the Executive to account by reference to legal standards that are enforceable via judicial review is a bedrock, and non-negotiable, function of an independent judiciary.

The difficulty is, such voices are too often drowned out in the media and social media din of outrage and sanctimonious indignation. A way must be found for carrying the calmer, more discerning messages to the citizenry in a respectful and more effective way in order that the citizenry might, in Jefferson’s words, be ‘better informed’ about the institutions and constitutional precepts through which we are all governed.

The great concern of course is that a miasma of misinformation and disinformation, together with hyper-partisan attacks upon courts and judicial officers, can cause lasting harm to the judiciary as an essential democratic institution. This is plainly what worried Lord Neuberger in the wake of the High Court decision in *Miller* when he spoke of a threat to the Rule of Law. The judiciary plays a fundamental role in tripartite democracies and if the respect for the institution of the judiciary is undermined by passive attrition in general legal literacy coupled with the active subversion of public respect for that institution, then the health of those tripartite democracies is placed in peril (and the citizenry along with it).

A citizenry whose level of legal literacy is tolerably high—a citizenry that, in Jefferson’s words, is ‘well-informed’—is better able to evolve and develop, and better able to digest what is circulating about the roles of courts and judicial officers, consider it critically and, thus, separate the wheat from the chaff.

In 2020, Lisa Wintersteiger wrote in her PhD dissertation at the University of London the following:

Public knowledge of law and its associated informational and educational practices

provide a decisive locus for the legitimizing function of the normative ideal of the rule of law with its underpinning assumptions of security and stability

Similarly, Faranaaz Verlva, writing for the Oxford Human Rights Hub, has stated:

[Legal literacy] seeks to empower ordinary citizens to know and understand the law and its impact so that they can engage and apply the law in a manner that improves the quality of their lives.

And in her 2020 report entitled *Legal Literacy as Integral to Rural Women's Land Rights*, Lois Aduamoah-Addo stated:

Women produce more than 80% of the food in Africa, yet they own only 1% of the land... Therefore, improving women's access to and control over land is crucial to socio-economic development of Africa. To achieve this, WiLDAF [Women in Law & Development in Africa] thematically works to enhance women's legal literacy on land issues as a critical step in scaling up their access to and control over land as means of promoting their economic advancement and reducing their poverty levels. [Emphasis added]

In a passage quoted earlier in this editorial, Lord Neuberger decried the failure of politicians recently to come sufficiently to the defence of the judiciary when it has been unfairly attacked, acknowledging the corrosive effects that allowing those attacks to stand unchallenged can have upon the Rule of Law. It is plain that waiting idly for politicians and others to take up the torch and promote a greater understanding of the judiciary's essential role in tripartite democracies is not a viable strategy for upholding the Rule of Law in modern times.

Real opportunities exist however for judicial officers—judges and magistrates, that is—to exert an ameliorating force in the face of the slowly eroding public understanding of, and respect for, the role of courts and judiciaries in daily life. Judges and magistrates are scattered all across the Commonwealth—in urban settings and smaller ones. Every day

they apply their knowledge and understanding of the Rule of Law and its core principles to the tasks they undertake in their important work. By more often inviting members of the citizenry into courthouses to see how justice is administered, judicial officers can broaden and deepen ordinary people's understanding of court processes. By giving up some time during their lunch breaks, or before or after the sitting day, judges and magistrates can meet with members of the public, explain some of the fundamental aspects of the work they do and answer questions those members of the public may have about the judiciary's role.

This kind of in-person engagement between the judiciary and the citizenry helps to de-mystify court processes and give the judiciary a human face. Such programmes must be approached in an organised and efficient way, of course, and particular care must be taken with regard to security. But it is not only possible, but desirable, to draw judicial officers further into the public legal education equation than has been done before. Engagement of this kind does now occur on some level in courthouses situated in many parts of the Commonwealth. If a more concerted effort were to be made to involve sitting members of the judiciary more fully in improving public understanding about the law and its workings, it seems reasonable to expect that some meaningful improvements in legal literacy would result.

Your editor spent many a lunch hour during his sitting years speaking with groups of school- and college-aged students who were curious about courts and how they work. Usually, those visitors would have spent the mornings observing proceedings in remand and trial courtrooms and they were brimming with questions about what they had seen and heard—some of them quite *hard* questions. It was a privilege and a pleasure to field those questions and to have the opportunity to fill some gaps in the visitors' understanding of key legal concepts. Clearly, that kind of fruitful interaction between the judiciary and members of the public will serve important 'big picture' public education ends; however, it is contended here that the judges who choose to participate in those interactions will almost always also describe them as being profoundly fulfilling and satisfying on a personal level.

By mounting a more organised and comprehensive approach to this type of public education across the Commonwealth, jurisdiction by jurisdiction, court systems would better utilise under-used resources to serve public legal education ends. Drawing upon the contributions of individual judicial officers would surely help address, at least in part, the legal literacy deficit that we see within the citizenry and better prepare ordinary people to be more critical consumers of the sometimes questionable ‘information’ regarding legal institutions that circulates widely in modern society.

And, in-person engagement is not the only way that courts and judicial officers can make their contributions. Creating and distributing informative resource materials about the Rule of Law and legal system fundamentals for use in schools and other community settings is also another. Still others methods and approaches can easily be imagined.

These ideas are not new. They accord with initiatives the Lord Chief Justice of England and Wales has been promoting since his appointment to that role in 2017. Those initiatives were described in an article by Owen Bowcott published in the *Guardian* in 2018:

On a visit to a school in Ipswich, Lord Ian Burnett has urged schools to invite judges into their classrooms so that children can learn more about the justice system.

The initiative is aimed at increasing knowledge about the judiciary and courts among children aged between 11 and 14. Online teaching resources will be made available to schools, including encouraging schools to stage mock trials...

Speaking at Claydon high school, the Lord Chief Justice said: ‘The rule of law is fundamental to our British way of life. Every day, many thousands of judges make decisions which affect people’s lives, and their livelihoods. But most people have little idea of what goes on unless they find themselves in the system.

‘I want to make it easier for schools to help teach pupils about the justice system,

and how it really works – I want to invite students to talk to us about our work.

‘We already know that having a discussion with a real judge is very popular with school students. I want to make this opportunity more widely available to schools by asking them to consider inviting judges to visit and give them access to other resources that support their curriculum, and their careers conversations with students...

Ensuring that the next generation appreciates the importance of the justice system is a consistent theme pursued by Burnett...

Four years have passed since the article quoted above was published in the *Guardian*. If anything, the need for the kind of immediate involvement of the judiciary in public education that LCJ Burnett was advocating has become greater during the interregnum. The attitude reflected in the article toward courts accepting greater responsibility for promoting legal literacy could and should be embraced and adopted across the Commonwealth. The Lord Chief Justice’s observations apply, *mutatis mutandis*, in every jurisdiction where CMJA members serve their populations daily in the administration of justice. It lies within the ability of chief justices, chief judges and chief magistrates sitting within Commonwealth member states to make active court participation in public legal education initiatives a greater priority. Let us hope they see fit to do so. The avoidance of tyranny is but one of the many benefits that accrue to having a ‘well-informed citizenry’.

PLAN TO ATTEND THE CMJA TRIENNIAL CONFERENCE IN GHANA

Mark your calendars!

The CMJA’s first in-person Conference since 2019 will take place in Accra, Ghana, from 4-9 September 2022. After the long hiatus necessitated by the COVID-19 pandemic, it will be wonderful for attendees to see and learn from each other face-to-face again.

The 2022 Triennial Conference theme is ‘Access to Justice in a Modern World’. Some of the agenda will be concerned with the legacy

of the pandemic. What have we learned from it? What positive and lasting benefits might be wrung from the need that befell us all to innovate, swiftly and creatively, to ensure that there was continuity in the functioning of court systems despite the ravages of COVID-19? Which of the innovations made necessary by the pandemic ought not be preserved, but rather be treated as necessary but dispensable responses to a temporary crisis?

Beyond those topics, the didactic sessions and symposia will cover the broad range of subject matter for which CMJA conferences are well known. Attendees will be able to enhance their learning on topics as diverse as security of tenure for the judiciary, community violence against suspected witches, judicial education through formal training vs. learning by osmosis, the strengthening of anti-terrorism laws and the appropriate use of sentencing guidelines (to name only a few).

Members of the hospitable Ghanaian judiciary are already hard at work in the background, preparing an interesting and informative program of events for conference attendees, including a “day out” which involves an excursion to Elmina Castle, a durbar and various cultural performances.

Accra, the venue for the Triennial Conference, is Ghana’s capital and the country’s cultural hub. Nearby one can find attractions such as the Kwame Nkrumah Memorial Park, the Makola Market (a colourful bazaar) and the Arts Centre which is home to many cultural artefacts and traditional items. Those who attend the Conference will therefore be able to combine some fascinating sightseeing and other activities unique to Accra and its environs with the learning and networking that the substantive programme will enable.

A fuller account of the Triennial Conference’s offerings, together with registration forms, information about visas and COVID-19 travel considerations and the like are all available on the CMJA website.

The CMJA’s Triennial Conference in Accra promises to be *the* event of the year in the Commonwealth’s legal calendar. Do not delay in making your reservation and travel plans!

HYPERLINKS AND THE COMMONWEALTH JUDICIAL JOURNAL: A POLICY ANNOUNCEMENT

After careful deliberation, the *CJJ*’s editorial board has decided to maintain its present practice of excluding the use of hyperlinks from the journal’s content. We ask potential contributors of articles for consideration and possible publication to take note of this decision.

While hyperlinks undoubtedly bring some benefits to readers who access the journal electronically, the editorial board ultimately determined that those benefits are outweighed by a number of disadvantages, including the following:

- hyperlinks are not operative for those subscribers who receive the *CJJ* in paper form;
- hyperlinks can have the effect of offloading substantive content to external sources, potentially leaving the articles that make use of them bereft themselves of important content; and
- the site sources to which hyperlinks direct the reader can sometimes change, or be taken offline or otherwise become inaccessible, and to that extent the value of past issues of the *CJJ* as an archival resource for judicial officers and scholars will be degraded.

The editorial board recognises that the *CJJ*, like all such journals, is published within a complex and evolving knowledge dissemination environment where the means for making scholarly and professional information available to readers are in constant flux. Accordingly, as time passes and conditions change, the board may revisit its decision to exclude the use of hyperlinks. For the time being, however, hyperlinks will not be included in the content published in the *CJJ* and the journal’s “Call for Submissions” has been amended accordingly.

WHAT AWAITS YOU IN THIS ISSUE

The work of magistrates and judges is endlessly diverse and, fittingly, so also is the range of

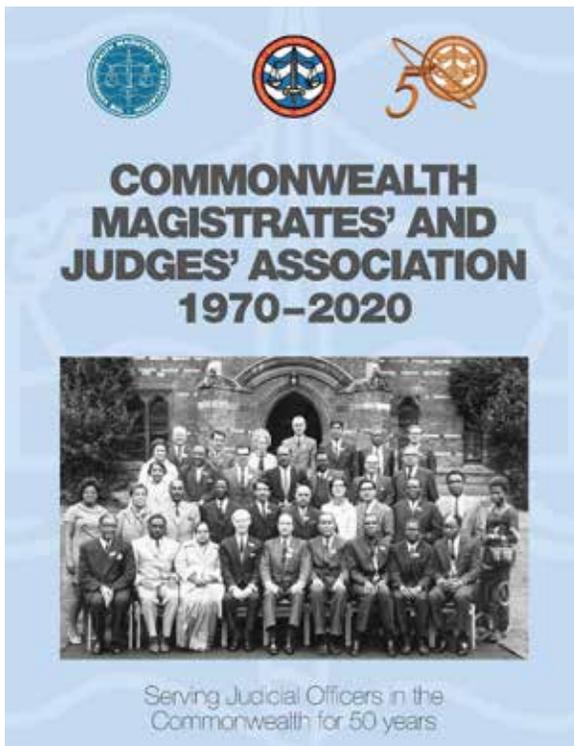
subject matter addressed in the substantive articles published in this journal. For this issue, the content includes articles by:

- Her Excellency Paula-Mae Weekes, on pandemic innovations in the court system of Caribbean states;
- Justice Lynne Leitch describing the mandate and activities of the Global Justice Integrity Network;
- Justice Malcolm Rowe and Ms Leanna Katz on stare decisis and the practicalities of the doctrine's application;
- Justice Awa Bah on pandemic innovations in the court system of the Gambia;
- Judge Thomas Woods (ret.) on serendipity and the surprises that sometimes await us at the bottom of internet rabbit holes;
- HH Leslie Newton, Lisa Harker and Mary Ryan on remote hearings and their implications for family justice;

- Prof David McClean on the use that can be made by courts, when interpreting and ruling on international conventions, of documentation produced before, during or after the negotiation of the texts of those conventions; and
- Justice John Logan on the dangers of permitting narrow conceptions of 'judicial efficiency' to dictate what practices and approaches developed by court systems during the COVID-19 pandemic should be permitted to continue in a post-pandemic environment.

Further, the June issue also includes a case note taken from the Law Reports of the Commonwealth and three reviews of books certain to be of interest to the *CJJ*'s readers.

We wish all of our readers a happy and relaxing summer season—one that, we hope, will be followed for many by illuminating and productive time spent at the CMJA's 2022 Triennial Conference.



Order your copy from the CMJA Office, or order online via the CMJA website

CALL FOR SUBMISSIONS

The *Commonwealth Judicial Journal* (the ‘CJJ’) is the flagship publication of the Commonwealth Magistrates’ and Judges’ Association (the ‘CMJA’) and has a readership of judges, magistrates and other legal practitioners from the Commonwealth and beyond. The *CJJ* invites submissions of manuscripts on various aspects of the law, in particular manuscripts focusing on the judicial function at the domestic, regional and/or international level. Essays, book reviews and related contributions are also encouraged.

Please read the following instructions carefully before submitting a manuscript or contribution.

CONTACT DETAILS

Manuscripts sent by e-mail, as Word document attachments, are particularly encouraged. These should be sent to CJJEditor@shaw.ca with a copy to info@cmja.org. Alternatively, manuscripts may be sent by post to CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX, UK, marked to the attention of the editor.

INFORMATION FOR AUTHORS

1. Manuscripts should be submitted in Microsoft Word format.
2. Articles should include a 200-word (maximum) abstract.
3. Submissions should be accompanied by details as to whether the manuscript has been published, submitted, or accepted elsewhere.
4. Manuscripts should normally range from 2,000 to 3,500 words in length.
5. Any references and/or citations should be integrated in the main body of the manuscript, as footnotes/endnotes will normally be removed.
6. Hyperlinks should not be embedded in manuscripts submitted for publication.
7. Manuscripts should be purged of all ‘track changes’ notations before being submitted.
8. The *CJJ* encourages authors to refer to material from one or more jurisdictions across the Commonwealth.
9. All manuscripts received are evaluated by our Editor in consultation with the Editorial Board. Notification of acceptance, rejection or need for revision will generally be given within 12 weeks of receipt of the manuscript, although exceptions to this time frame may occur. Please note that our evaluation process takes account of several criteria, including the need for a balance of topics, the *CJJ*’s particular areas of interest which may change over time, etc., and this may also influence the final decision. Therefore, a rejection does not necessarily reflect upon the quality of a piece. The Editorial Board retains the discretion as to whether or not an article may or may not be published.
10. By submitting an article or other contribution for publication, you confirm that the piece is original and that you are the author or co-author, and owner of the relevant copyright and other applicable rights over the article and/or contribution. You also confirm that you are the corresponding/submitting author and that the *CJJ* may retain your email address for the purpose of communicating with you about the article. You agree to notify *CJJ* immediately if your details change.

Please note that the CMJA retains the copyright of any articles once these are published in the Journal but in the interests of the widest dissemination, the CMJA may authorise publication of the articles in other appropriate publications.

PANDEMIC INNOVATIONS IN THE CARIBBEAN

Her Excellency Paula-Mae Weekes ORTT, President of the Republic of Trinidad and Tobago and former Justice of the Court of Appeal of Trinidad and Tobago. This article is based on the author's keynote address at the CMJA's virtual conference held in September 2021.

Abstract: *The COVID-19 pandemic has forced courts within the Commonwealth Caribbean, as it has courts around the world, to move swiftly to innovate in order to preserve continuity of access to justice to the citizens they serve. Some were further along in their use of e-filing and other such technologies, and so some had more work to do to respond to COVID-19's impact on the administration of justice. COVID-19 has proven to be a 'great leveller' in this respect, forcing rapid adaptation. Ironically, in that way at least, the pandemic can be seen to have been beneficial in facilitating the modernisation of various aspects of court system operations.*

Keywords: COVID-19 pandemic – effects on court processes – innovation in the delivery of court services – maintenance of access to justice in the face of disruption

INTRODUCTION

The CMJA's recourse to a virtual platform for this conference is a reminder of the many significant and far-reaching effects of COVID-19. Although vaccination has provided some light at the end of the tunnel, it is clear that globally we must learn to live with, respond to and work around the many challenges thrown up by the pandemic. At individual, institutional and governmental levels, all are now called to modify how we function or risk becoming irrelevant, moribund or extinct. Judiciaries have not been spared.

Some organisations are by nature flexible, readily able to answer the demands of those they serve, but historically judiciaries have been painfully slow to change, more often than not reacting to situations and crises rather than being proactive in assessing and responding to the needs of their users. Tradition, precedent and the desirability of certainty, all recognisable hallmarks of the judicial process, are not attributes that lend themselves to easy transition. But Covid-19 has compelled a sea-change in operations necessitating

post-pandemic innovations. While this article presents a mainly Caribbean perspective (and I am grateful to my neighbouring jurisdictions for their readiness to supply material), I am certain that all across the Commonwealth we share the lived experiences.

To innovate is 'to make changes in something established, especially by introducing new methods, ideas, or products'. In January 2020, our various judiciaries were either gazelles, sprinting ahead towards state-of-the-art operations; tortoises, ambling along making incremental changes as they moved in the direction of modernisation; or sloths, for whatever reason lazily delivering the bare minimum of services. Whichever, all took a hit as COVID-19 affected the core mandates and functions of the institutions tasked with upholding individual rights, enforcing laws, providing oversight of government actions and ensuring that the Rule of Law prevails.

Rapid responsive innovations became crucial if our judiciaries were to continue to fulfill their mandates. I am partial to the way our Kenyan colleagues succinctly express it on their website: 'to attain the ideal rule of law'. And we would no doubt agree with Justice Geoffry Venning, former Chief Judge of the High Court of New Zealand that 'access to justice is fundamental to the maintenance of the rule of law.' Without it, people are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision-makers accountable.

ACCESS TO JUSTICE

Originating Process

The first step in accessing justice is, of course, the ability to initiate proceedings—traditionally done by walking into a courthouse. The health and safety concerns occasioned by the coronavirus pandemic closed courthouses to the public, some as early as March 2020, or imposed restrictions on entry, thereby frustrating this customary method.

Certain jurisdictions are fortunate to have Continuity of Operations Planning ('COOP') programmes meant to establish policy and guidelines to ensure that essential functions of their judiciary continue in times of crisis. That usually involves a relocation of personnel and resources to alternative facilities, but COOP did not contemplate the absolute unavailability of brick and mortar accommodations for the daily dispensation of justice.

With the approach to court registries denied, it became necessary to have all matters filed electronically to ensure uninterrupted access to justice. E-filing thus became the order of the day, whether in a simple form, *e.g.* e-mail, or through more sophisticated e-portals. Gazelles like Singapore and Australia that had largely moved to e-filing pre-COVID suffered the least disruption to their operations and enjoyed a head start. The Eastern Caribbean Supreme Court was a regional front-runner, launching its e-filing project in 2014 and engaging since in a continuous roll-out. Trinidad and Tobago's e-services portal, established in 2019, allows attorneys, self-represented litigants, police officers and other justice sector agencies to file their documents electronically.

The tortoises and sloths found themselves in the unenviable position of having to fast-track electronic filing systems already in the pipeline or scramble to implement rudimentary systems to guarantee the continuous turning of the wheels of justice. In response to COVID-19, Jamaica, Barbados and Guyana implemented simple e-filing systems.

E-filing has proven workable and convenient for the submission of originating process and other documents and surely will become more sophisticated across all jurisdictions in the coming years. There can be no turning back.

Hearings

The second step in accessing justice is the hearing of a matter. Pre-COVID, save for limited exceptions, hearings required in-person attendance by judicial officers, court staff, attorneys, litigants and witnesses. The advent of the pandemic turned this on its head.

Initially, courts adjourned all but the most

urgent matters while taking stock of the situations they faced, but as the pandemic dragged on, alternatives to traditional hearings became necessary.

The ideal was to bring all the players together in the same virtual space while preserving the sanctity of the court process. Several approaches were adopted with varying degrees of conformity to old standards. Venues were the first concern. Courthouses, attorneys' chambers, offsite designated and court-controlled spaces, prison facilities (especially for bail hearings and other matters in which an accused is in custody) and, last but not least, private homes have all been employed as venues for hearings—often in combination. As you could well imagine, permitting witnesses to testify from uncontrolled home environments have given rise to some unusual and amusing situations.

In The Trinidad and Tobago Children Court a witness disappeared from view during a hearing and when asked on her return to explain her absence, responded indignantly that she had gone to see about her pot. In another case, a witness, dressed in a sleeveless shirt known colloquially (and invidiously) in some circles as a 'wife beater', paced up and down in his yard, as that was the only place he could get connectivity. The final straw was when he lit a cigarette; that pushed judicial accommodation to the limit and he was unceremoniously put out of court, virtually. I am sure that there are many such tales to be told from other jurisdictions.

There have been in many cases a hitherto unimaginable relaxation of the rules, but what is clear is that each judiciary must establish well-defined protocols, clearly communicated to and understood by attorneys, litigants and witnesses. There is likely to be a period of trial and error before the optimal practice is settled.

Criminal trials have proven to be a particularly thorny problem, especially in jurisdictions which still have trial by jury. Guyana is one of a few jurisdictions in the region to have resumed jury trials since late 2020, with jurors, court staff and judge appropriately spaced in the courthouse—that is, accused in custody joining via a virtual platform, accused at large at a location approved by the courts. Attorneys

are given the option to appear virtually. When, in Trinidad and Tobago, accused have opted for judge-alone trials, the virtual process has operated fairly smoothly, but there has been a complete cessation of trials by jury until we have satisfactorily worked out the logistics.

Another difficulty arises with cases in which witnesses pose a potential security risk, for example, gang members.

An important feature of hearings, especially in the criminal courts, is access to the courtroom by the public and the media. COVID-19 has effectively done away with the familiar phenomenon of court regulars. In some Caribbean jurisdictions, including Trinidad and Tobago, members of the public and the media desirous of a virtual seat at a hearing can contact Court Offices and be provided with a link for entering the virtual hearing room. In Barbados, media practitioners are given links to public hearings and they in turn inform the public about the happenings there. Guyana has taken it a step further, livestreaming court matters of national interest through its newly-established website and social media pages.

EQUAL ACCESS TO JUSTICE FOR ALL

As members of jurisdictions committed to achieving the United Nations Sustainable Development Target 16.3—to ‘Promote the rule of law at the national and international levels and ensure equal access to justice for all’—we have a duty to ensure that, COVID-19 notwithstanding, all individuals are able to seek and obtain remedy for their grievances through the courts.

While implementing the necessary changes to ensure that matters can be filed, heard and adjudicated on, judiciaries must remain alert to subtle barriers to justice made even more opaque by the pandemic. Special groups such as those involved in domestic violence victims, prisoners, migrants and those without devices or connectivity must be catered for specifically in the post pandemic innovations.

Barbados and Trinidad and Tobago are among many jurisdictions whose courts have provided facilities to enable members of the public without technological resources or know-how to access justice. Botswana kept its courts

open for cases involving domestic and family matters, and Trinidad and Tobago established a dedicated Domestic Violence Call Centre and constructed a portal to quickly dispatch Orders, Summonses and documents to the Gender-Based Violence Unit of the local Police Service.

At the end of the day, access to justice is not achieved unless there is access for all.

COURT REGISTRIES

None of the aforementioned accommodations happen without registries—the engine room of court machinery—managing cases from filing to disposition. The exigencies of the pandemic upended the usual order of court business and judiciaries have had to find novel ways of discharging their responsibility to ensure that court documents are processed and disseminated in a reasonable timeframe.

Locally, the use of Courtmail to manage and disseminate court documents began in 2018 and was intensified following the onset of the pandemic. The Trinidad and Tobago Judicial Information Management System, piloted in the Children Court in 2018, was ramped up to meet the demands of Covid-19. Both Jamaica and Guyana have developed and are piloting their own electronic case management systems to address issues arising out of the pandemic. Across the Commonwealth Caribbean, judgments continue to be made available to the public via the judiciaries’ websites.

CHALLENGES

Post pandemic innovation has not come without its challenges. Financial resources are critical to the success of measures devised to answer COVID-19. There is equipment and training and we cannot forget the cost of the various health and safety measures. Judicial innovation will all come to naught without proper investment by our respective governments. I trust that this imperative has been recognised.

The shift to virtual proceedings hinges upon the efficacy and efficiency of the technology employed. Courts, in this part of the world, are subject to the vagaries of public utilities (where interruptions of electricity supply and

internet connectivity can be destabilising). Hearings have been disrupted or aborted on multiple occasions as a result of lost internet connections or power outages. And we cannot forget that many jurisdictions in the Caribbean lie within the Hurricane Belt.

The ability of judiciaries to implement strategies depends on an interconnected system of actors, including law associations, police and prisons, various agencies and social support groups. Collaboration is critical; courts may be outfitted with the technology to conduct online hearings, but if police stations and other detention facilities are not, proceedings cannot progress. Guyana's judiciary was proactive, formulating special teams to not only draft and implement Covid-19 protocols, but also to meet and confer with all stakeholders.

Public trust is essential to any effective judicial system. That trust is built on transparency and accountability which, in turn, are premised on unrestricted access to all the activities of a court, unless circumstances dictate otherwise.

COVID-19 has, to some extent, temporarily curtailed the former ease of access and judiciaries must take aggressive steps to foster

public trust through this difficult period.

With support from JURIST, a Caribbean judicial reform initiative, Guyana has launched a public education campaign on social media titled, 'We can still hear you'. It advises the public that matters are still being heard in all courts and that all judicial officers are working remotely, using online platforms, or in physical courtrooms.

CONCLUSIONS

All of us who are active in the judicial sphere have had our work affected by the pandemic. Judiciaries—whether gazelle, tortoise or sloth—have been forced to devise new strategies to meet with the unprecedented disruption brought about by COVID-19. I am willing to bet that courts, which have been around in some form since time immemorial, have never moved so far or so quickly in such a short span of time.

We are all familiar with the expression, 'when push comes to shove', and we have a prime example of that in the effects of the pandemic. Ironically, in the long run, we may well find ourselves indebted to COVID-19 for much needed progress in our respective jurisdictions.



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PANDEMIC INNOVATIONS IN COURT PROCESSES IN THE GAMBIA

Justice Awa Bah, of the Supreme Court of The Gambia. This article is based on a presentation made by the author at the CMJA's virtual conference held in September 2021.

Abstract: *The unanticipated and unwelcome arrival of the COVID-19 pandemic challenged the court system of The Gambia. Innovations had to be explored and adopted swiftly. Judges, magistrates and all court system players had to be nimble and adjust in real time to the changing landscape so that access to quality justice despite COVID-19 could be maintained. A greater emphasis on case management, improved use of technology and other benefits born out of crisis conditions will outlive the pandemic and leave the court system in The Gambia stronger.*

Keywords: COVID-19 pandemic – effects of pandemic on the court system in The Gambia – various innovations adopted to accommodate the challenges presented the pandemic – improved efficiency in handling cases being the lasting legacy of COVID-19 for the court system in The Gambia

INTRODUCTION

COVID-19, the very unexpected and unwelcomed global visitor, has left untold damage along its footprints in the sands of our times. Undoubtedly, COVID-19 has adversely affected all walks of life. It has been responsible for huge losses of valuable human lives. Its socio-economic effects in our countries have been far-reaching and it has burdened and over-stretched our struggling health care systems. The list goes on. Certainly, the pandemic has awakened us to some difficult realities. The justice delivery system, and in particular the courts, are no exception. They too have had to endure the havoc caused by COVID-19; the judiciary of The Gambia has not escaped its long tentacles.

The subject of how cases might be disposed of efficiently after COVID-is not only timely but topical as judiciaries across jurisdictions strive to cope with the effects of the pandemic. Such systems must now chart a way forward where more resilient judiciaries can withstand such crises with minimal effects on the delivery of

justice and without compromising adherence to rule of law and access to justice for all.

THE GAMBIAN EXPERIENCE

Access to justice within a reasonable time is a fundamental right which has been guaranteed in the Constitution of The Gambia. Our courts are therefore obliged to ensure that litigants who seek redress/justice before them have their matters resolved fairly and justly and within a reasonable time. There is no counterargument to the hallowed saying, “justice delayed is justice denied”. Speedy disposition of cases is a *sine qua non* of true justice, especially in criminal trials where the liberty of the subject is at stake, bearing in mind the common law principle (and, in most nations, constitutional guarantee) that an accused person is innocent until proven guilty.

COVID-19 has brought to the fore some challenges or deficiencies in our judiciaries and has thus become the driver for necessary improvements aimed at making the delivery of justice more effective and efficient.

Speaking from the Gambian experience, it can be said that COVID-19 surely added to the hitherto existing backlog of our cases. We were thus temporarily faced with the challenge of choosing between health and safety on the one hand, and the promotion of rule of law and access to speedy justice for all (the expectation of the court users) on the other. Certainly, our judiciary was not prepared for such a situation. The first action that came to mind when the pandemic reared its ugly face on our shores was for the courts to be closed down in order to save the lives of not only the judges, magistrates and other court officials but also those of the litigants, the lawyers and the general public at large.

The machinery of justice was certainly brought to a halt for a short while in the midst of the pandemic. Time was needed for strategizing

about the way forward in order to allow court processes to continue to operate and to do so efficiently. Our Hon. Chief Justice had to be proactive under the circumstances. He closed down the courts in The Gambia for at least two months (though hesitantly) and issued a practice direction prescribing very minimal hearings and only for criminal cases at scheduled times (to reduce the clogging of our courts). The necessary emergency health and sanitary measures had to be looked into and put in place. For a time, civil cases were held at bay. Stakeholders were hesitant to sit in open court. In addition, only essential administrative and court staff were directed to come to work and on a shift basis, to minimise the spread of infection.

The need for an alternative to open court hearings was quickly recognised. Without such alternatives, it would not have been possible to keep courts open in The Gambia. COVID-19 showed no signs of relenting. Technology came to the fore. Harnessing technology is an absolute necessity in a modern judiciary, even without a pandemic. With the initiative and support of the United Nations Development Programme in The Gambia, virtual courts were introduced for the remote trials of criminal cases. The judiciary was linked with the Attorney General's Chambers and the Central Prisons remotely. The pilot was reserved for cases involving bail applications only. It was subsequently rolled out to other judges sitting on different matters. Even the magistracy in the Greater Banjul Area was subsequently linked in to remote hearings. In time, as the effectiveness of remote hearings became more established, some judges decided to begin hearing some civil cases remotely—mainly in simple matters such as interlocutory applications and other appearances where live witnesses were not required. All of this was done bearing in mind the interests of justice and the important principle that not only must justice be done, but it must be seen to be done. Platforms such as Zoom were employed with the agreement of parties and their counsel. In fact, the service of process was at the time performed electronically by email and notices were even sent by WhatsApp.

The challenge that arose was that our legislation and rules of court in The Gambia made no provision for the utilisation of remote

hearings and the use of technology in our case management system. There was a need to give the system legitimacy. The Hon. Chief Justice had to issue a practice direction as an interim measure on the modalities for the use of virtual courts and service by electronic means due to the COVID-19 pandemic.

THE LESSONS LEARNED

What the pandemic has taught us is that we needed to have in place resilient systems and structures that would, in the future, guard the machinery of justice against being brought to a halt, even if for a short time—that is, systems that would ensure the smooth operation of the courts in virtually all circumstances (come what may). To achieve this objective, there was and remains a great need for cooperation amongst all stakeholders, especially members of the private bar. Without the cooperation of counsel, it would be difficult for the judiciary to achieve its objective of dispensing justice in an effective, efficient and timely manner. COVID-19 has taught us that:

1. We can actually hear and determine some matters remotely and dispense with public hearings in certain cases, thereby enhancing speed and efficiency in the disposal of matters and reducing to a large extent the challenges posed by physical hearings. Notwithstanding that, however, consideration must be given to those court users who lack access to technology, bearing in mind the principal objective of ensuring access to justice for all. Additionally, there is the need to look at our legislation, rules of court and practice directions with a view to making provision in them for the use of remote hearings. Thus, there is the need to amend our existing laws and procedural rules.
2. The lack of automation in our courts creates a big challenge. Typed or transcribed records of proceedings are not as readily available as they should be and this constitutes a great hindrance to progress in our courts, especially at the appellate level. Unfortunately, in our courts we still record proceedings in long hand. This is a very onerous task for a judge/magistrate who has a caseload of over 100 cases and has to sit for long

hours in a day presiding over them. The need for harnessing technology became more apparent when the pandemic struck. Certainly, there is only so much a judge or magistrate can do in a day if he or she is recording proceedings in long hand. This is truly not efficient and COVID-19 has made that more obvious. Most appeals are held back due to lack of typed records of proceedings. Thus, there is the need to automate certain processes within our courts and our registries (the engines of our judiciaries) and to move toward a paperless approach (creating what some have referred to as an e-judiciary). Automation will certainly enhance efficiency in the justice delivery system. Harnessing technology is a key element of our judiciary's five-year strategy for improvement of the delivery of justice.

3. The need for readily available electronic research tools (online law research tools and e-libraries) cannot be over-emphasised. Easy electronic access will surely reduce the amount of valuable time that is spent on manual legal research using hard copy texts, treatises and law reports.
4. It makes good sense to dedicate a particular month in each term in the legal calendar for the trial and disposal of criminal cases only. This is another strategy introduced by the Hon. Chief Justice. This will ensure that maximum progress is achieved in the disposal of criminal cases (which are ever on the rise). Likewise, scheduling changes will enable more remand cases in particular to be disposed of summarily. The creation of divisions in the courts of The Gambia will make it possible to stream cases to the relevant divisions for more efficient and speedy disposition.
5. More disputes can and should be settled out of court. Alternative Dispute Resolution ('ADR') as a tool for fostering and facilitating settlement comes with huge benefits. It reduces valuable time spent in litigation, saves money and even cements relationships. Our courts are inundated with cases that could be easily settled amicably. These cases overtax judicial resources. As judges we should be able to quickly identify cases with the

potential for settlement and encourage parties to explore same. With that in mind we have concurrently reviewed our Court Connected ADR structure, legislation and rules with a view to updating and reviving court facilitated ADR. We intend to make better use of ADR and even make it mandatory for parties to explore it before embarking on trials proper. Such enhancements should greatly reduce the excessive workloads of the 10 currently sitting high court judges.

6. Judges and magistrates must acquire better case management skills for the efficient disposal of cases. There is, at present, is no formal electronic case management structure/policy in place for the judiciary in The Gambia. However, the judges and especially the magistracy have been trained on the requisite skills for the effective and efficient management of their cases. Effective judicial control must be exercised not only in trials or hearings, but also through the pre-trial activities that lead up to trials and hearings. This requires, among other things:
 - close study of case files, the relevant law, rules and procedures and the strict application of the same to avoid delays;
 - sanctions for non-compliance with case management directives by litigants/lawyers;
 - timelines that are enforced;
 - a sparing approach to the granting of adjournments;
 - an increase in on-the-bench rulings;
 - priority scheduling for cases that are ready to proceed;
 - the setting of particular days for motions/interlocutory applications and /rulings;
 - etc.

All the above are laudable goals and initiatives. They cannot however be achieved without the necessary financing. Our judiciaries must be sufficiently funded if they are to be

efficient and effective in the dispensation of justice. Every component of any court system requires financing and our governments must therefore invest heavily in court systems. The fundamental role the judiciary plays in a state's democratic governance structure cannot be over-emphasised. Putting in place the necessary structures and facilities (training, equipment, technology, enabling environment, welfare systems, etc.) requires adequate resources, without which practical implementation and sustainability are not possible.

CONCLUSION

Bitter lessons have been learned from the

advent of COVID-19 but they are all for the better. Our judiciaries have emerged in an improved state in terms of efficiency and effectiveness in justice delivery. COVID-19 has given us the opportunity to assess our strengths, weaknesses, as well as the challenges and threats our courts face. The pandemic has created opportunities to increase the use of technology in our courts. We have, in a sense, been forced to go back to the drawing board—to reflect, adjust and attempt to improve and build on what we already have. Though undoubtedly a crisis, the COVID-10 pandemic has undoubtedly opened our eyes to the realities and needs of a modern day judiciary. There is no turning back.

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AN INTRODUCTION TO THE GLOBAL JUDICIAL INTEGRITY NETWORK

Justice Lynne Leitch, Judicial Officer of the Ontario Superior Court of Justice and a member of the Global Judicial Integrity Network’s Advisory Board representing the CMJA

Abstract: *The Global Judicial Integrity Network is a new, international training tool for judicial officers that was launched by the United Nations Office on Drugs and Crime. This article explains the benefits that the Network offers to judicial officers and explains the trajectories—past and future—of the Network. The Network is available to all who wish to become a registered user. Judges are encouraged to register on the Network via its online portal.*

Keywords: Judicial integrity, preservation of – UNODC – Benefits of Global Judicial Integrity Network to judicial officers

INTRODUCTION

A photo of a judge photographed ‘dad dancing’ at his daughter’s birthday party goes viral—should he be concerned? Do the WhatsApp and Instagram platforms share data with Facebook? Can a judge be a member of a political party?

The Global Judicial Integrity Network (the ‘GJI Network’ or ‘Network’) offers answers to these questions in its *Non-Binding Guidelines on the Use of Social Media by Judges* and its judicial ethics training package. These are just two of the ways that the GJI Network seeks to support judges as they strive towards the ideal of judicial impartiality.

Launched in April 2018, the GJI Network serves judges around the globe. They can turn to it and engage in training; they can also access guidelines and resources to strengthen integrity, accountability and professionalism. The Network is a platform which promotes networking opportunities, facilitates access to resources, supports the development of new tools and provides peer-to-peer support and learning opportunities. It has its roots in international anti-corruption law and aims to become a global resource for judges facing ethical dilemmas, especially in vanguard areas of practice like social media.

In this article, I will outline the current benefits that the GJI Network offers to its members. I will briefly explain the United Nations Convention Against Corruption and the subsequent creation of the Network by the United Nations Office on Drugs and Crime (‘UNODC’). I will explain the short- and long-term goals of the GJI Network. I hope in the end to persuade you to examine the resources offered by the Network for yourself, confident that you will find, as I have, that the Network is a useful and enriching training platform and community.

WHAT THE GJI NETWORK CAN OFFER AND HOW IT CAN HELP

First and foremost, the GJI Network promotes best practices. I highlight three specific training areas below: ethical dilemmas, social media, and gender-related and systemic integrity issues.

Judicial Ethics Training Initiative

A training package has been designed to help judges resolve ethical dilemmas. There are three components to this package, which is based on the *Bangalore Principles of Judicial Conduct* and the *UNODC Commentary on the Bangalore Principles of Judicial Conduct*: namely, an e-learning course, a self-directed course and a trainer’s manual. The e-learning course and self-directed course provide training in judicial ethics and integrity. The trainer’s manual helps judges to design training courses for use in their jurisdictions. Each resource is available in numerous languages.

The learning outcomes are aspirational and include acquiring a deep understanding of the *Bangalore Principles*; acquiring an increased capacity to recognise when judicial conduct and ethics issues come into play both inside and outside the workplace; acquiring a basic understanding of the interaction between social media and judicial conduct; and acquiring an awareness of a range of cognitive biases judges

might have and developing the reflective skill to counter them.

To gauge your own comfort with the principles of judicial integrity, consider the following questions asked in the training package:

- Should a judge attend a night club?
- Can judges be members of secret brotherhoods or sororities?
- Can a judge's food intake during a trial affect impartiality?
- Can a judge's body language form the basis of a recusal challenge?

The answer to each of these questions is either 'no' or 'yes, but'. Feedback is provided.

There are other valuable exercises provided, such as case studies. One such exercise considers a colleague who decides to speak out about the lack of judicial resources at a national association meeting. Nothing happens, so the colleague proceeds to pen an article in a national law journal and to give an interview with a journalist. Ethical questions are posed and follow up directs the user to relevant paragraphs of the *Commentary on the Bangalore Principles*.

The effects of the GJI Network's training programme are already widespread: ethics training has occurred in 74 geographically diverse sites and has involved 7,100 members of the judiciary worldwide. Training sites have been active even during the pandemic and these training opportunities continue to attract new judiciaries.

Guidelines on the Use of Social Media

Non-Binding Guidelines on the Use of Social Media by Judges have also been developed. In the social media section of the training, modules offer practical advice and tips. A social media networks glossary provides useful information. There are helpful substantive questions about social media with answers provided.

Exercises also consider the role that social media may play in the interaction between

judicial conduct and the public, where you are to match a scenario to one of the principles underpinning the *Bangalore Principles*. The scenarios essentially outline a 'what not to do' and consider the way that social media may place judicial conduct both in- and outside the courthouse in the public eye.

The above-mentioned guidelines are some of the first to address the challenges posed by social media for judicial officers and applicants for judicial appointment. Their significance is reflected by the fact that they have been translated into thirteen languages for use across the globe.

Gender-Related and Systemic Integrity Issues

An issue paper entitled *Gender-Related Judicial Integrity Issues* has been created by the GJI Network. Its purpose is to raise awareness of its subject matter, but it also shares good practices in relation to training as well as in relation to guidelines.

A Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-Based Violence Against Women and Girls is also available to again highlight these issues and share and promote good practices.

Codes of Judicial Conduct and Other Integrity Strengthening Resources

The GJI Network makes available a *Guide to the Development of Codes of Judicial Conduct*. This guide addresses and suggests content for codes of judicial conduct and discusses the enforcement of such codes.

The Network also provides a *Resource Guide on Strengthening Judicial Integrity and Capacity* to guide those navigating the challenge of implementing an appropriate conduct review process without diminishing judicial independence or threatening public confidence in the administration of justice. This guide includes a chapter on judicial recruitment, dismissal and remuneration, as well as a chapter on judicial codes of conduct and disciplinary mechanisms.

In addition, the GJI Network library contains disciplinary cases from numerous counties which reveal good practices. There are myriad

resources available on the global data base which can be accessed by searching disciplinary proceedings.

Beyond the resources highlighted below, the GJI Network features podcasts and view pieces as well as an extensive virtual library of resources containing more than 2,100 documents from 182 countries in 43 languages. The Network has also published a discussion paper on judicial immunity addressing the balancing of judicial accountability and judicial independence.

WHY WAS THE GJI NETWORK CREATED?

The catalyst for the creation of the Network was Article 11 of the United Nations Convention against Corruption. Article 11 is described as a legally binding standard for international anti-corruption measures. The Convention against Corruption emphasises the crucial role of the judiciary in combatting corruption and recognises that to effectively fulfil this role, the judiciary itself must be free of corruption and its members must act with integrity.

‘Integrity’ is defined in the commentary to the *Bangalore Principles* as the attribute of rectitude, honesty and righteousness expected from the members of the judiciary. It is worth noting that this definition states that the concept of integrity implies that the judiciary should always be good and virtuous in behavior and character, and not only in the discharge of official duties.

The establishment of the GJI Network implements the Doha Declaration of 2015 adopted at the 13th United Nations Congress on Crime Prevention and Criminal Justice. In part, the Doha Declaration reaffirmed the commitment of member states to promote the integrity and accountability of criminal justice systems.

The Network is designed to offer timely and effective support to judiciaries worldwide.

HOW WAS THE GJI NETWORK CREATED?

The preparation of the GJI Network involved consultation with 4,000 judicial officers from across the globe. There were seven regional preparatory meetings between 2016 and 2017 and more than 1,000 judicial officers and

justice sector stakeholders were surveyed. I am proud to say that the CMJA was part of the preparatory process.

The GJI Network was launched in April 2018 at a programme hosted by UNODC in Vienna. The programme was attended by more than 350 judicial officers from 106 member states, with 40 judicial associations represented. The Network creates a forum ‘by judges, for judges’. It has been described by representatives of the UNODC as ‘an international hub to link existing initiatives and provide a space for members of judiciaries to work together on common challenges’.

To this end, the launch programme involved numerous thematic breakout sessions focused on strengthening judicial integrity and accountability and preventing corruption in the justice system, one of which was organised and presented by the CMJA: ‘A trade off? Balancing Independence and Accountability’. The Honourable Keith Hollis moderated the session and the Honourable Charles Mkandawire and I made presentations.

Attendees of the GJI Network launch also passed a *Declaration on Judicial Integrity*. This landmark declaration established key priorities for the work of the Network and encouraged all judges and judiciaries to participate in the Network.

Participants at the launch also endorsed terms of reference for the Network (the ‘GJI Network Terms of Reference’), noting that the Network is ‘harnessing the experience and expertise of judges, magistrates, other judicial office holders, members of judicial councils, court personnel, judicial associations and other stake holders’.

The GJI Terms of Reference outline the Network’s mission statement to provide assistance to judiciaries in strengthening judicial integrity and preventing corruption in the justice system. The document also sets out core objectives of the Network, which include the promotion of networking opportunities and access to guidance materials, the goal of continuously expanding the Network and advancing the exchange of knowledge and mutual support, assisting in the identification of gaps in international standards and technical

resources, supporting the development of new tools and technical resources to address such gaps and facilitating the identification of technical assistance needs and providing such assistance.

HOW IS THE GJI NETWORK MAINTAINED?

The UNODC, as Secretariat, and a 12-member advisory board work to develop and maintain the GJI Network. The advisory board establishes a work plan for the Network each year and the board meets regularly for the purposes of receiving updates from the Secretariat on the activities of the Network, updating the Secretariat on their Network-related activities or opportunities for the Network and identifying and discussing next steps related to the work of the Network. My membership on the advisory board reflects the Network's respect for the Commonwealth and the CMJA.

In February 2020, I attended the Second High-Level Meeting of the CJJ Network, which was hosted by the Supreme Judiciary Council of the State of Qatar with support from UNODC. With 700 participants from 118 countries and representation from 50 judicial associations and organisations, the event surpassed in size even the launch of the Network, which at the time had been the largest gathering of judges ever assembled under the auspices of the United Nations.

As noted in the Summary Report of the 2020 meeting, the large number of participants was 'undoubtedly proof that the Network has succeeded in generating trust, interest and support for its goals and visions'. It is fair to say that the Network has earned recognition and respect at the international level.

The purpose of this meeting related to its theme: The Past, Present and Future of the Network. The achievements of the Network were celebrated, existing and emerging challenges related to judicial integrity were discussed and priority areas for the Network going forward were identified.

Guidelines on the selection of advisory board members were passed at the 2020 meeting. These built upon the GJI Network Terms of Reference adopted at the April 2018 launch.

The guidelines were drafted by the first advisory board and the Secretariat with a view to strengthening the transparency of the advisory board and the selection of its members. The guidelines formalised representation on the advisory board of six judiciaries and six judicial associations or institutions, permanently reserving one position for the United Nations Special Rapporteur on the Independence of Judges and Lawyers.

At the 2020 Meeting a further Doha Declaration on Judicial Integrity was also passed. This Declaration, amongst other things, acknowledged the achievements of the Network and renewed the commitment to 'firmly uphold judicial independence, an essential element of the Rule of Law, and to strengthen integrity, accountability and transparency in the justice system and reinforce the bonds between these fundamental concepts'.

Recently, on 10 March 2022, the GJI Network celebrated the first International Day of Women Judges. This day was established by the declaration of the United Nations General Assembly on 28 April 2021. The General Assembly resolution was drafted by the State of Qatar which, together with International Association of Women Judges, championed this recognition and noted with appreciation the work of the Network to incorporate women's representation issues into judicial systems. The resolution reaffirmed that 'the active participation of women, on equal terms with men, at all levels of decision-making is essential to the achievement of equality, sustainable development, peace and democracy'.

The GJI Network published dedicated opinion pieces on the representation of women in the judiciary and key messages from each member of the Advisory Board.

WHAT DEVELOPMENTS ARE ANTICIPATED FOR THE FUTURE?

The GJI Network's knowledge products and other content will continue to grow. In particular, the Network is focused on translating judicial resources to include more languages.

The Network has noted the emerging use of artificial intelligence in judicial systems and intends to promote the ethical use of artificial intelligence.

The GJI Network will continue to provide guidance to judiciaries on good practices in transparency, the judiciary's relationship with the media, public outreach, education, and other methods of promoting public confidence in the administration of justice. Podcasts and webinars will continue to be posted on these topics.

The Network publishes opinion pieces on a variety of topics at least once a month.

In the fall of 2021, the GJI Network conducted a global survey of judges and other members of the judiciary on the subject of judicial well-being. This survey attracted the highest response rate of any global survey conducted by the Network—758 responses from 102 countries—revealing the significant interest that this topic attracts. A full report on the survey has been prepared and is posted on the Network's website.

The statistics gathered reveal that 97 percent of those surveyed agreed that more prominence should be given to promoting judicial well-being. Some 46 percent reported experiencing deterioration of both mental and physical well-being as a result of the COVID-19 pandemic; 76 percent indicated they do not have sufficient time to maintain optimal physical and mental well-being; 89 percent know colleagues experiencing stress or anxiety; and 92 percent indicated that judicial work brings them stress sometimes, frequently, or always, with the most common contributing factor being excessive workloads.

One of the purposes of the survey was to identify ways in which the GJI Network could help promote judicial well-being and raise awareness of the linkage between judicial well-being and judicial integrity. Thus far, the Network has created a new thematic page on its website in relation to judicial well-being with a resources page.

After the inaugural publication in December 2021, and a second publication in March 2022, the GJI Network will continue to publish

a quarterly newsletter outlining its latest activities and achievements and describing the newest resources that have been added its offerings. These newsletters have been shared with more than 3,000 stakeholders. The Secretariat has reported that the publication of these newsletters increased the Network's internet 'traffic and encouraged more users and page views.

Gender-related judicial integrity issues will continue to be a high priority for the Network.

HAS THE GJI NETWORK BEEN A SUCCESS?

The achievements during the three years since the inception of the GJI Network were celebrated at a virtual Special Event in April 2021, when it was noted that the Network had reached more than 220,000 people from 99 countries. Users expressed appreciation for the opportunities for learning and for sharing experiences and best practices provided by the Network.

During the one-year period from April 2021 to April 2022, the Network website recorded 227,362 pageviews and provided resources to 133,721 users.

HOW TO REGISTER

I encourage all judicial officers to join the GJI Network and to access its library of resources from around the globe. You can engage in online training; read publications, news, and views; and listen to podcasts and webinars. By participating in the Network, you do the critical work of strengthening the justice system, both at home and abroad.

Registration is fast and easy. The GJI Network is available to all who wish to become a registered user. Thus, judicial officers are encouraged to register. The UNODC portal for the GJI Network is easily found by typing 'Global Judicial Integrity Network' into any web browser.

A PRACTICAL GUIDE TO STARE DECISIS

Justice Malcolm Rowe of the Supreme Court of Canada and Leanna Katz, attorney at Sullivan & Cromwell LLP, New York, NY and a former clerk at the Supreme Court of Canada and the British Columbia Court of Appeal. An earlier version of this article was published in the Windsor Review of Legal and Social Issues. The present article is reproduced here with permission.

Abstract: *This article describes the contours of stare decisis in Canada. It begins with a summary of the rationales, history, and conventions of stare decisis. It then explains how judges at different levels of court (trial, intermediate, and apex courts) apply stare decisis. Finally, it contends with the circumstances in which Canadian judges distinguish, overrule, or follow precedent, noting connections with the UK and other Commonwealth jurisdictions.*

Keywords: *stare decisis* – precedent – Canada, UK and other Commonwealth jurisdictions – horizontal and vertical conventions – *ratio decidendi* – *obiter dicta* – distinguishing, overruling, or following precedent

INTRODUCTION

We tend to think of *stare decisis* as asking judges to look back to cases that have been decided as a guide to judging the case before them. The term comes from the Latin phrase *stare decisis et non quieta movere*, which means ‘to stand by decisions, and not to disturb settled points’ (Bryan A Garner (ed), *Black’s Law Dictionary* (11th edn, Thomson Reuters, 2019) sub verbo ‘*stare decisis et non quieta movere*’). *Stare decisis* is often described as incorporating a tension between certainty on the one hand and achieving a just result on the other.

The Supreme Court of Canada captured this idea of maintaining certainty versus correcting error to achieve a just result as competing forces: ‘The Court must ask whether it is preferable to adhere to an incorrect precedent to maintain certainty, or to correct the error’ (*Canada v. Craig*, 2012 SCC 43 [27]). Similarly, legal scholar Wolfgang Friedmann characterised as the basic problem of a legal system:

All laws oscillate between the demands of certainty—which require firm and reliable

guidance by authority—and the demands of justice, which require that the solution of an individual case should be equitable and conform to current social ideals and conceptions of justice. Every legal system must compromise between these two pulls; it must balance rigidity with flexibility (*‘Stare Decisis at Common Law and under the Civil Code of Quebec’* (1953) 31 *Can Bar Rev* 723, 723).

In what follows, we offer a guide to the Canadian approach to *stare decisis*. We focus on the approach in common law jurisdictions rather than the civil law approach that governs in Quebec, although some scholars suggest that the approaches are similar in practice (see e.g. Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008) 12-13 n 33). We also touch on *stare decisis* in other Commonwealth jurisdictions.

We observe, reflecting on the principles of *stare decisis*, that what appear to be competing demands of certainty and correctness can yield a productive tension. Indeed, the destination of the law is not an immutably fixed point. Over time, the law evolves, not so much in its foundational concepts, but in the edifice erected, repaired, and, from time to time, rebuilt based upon its foundations. *Stare decisis* is a guide to charting the appropriate path. By engaging with lines of reasoning laid down in the law and relevant circumstances, *stare decisis* helps determine when to stay the course and when to set out, at least in part, in a new direction.

Rationales for Stare Decisis

Oft-cited rationales for *stare decisis* tend to sound in the theme of keeping the law settled, such as concern with ‘consistency, certainty, predictability and sound judicial administration’ (*David Polowin Real Estate Ltd v. The Dominion of Canada General Insurance Co* (2005), 76 OR (3d) 161, 190–91, (CA)).

In other words, by adhering to precedent, judges keep the law certain and predictable. But judges and scholars have laid down multiple rationales for *stare decisis*. Moreover, even citing rationales such as certainty and predictability belies the fact that certainty as to the law and predictability as to the outcome—while related—are conceptually distinct. Each case raises a new factual scenario, which makes it difficult to predict the outcome—no matter how certain the law may be.

Other rationales for *stare decisis* include: administrative efficiency (limiting what goes on the judicial agenda and improving efficiency by following past cases that have decided the legal question); judicial humility (understanding we can learn from how judges have decided past cases); and judicial comity (judges treating fellow judges' decisions with courtesy and consideration).

Aristotle considered it a fundamental element of justice to treat like cases alike (Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, Cambridge 2008) 36, citing *Nicomachean Ethics*, V 2 1131^a–1131^b). At one level, doing so can allow individuals to plan their affairs, lawyers to advise clients, and citizens to interact with the legal system based on a set of reasonable expectations. Yet, what it means to treat like cases alike merits some explanation given the vast number of cases that have been decided and the fact that cases are 'alike' to varying degrees. As such, one might think of following precedent in terms of articulating and respecting general legal norms (Jeremy Waldron, 'Stare Decisis and the Rule of Law: A Layered Approach' (2012) 111 Mich L Rev 1, 4). Turning briefly to history illuminates the foundations of this approach to *stare decisis*.

Historical View of Stare Decisis

The doctrine of *stare decisis* began to take shape in England in the 18th century and crystallised as a rule in the late 19th century (Duxbury, *supra*, 25). Prior to this, the 17th century view considered whether a decision fit coherently in the common law. Rather than emphasising treating individual cases alike, judges were concerned with judgments being consistent with the law as a whole. Sir Matthew Hale did not think that individual

rulings had the authority of law except 'as a Law between the Parties. . . they do not make a Law properly so called (for that only the King and Parliament can do).' But Hale saw individual rulings as having value in articulating a generally applicable law, that is, rulings have 'a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is' (ibid 50, citing Sir Matthew Hale, *The History of the Common Law of England* (first published 1713, Chicago University Press, 1971), 45). In the same vein, judicial decisions can be understood as *evidence* of the law, rather than being the law itself (ibid 51).

In 19th century England, precedent became the dominant form of authority in legal argument. The publication of official law reports in 1865 made judicial decisions more widely accessible and, thereby, more reliable sources of authority for courts to consider. On one view, this strengthened the doctrine of *stare decisis* (ibid 55–56). Yet, Australian law Professor Julius Stone clarified how we might think of *stare decisis*; he expressed scepticism at the notion of a 'doctrine' of *stare decisis*, beyond as a description of the 19th century construct. He instead referred to a 'theory' of *stare decisis*, which aligned with the notion that judges make choices using tools of judicial reasoning rather than declaring what the law is (Justice Geoff Lindsay, 'The 'Doctrine of Precedent' in Australian Legal History,' (2017) Sydney Law School 2).

Stone's perspective captures the idea that judges continue to make choices by considering themselves bound by precedent. Indeed, *stare decisis* is not a constitutional or statutory requirement. Rather, precedents bind because judges consider that they are required, at least, to take precedent into account in reaching a decision. As Professor Carleton Kemp Allen put it, a judge 'places the fetters in his own hands' (Neil Duxbury, *supra*, 15 n 44, citing Carleton Kemp Allen, *Law in the Making* (3rd edn, Clarendon Press, 1939) 247–48). Of what these fetters consist is a question we turn to next.

THE CANADIAN APPROACH TO STARE DECISIS

We first explain the elements of *stare decisis*, with which many readers may be familiar, and then the approaches of different levels of court in Canada, which readers may find resemble approaches in their home jurisdictions to varying degrees. As we note later on, approaches to *stare decisis* in Canada have changed over time, particularly with the introduction of the Canadian *Charter of Rights and Freedoms* in 1982—but the basic elements remain the same.

The Vertical and Horizontal Conventions

The Canadian approach to *stare decisis* consists of two conventions: the vertical and the horizontal. According to the vertical convention, lower courts must follow decisions of higher courts. This rule gives practical effect to the hierarchical court structure. In Canada, only the vertical convention of *stare decisis* is strictly binding. The horizontal convention, in contrast, provides that decisions from the same level of court should be followed unless there is a compelling reason not to. Decisions from courts outside the direct hierarchy of the decision-making court are persuasive rather than binding (Debra Parkes, ‘Precedent Unbound? Contemporary Approaches to Precedent in Canada’ (2006) 32 Man LJ 135, 137).

What Does the Case Decide? *Ratio Decidendi* Versus *Obiter Dicta*

To determine whether and how a precedent applies, one begins by asking: what did the case decide? That is, what part of the decision is the binding *ratio decidendi* and what parts are *obiter dicta*? The Latin term *ratio decidendi* means ‘the reason for deciding’ and *obiter dicta* means ‘something said in passing’ (Bryan A Garner (ed), *Black’s Law Dictionary* (11th edn, Thomson Reuters, 2019) sub verbo ‘*ratio decidendi*,’ ‘*dictum*’). The Supreme Court of Canada described the *ratio* as ‘generally rooted in the facts’ bearing in mind that ‘the legal point decided ... may be ... narrow ... or ... broad’ (*R. v. Henry*, 2005 SCC 76 [57]). Canadian courts are bound only to follow *the ratio*, as that is what is considered to have been decided. Courts are not bound to follow

obiter, what was merely said in passing, as that is by definition not part of the reasoning by which the result was determined.

What is considered binding tends to vary by level of court. Lower courts are generally most involved with the facts of the case. Therefore, their decisions are read as deciding a matter based on the facts, often without speaking to the law more broadly. Intermediate appellate courts hear appeals on questions of law, in particular, on the proper application of the law to the facts of the case under appeal. The *ratio* may speak to a broader legal point, but often relates to the proper application of settled law, rather than to the making of new law. That said, considered *obiter* from an intermediate appellate court should be respected, particularly when the court has surveyed the law with a view to clarifying it. Finally, Supreme Court of Canada decisions often reflect a consideration of broader legal questions and speak to the formulation of the law beyond what is required by the facts of the case. The Supreme Court thus makes statements as to the meaning and operation of the law, which constitute precedents binding on all courts in the relevant jurisdiction, often the whole country.

The Supreme Court of Canada described how to treat its considered *obiter dicta* as follows:

All obiter do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive ratio decidendi to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not ‘binding’ (R. v. Henry, 2005 SCC 76 [57]).

Our view, consistent with this statement, is that to the extent the Supreme Court makes a statement in a decision that reflects the Court’s considered view of an area of law, it provides guidance that should be treated as binding. That is, where the Supreme Court turns its full attention to an issue and deals with it definitively, the concepts of *ratio* and *obiter* tend to lose significance.

When to Distinguish or Overrule Precedent

Having identified the *ratio* of a prior decision, a court may determine that it cannot or ought not follow the decision. In such cases, the court may distinguish or overrule the prior decision. Distinguishing a prior decision means interpreting its *ratio* to show that it does not apply in the case before the judge. Overruling, by comparison, is a bolder step amounting to repealing an earlier decision. Judges are expected to give reasons explaining why they departed from precedent—providing transparent and compelling reasoning helps to keep the law settled even in the face of overruling a decision.

Distinguishing precedent

Courts show that there is good reason not to follow a precedent by drawing a distinction and then explaining why the distinction is material. When one identifies the *ratio* of a precedent, one is engaged in describing the legal principle or rule for which the precedent stands. Facts are important to determine whether to distinguish a prior decision or how far to follow it. That said, the same facts are unlikely to occur twice, and not all factual differences provide a proper foundation for distinguishing precedent. In order to properly distinguish precedent, one asks whether a factual difference is one that is *material* to the legal rule or principle for which the precedent stands. If not, then such a factual difference is not a valid basis to distinguish, and thus avoid the application of, precedent.

Distinguishing a case generally does not disturb the authority of the precedent; rather, it indicates the precedent is inapplicable. That said, distinguishing may weaken the authority of a case, thus a precedent may come to lack authority because it is ‘very distinguished.’ Overruling a case, by contrast, is a direct refutation of a precedent. Courts have limited overruling to specific circumstances; the rules differ for each level of court.

Overruling precedent under the vertical convention

Under the vertical convention, courts are bound by the decisions of courts higher in the judicial hierarchy, aside from exceptional cases. The

vertical convention of *stare decisis* provides that judges should follow prior decisions from higher courts even if they disagree with them. It is generally accepted that courts that are not final should follow precedent more strictly than final courts of appeal.

In recent years, the Supreme Court of Canada has decided three cases that provide guidance about when trial courts may depart from decisions of higher courts. Taken together, these three cases suggest a somewhat more flexible approach to vertical *stare decisis*. It is worth recounting what happened in each case to describe the state of the law.

In 2013, the Supreme Court of Canada considered the constitutionality of *Criminal Code* prohibitions relating to prostitution in *Canada (Attorney General) v. Bedford*, 2013 SCC 72 (*‘Bedford’*). An earlier Supreme Court of Canada opinion had found the provisions were constitutional, but the trial judge found the contrary. The Supreme Court held the trial judge was entitled to revisit a matter decided by the Supreme Court. In doing so, the Court articulated a standard for when a lower court can overrule a decision of a higher court: (1) if there is a new legal issue, including if new legal issues are raised as a result of ‘significant developments in the law,’ or (2) ‘if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate’ (ibid 42). In the *Bedford* case, the Supreme Court found there was a new legal issue (whether the laws violated the security of the person guaranteed by section 7 of the Canadian *Charter*, whereas only the liberty guarantee under section 7 was at issue in the earlier opinion), and relevant legal principles had developed in the intervening years (ibid 45).

Two years later, the Supreme Court considered the constitutionality of the Canadian *Criminal Code* prohibition on physician-assisted suicide in *Carter v. Canada (Attorney General)*, 2015 SCC 5. The Supreme Court had ten years earlier concluded the prohibition was constitutional, but the trial judge found it was not. The Supreme Court, applying the holding from *Bedford*, concluded the trial court judge was entitled to reconsider a settled ruling of a higher court as both conditions from *Bedford* were satisfied (ibid 44-45). The

Supreme Court noted the need for flexibility: '[t]he doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis' (ibid 44).

Most recently, the Supreme Court considered the constitutionality of a provision restricting access to liquor from other provinces in the case *R. v. Comeau*, 2018 SCC 15. The trial judge held that 'new evidence' from a historian about the intentions of the drafters of the prohibition provided a basis to depart from a prior Supreme Court decision under the evidence-based exception to vertical *stare decisis* noted in *Bedford*. The Supreme Court disagreed. The historical evidence, it held, was not evidence of changing legislative, social or other facts that would justify departing from *stare decisis* (ibid 37). The Supreme Court clarified that a fundamental change in circumstances that justifies departing from vertical *stare decisis* is a 'high threshold' and that 'new evidence must 'fundamentally shift' how jurists understand the legal question at issue. It is not enough to find that an alternate perspective on existing evidence might change how jurists would answer the same legal question (ibid 34). In so ruling, the Supreme Court saw the need to enforce limits on the circumstances in which a lower court can depart from a precedent of a higher court.

Considering these three cases, the threshold for vertical *stare decisis* is high, but not unattainable. Judges are to assess how the legal question was previously cast and new evidence relevant to the factual matrix in order to ascertain whether any changes rise to the level that justifies overturning precedent. Within these parameters, there is room to debate when a lower court should properly follow, distinguish, overturn precedent from a higher court.

Approaches to *Stare Decisis* in Common Law, Statutory Interpretation, and Constitutional Cases

It should be noted that the prior three cases deal with vertical *stare decisis* in the context of constitutional questions. In practice, the

approach to *stare decisis* can vary depending on whether the issue before a judge pertains to a constitutional question, the common law, or statutory interpretation, as a judge's task is somewhat different in each context.

In constitutional cases, Canadian courts have adopted an approach based on the 'living tree' metaphor, which understands that the constitution must 'be capable of growth and development over time to meet new social, political, and historical realities often unimagined by its framers' (*Hunter et al v. Southam Inc.* [1984] 2 SCR 145, 155; see also *Edwards v. Attorney-General for Canada*, [1930] AC 124, 136). Other considerations further suggest that precedents should have less binding force in constitutional cases; for example, the principle of constitutional supremacy enshrined in section 52 of the *Constitution Act, 1867* points to a court's constitutional interpretation superseding answers in precedent (Peter Hogg, *Constitutional Law of Canada* (5th edn, 2017) (supp 2019) 1 ch 8.7 nn 135–36^{a-b}). When it comes to common law precedent, a judge may consider the threshold for revisiting precedent to be somewhat lower, as the judge is engaging with other judge-made law, and thus may feel less restrained in overruling a decision that meets the criteria for overruling. In contrast, when a precedent raises a question of statutory interpretation, a judge is guided by what they determine to be the legislative intent, which may put the judge on a somewhat different footing, particularly when it comes to determining the remedy. For instance, even if a judge concludes there is a basis to overrule a precedent, they may reflect on whether, practically speaking, the better response is to offer a re-interpretation of the statute, or come to a narrower decision by providing relief to the seeking party and deferring to the legislature to amend the legislative scheme.

Amidst these context-specific considerations, a judge's larger concern for stability in the law and correcting error to achieve a just result motivates how they decide to deal with precedent. In some cases, a judge's approach to precedent under the vertical convention may wind up resembling the approach under the horizontal convention, that is, a more flexible approach.

Overruling precedent under the horizontal convention

Turning now to the horizontal convention. The horizontal convention, unlike the vertical convention, is not strictly binding. It provides that judges should follow decisions of judges from the same court unless there is compelling reason not to. As such, it accepts that in certain circumstances a decision from a judge of the same court need not be followed. The rationale for and application of horizontal *stare decisis* vary by level of court.

Trial courts

At the trial level, judges ordinarily follow decisions of other judges from the same court absent compelling reasons to the contrary. In a classic statement as to the rationales for *stare decisis* in trial courts, Justice Wilson of the Supreme Court of British Columbia invoked judicial comity as well as certainty and protecting parties' reliance interests:

I have no power to override a brother judge. I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following such a difference of opinion, the unhappy litigant is confronted with conflicting opinions emanating from the same Court and therefore of the same legal weight (Re Hansard Spruce Mills Ltd, [1954] 4 DLR 590, 592, (SCBC)).

Given that a trial judge's primary task is to decide the case on the facts, the horizontal convention provides a trial judge with some room to distinguish facts or find an appropriate reason not to follow a prior decision. For one, a judge need not follow a prior decision from the same court where its authority has been undermined, for example, if it has been overruled by or is inconsistent with a decision of a higher court. Another instance is where the decision was reached without considering a relevant statute or binding authority. In other words, the decision was made *per incuriam*, Latin for through carelessness or inadvertence (James Arthur Ballentine (ed) *Ballentine's Law Dictionary* (3rd edn, Lawyers Co-operative Pub Co, 1969) sub verbo '*per incuriam*'). It cannot only be that an authority was not mentioned, rather, the fact that the authority

was missing must be shown to have affected the judgment. Finally, a judge is not bound to follow a prior decision that was not fully considered such as where the exigencies of trial called for an immediate decision without fully consulting authority (*Re Hansard Spruce Mills Ltd*, supra, 592). Trial judges generally know such a decision when they see one.

Intermediate appellate courts

Like trial courts, intermediate appellate courts do not ordinarily depart from their own decisions. They have a duty to provide general guidance on the law, and administer a large number of decisions, so must be concerned with the integrity and stability of the legal system.

The traditional rule provided narrow exceptions to horizontal *stare decisis* for intermediate appellate courts: where a judge was faced with conflicting decisions (the judge could decide which decision to follow), where a prior decision was inconsistent with a decision of the apex court, where a prior decision was *per incuriam* or made in disregard of an authority (*Young v. Bristol Aeroplane Co Ltd*, [1944] KB 718, 725, (CA)), or where a prior decision was based on a 'manifest slip or error'—the latter being an especially rare occurrence (*Morelle Ltd. v. Wakeling*, [1955] EWCA Civ 1; *R. v. Neves*, 2005 MBCA 112, 106).

More recently, the Court of Appeal for Ontario listed several factors, capturing broader circumstances than the traditional rule, that justify an appellate judge departing from a prior decision of the same court. These factors include where the prior decision has been attenuated by later decisions of the court, where the decision is relatively recent (it is preferable to 'correct an error early on than to let it settle in'), where the new factual record provides better context for the decision, and where the Supreme Court of Canada may be likely to correct the error (*David Polowin Real Estate Ltd v. The Dominion of Canada General Insurance Co* (2005), 76 OR (3d) 161, 195–97, (CA)).

In practice, appellate courts in most Canadian jurisdictions strike a panel of five or more judges (rather than the usual three) when the court is considering overruling its previous

decision. In such cases, the court can depart from *stare decisis* when none of the exceptions apply. Note, at least two jurisdictions do not sit as five: the Prince Edward Island Court of Appeal, which has only three judges, and the Court Martial Appeal Court of Canada, whose enabling legislation provides that an appeal is to be heard by a panel of three (*National Defence Act*, RSC, 1985, c N-5, s 235(2)).

Supreme Court of Canada

Finally, the Supreme Court of Canada, as an apex court, takes a distinct approach to horizontal *stare decisis*, in large part shaped by the Court's law-making function.

In this regard, the Supreme Court's role has changed over time. At its inception, the Supreme Court was not the court of last resort in Canada, and instead answered to the Judicial Committee of the Privy Council in England. During that time, the Supreme Court stated its approach to *stare decisis* was that it would not overturn its own prior decisions apart from 'exceptional circumstances' (Andrew Joanes, 'Stare Decisis in the Supreme Court of Canada' (1958) 36 Can Bar Rev 175, 180–81; *Stuart v. Bank of Montreal*, (1909) 41 SCR 516, 535).

In 1949, appeals to the Privy Council were abolished, following which the Supreme Court developed a distinct body of jurisprudence (John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (University of Toronto Press, Toronto 2002)). Since the 1950s, the Supreme Court has accepted the possibility of overruling its own decisions. Beginning in the late 1970s and early 1980s, the Supreme Court demonstrated a willingness to overturn precedents of its own as well as Privy Council precedents where there were 'compelling reasons' (*Binus v. R.*, [1967] SCR 594, 601, [1968] 1 CCC 227; *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 SCR 518, 527).

Gaining control of its docket through the leave to appeal process reoriented the Court's main function, as former Chief Justice Bora Laskin put it, 'to oversee the development of the law' and 'to give guidance in articulate reasons ... on issues of national concern' (Bora Laskin, 'The Role and Function of Final Appellate Courts: The Supreme Court

of Canada' (1975) 53 Can Bar Rev 469, 475). And, the introduction of the *Canadian Charter of Rights and Freedoms* in 1982 gave the Supreme Court a greater law-making function as the Court re-examined earlier decisions in light of the rights and freedoms enshrined in the *Charter*.

In the early days of the *Charter*, former Chief Justice Dickson set out a non-exhaustive list of instances in which the Supreme Court would overturn its own precedent. Such circumstances include where a decision is inconsistent with or fails to reflect the values of the *Charter*; where a decision has been attenuated and failed to stand the test of time; where the social, political or economic assumptions underlying a decision are no longer valid; and where a decision fails to articulate a workable rule or standard sufficient to guide behaviour. As well, Justice Dickson addressed an instance particular to criminal law: a court will not ordinarily overrule a prior decision where the effect would be to expand the reach of criminal liability or restrict the liberty of the subject (Dickson C.J. dissenting in *R. v. Bernard*, [1988] 2 SCR 833, later adopted by the full Court in *R. v. Chaulk*, [1990] 3 SCR 1303). This recognition of broader circumstances in which the Court would overturn its own precedent signalled a greater role for the Court in assessing the constitutionality of laws.

Speaking at the turn of the 21st century, former Chief Justice McLachlin reflected on the expanded role of the Supreme Court, which at times, reaches beyond making incremental changes to the law. Correspondingly, courts have adopted a more flexible approach to *stare decisis* in carrying out their judicial law-making function:

Resolving disputes is still the primary and most fundamental task of the judiciary. But for some time now, it has been recognised that the matter is not so simple. In the course of resolving disputes, common law judges interpreted and inevitably, incrementally, with the aid of the doctrine of precedent or stare decisis, changed the law. The common law thus came to recognise that while dispute resolution was the primary task of the judge, the judge played a secondary role of lawmaker, or at least, law-developer. In the latter part of

the twentieth century, the lawmaking role of the judge has dramatically expanded. Judicial lawmaking is no longer always confined to small, incremental changes. Increasingly, it is invading the domain of social policy, once perceived as the exclusive right of Parliament and the legislatures (Rt Hon Beverley McLachlin, 'The Role of Judges in Modern Society' (Speech at The Fourth Worldwide Common Law Judiciary Conference, Vancouver, BC, 5 May 2001)).

These perspectives from two former chief justices of Canada's apex court reflect that, as circumstances have changed, the Court has adapted its role and modified its approach to *stare decisis*. This shift in approach enables judges to undertake the task of balancing certainty and predictability with the need to keep the common law in step with an evolving society.

Former South African Constitutional Court Justice Albie Sachs spoke to the task of introducing changes to society through a new constitution—in 1996, following the end of the apartheid era, the Constitutional Court of South Africa approved a new constitution. Identifying a parallel between the Canadian and South African experiences of a dialogue between the three branches of government, Justice Sachs said: 'I believe that, as in Canada, the South African Constitution envisages the legislature, the executive and the judiciary as all being involved in a common constitutionally-defined project to improve the lives of the people and protect human dignity, equality and freedom' (Justice Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford University Press, 2009) 262). Justice Sachs also noted the need to provide reasons when a court departs from precedent, key to a court's role within

the separation of powers, working toward a shared goal of realising constitutionally enshrined human ideals (ibid 272).

Following Precedent

So far, we have discussed distinguishing or overturning precedent. But what of the more common occurrence of following precedent? When following precedent, a judge does more than trace a line of cases and replicate the reasoning. A judge will consider a number of prior decisions to understand how a principle applies, often looking to multiple lines of cases and thinking across a range of decisions. A judge will reflect on the reasoning in precedent decisions and consider how to apply that reasoning to the factual matrix before them. When writing the reasons for decision, a judge should attempt to articulate a clear line of reasoning—bearing in mind that today's decision is tomorrow's precedent (Frederick Schauer, 'Precedent' (1987) 39 *Stan L Rev* 571, 572-73).

CONCLUSION

Based on the foregoing discussion of the Canadian approach to *stare decisis*, we observe that the principles of *stare decisis* inform judicial decision-making by creating a productive tension between maintaining certainty and achieving a just result. The principles of *stare decisis* shape the judicial making process by simultaneously constraining judicial decision-making and allowing judges discretion to determine when to follow precedent or when circumstances call for judicial development of the law to reach a new result. It is in navigating this tension with good judgment that one strives to reach a just result within a coherent and (relatively) certain system of law.

PLEASE DON'T FORGET TO PAY YOUR MEMBERSHIP DUES ON TIME.

Arrears in Membership dues adversely affects the work that the CMJA can undertake on behalf of its membership and the work that the CMJA does on promoting and protecting judicial independence across the Commonwealth. We would urge all Member Associations and Individual Members to pay their Membership on time

REMOTE HEARINGS AND THEIR IMPLICATIONS FOR FAMILY JUSTICE

Her Honour Lesley Newton; Lisa Harker, Director of the Nuffield Family Justice Observatory and Mary Ryan, Associate at the Nuffield Family Justice Observatory

Abstract: *The introduction of social distancing measures during the COVID-19 pandemic resulted in family court hearings in most Commonwealth jurisdictions being conducted remotely, by video-link or telephone. Over a 15-month period the Nuffield Family Justice Observatory undertook three rapid consultations to identify how remote proceedings were working in England and Wales. The consultations revealed the value of working remotely in certain circumstances but also highlighted significant questions of fairness and justice. As short-term emergency measures recede and courts resume face-to-face hearings, it seems likely that there will be a shift toward the increased use of virtual hearings in the longer term. Insights derived from the consultations will prove useful in assessing what elements could be preserved and what needs to be improved upon.*

Keywords: COVID-19 pandemic, family courts, remote hearings, NFJO

INTRODUCTION

Since March 2020 the COVID-19 pandemic has had a global impact upon the ability of family courts to hear cases ‘face to face’ in a traditional court room. In England and Wales, the family justice system in England and Wales adapted remarkably quickly to working remotely, particularly in courts with established electronic filing and document bundling systems.

However, several weeks after social distancing restrictions were introduced, questions started to be raised about the fairness of operating hearings in this way. In light of these concerns, the President of the Family Division and head of the family justice system in England and Wales asked the Nuffield Family Justice Observatory (the ‘NFJO’) to undertake a rapid consultation in April 2020 to explore the impact of remote hearings.

At the time of the consultation in April 2020, it was not clear whether social distancing measures would be in place for very long, so much of the

discussion centred around which cases should be adjourned. However, by June 2020 it became clear that remote hearings were likely to remain in place for some time. The President noted in his message to the judiciary in June 2020:

Apparent potential unfairness which justified a case being adjourned for what was hoped to be a relatively short period of time, must now be re-evaluated against this much longer timescale. The need to achieve finality in decision-making for children and families, the detrimental effect of delay and the overall impact on the wider system of an ever-growing backlog must form important elements in judicial decision making alongside the need for fairness to all parties. More positively, experience of remote hearings in the past two months has identified steps that can be taken to reduce the potential for unfairness... enabling cases to proceed fairly when previously they may have been adjourned.

In light of this changing situation, the NFJO undertook a further rapid consultation in September 2020 to find out how remote hearings were operating. A third consultation was undertaken in June 2021, when social distancing measures started to be eased. Its purpose was to seek feedback as to which forms of remote working should endure beyond the pandemic.

This paper draws together the insights from these three consultations, which took place during an intense period of change for the family justice system in England and Wales.

THE FAMILY JUSTICE SYSTEM IN ENGLAND AND WALES RELATING TO CHILDREN

The statutory basis for the family justice system in England and Wales relating to children is found in the Children Act, 1989. Public law proceedings are proceedings brought by the state because a child has suffered or is at risk of suffering significant harm. Proceedings are brought by local authorities who have responsibility for

child protection. In these proceedings parents and children are entitled to legal representation and the court is also assisted by children's guardians from the Children and Family Court Advisory and Support Service ('CAFCASS'). Private law proceedings concern family disputes between family members, usually parents. People are not entitled to legal aid to cover representation in such proceedings, except where one party is seeking protection because of domestic abuse. As a result, many people in private law proceedings are unrepresented. They are referred to as litigants in person. Family proceedings can be heard by judges of different levels of seniority and also by lay magistrates, who are assisted by legal advisers.

THE NUFFIELD FAMILY JUSTICE OBSERVATORY

The NFJO improves the lives of children and families by putting data and evidence at the heart of the family justice system. It exists to find and fill gaps in our understanding of the system, highlight the areas where change will have the greatest impact and foster collaboration to make that change happen. The NFJO is currently funded and incubated by the Nuffield Foundation.

THE CONSULTATION PROCESS

In the first consultation (April 2020), survey participants were asked a series of questions regarding their experience of remote hearings. In the second (September 2020) and third (June 2021) consultations, respondents were invited to complete an online survey. Respondents were encouraged to provide qualitative as well as yes/no responses.

All three consultations sought feedback from parents, other family members and all professionals in the family justice system, including judges, magistrates, barristers, solicitors, CAFCASS advisers, court staff and social workers. Particular efforts were made to encourage feedback from parents and litigants in person by contacting organisations that support parties through the legal process. In addition, a focus group with parents and kinship carers was held as part of the first consultation. As part of the second consultation, NFJO commissioned the Parent Families and Allies Network (the 'PFAN') to collect information from parents and relatives through focus groups and interviews.

Some 932 participants (professionals and parents) responded to the first consultation, 1,306 responded to the second and 3,219 responded to the third. Some responses collated information from groups of individuals, but these were counted as single responses, so the actual number of individuals who provided feedback was higher than the responses recorded.

There was a similar pattern in the type of respondents participating in the consultations, with judges, barristers, solicitors and magistrates making up at least two-thirds of the respondents in each consultation. Responses were received from all regions of England and Wales.

It should be noted that the surveys were rapidly conducted and that they relied on those who chose to respond. Each survey included slightly different questions. They were analysed at speed with a focus on identifying main messages and with little opportunity for deeper investigation of variables. However, given the large number of participants, the consultations provided a valuable snapshot of the experience of remote hearings for professionals and families within the family justice system in rapidly changing circumstances.

The findings of both reports were subsequently presented to over 1,000 judges and magistrates as part of the training programmes routinely offered to them.

THE CURRENT POSITION

On 14 February 2022, the Lord Chief Justice issued guidance in the following broad terms:

The decision as to whether participants attend a hearing remotely or in-person is a judicial decision and a matter for the discretion of the judge in each case applying the 'interests of justice' test in the light of all the circumstances...

The interests of justice are very broad and wider than the circumstances of the individual case and holding an effective hearing. They include the efficient despatch of business overall and the availability of judicial, staff, technical and other resources. The relevant circumstances properly to be taken into account may vary widely in different courts at different times.

Albeit that that guidance is general, in the absence of specific guidance for family cases it is broadly the approach which family courts in England and Wales have adopted, with decisions as to the mode of hearing being reached on a case-by-case basis.

THE CONSULTATION FINDINGS

The full reports resulting from the consultations can be found on the NFJO website. What follows is, of necessity, a summary.

Technology Used

A wide range of different telephone and video platforms were being used to conduct remote hearings during the time of the consultations. Initially, most hearings were conducted by telephone, and even 15 months into the pandemic, although access to video conferencing had increased, telephone hearings continued to be widely used for final and contested hearings as well as for administrative and direction hearings. Responses indicated significant variations in the use of technology across courts in different geographic locations and at different levels of the judiciary.

In the summer of 2020, the court service in England and Wales introduced a new video platform to all family courts (the ‘Cloud Video Platform’), which is itself currently being replaced by a still newer platform (the ‘Video Hearing System’). However, even by June 2021, respondents continued to report the use of other types of video platforms, as well as variety of telephone platforms.

Positive Aspects of Remote Hearings

Many respondents felt that remote hearings were justified in the circumstances of the pandemic. In reality, there were no viable alternatives if family justice was to continue to function.

Although sometimes concerned about whether proceedings were always perceived as fair, most family justice professionals felt that fairness and justice had been achieved in the cases they were involved with most or all of the time. (*Verbatim* comments taken from respondents’ answers to consultation questions are presented here and there throughout the remainder of this article. They appear as italicised quotations followed by a reference to the respondent category to which

the commentator belonged.)

I think they have been fair and just in terms of legal outcome, but I am not sure the perception has always been of fairness and justice being done. (Judge)

Lawyers, social workers and CAFCASS highlighted the positive benefits upon their time and working patterns, particularly in relation to a reduction in time spent travelling or in waiting at court for a case to be called.

There were some parents who reported that they had preferred the remote hearing over having to attend court in person and others who were pleased that at least their hearing had taken place.

For some women who had experienced domestic abuse, being able to avoid going to court and potentially meeting perpetrators was a relief. For others, the experience of seeing or hearing the perpetrator in their homes via phone or video was very upsetting.

Concerns Raised by Respondents in Relation to Remote Hearings

There was a notable disconnect between the experience of professionals and that of parents and other family members. A clear majority of parents and family members had concerns about the way their cases had been dealt with and just under half said they had not understood what had happened during the hearing. Consistent themes raised by all respondents, including professionals, revolved around the issue of fairness.

Let’s not kid ourselves—none of us would have thought these methods of working achieved fairness and justice six months ago. (Judge)

Respondents highlighted the difficulties in reading reactions and communicating in a humane and sensitive way when there was no face-to-face contact. Many professional respondents referred to the challenge of being sufficiently empathetic, supportive, and attuned to lay parties when conducting hearings remotely, particularly in public law cases where children may be removed from their parents.

The court process is more important than simply being an administrative adjudication. It's a very human set of interactions. My role as a judge is absolutely dependent on the humane administration of a very, very complex interactive process. (Judge)

There were also concerns that parents were having to take part in remote hearings alone and from their homes, without any legal or other emotional support. It was noted that it was difficult to assess vulnerability before a hearing took place:

We cannot always identify whether a person is going to be vulnerable. In the middle of hearing yesterday a mother told me she was self-harming. I immediately adjourned the hearing, and an ambulance was called. My concern was that I had not identified the hearing as unsuitable for remote and I did not pick up on the problem until the mother told me. We have a good triage system, but it didn't pick this up. (Judge)

In addition, respondents noted that it could be very difficult for parents to ensure privacy and confidentiality when they were calling from home. In the earlier phase of social distancing, when schools were closed, it was not uncommon for parents to be at home with the children who were the subject of the proceedings.

The mother, who was at risk of having her four children removed, gave evidence by telephone from her garden shed as there was nowhere else private, she could go. She was self-isolating due to COVID-19 and the children were in the house with their grandmother. The likelihood of parents involved in care proceedings having a private space from which to attend remote hearings seems low. (Judge)

The concerns about parents being alone and unsupported during remote hearings where important decisions were being made were particularly strong when the cases involved applications to remove new-born babies from their mothers.

I found it profoundly inappropriate not to be speaking to... [the mother]... in person but on a telephone when she had never met me before and had given birth to her baby only the previous day. The court decided, almost inevitably, that the child should be removed but for that mother

to be listening to the hearing in a side room in hospital, and to be told of the court's decision by telephone... without me being there to put an arm round her seemed horribly cruel to me. (Barrister)

Another issue identified by both parents and professionals was the problem of communication between lay parties and their legal representatives before and during hearings. Pre-hearing communication, instead of being in person, was mainly by phone or email. This adversely affected the taking of instructions and drafting of statements. During hearings it was difficult for many parents to communicate with their legal representatives in private because they did not have access to more than one device to enable them to send private messages and because judges or magistrates did not always allow for breaks or adjournments so that lawyers could communicate with their clients. Particular anxieties were commonly raised in relation to parties with disabilities or cognitive impairments or where an intermediary or interpreter was required.

There was widespread concern for litigants in person in private law matters. Many examples were given of support being provided to litigants in person by judges, magistrates, and legal advisers but it was acknowledged that this was often insufficient.

I have major concerns about the fairness of proceedings with... litigants in person... Making major decisions, e.g. on contact, can have long term (even lifelong) consequences. Notwithstanding everyone's best efforts, remote parties cannot sometimes be adequately engaged and whilst Judges and professionals can 'get on with it' and make it work, I have real misgivings about how fair it is and how fair it is felt and seen to be. (Judge)

Many respondents raised concerns about the impact that working remotely was having on the formality and authority of the court. There were fears that the relative informality of telephone and video hearings meant that lay parties were not taking the court as seriously as they would if the hearing were taking place in person.

Lay parties often don't treat the court process with the usual respect when connecting from home. I have undertaken cases where a lay party is in bed, or in pyjamas or trying

to do household tasks while participating.
(Barrister)

Parents also expressed concern about professionals appearing overly relaxed in situations where important decisions are being made about their future.

The social worker was zipping in and out ... and that wouldn't have happened in a court they would have had to be sitting there in silence. (Mother, PFAN)

There were concerns that the relative informality of proceedings meant that parents did not realise the seriousness of the decisions being made until it was too late.

The respect and authority of the court is being slowly eroded. The quality of evidence mixed. The informality of the home setting undermining the seriousness of the process. Often the hearings seen as 'call' not a hearing—counsel being seen not in court attire, witnesses and parties having mugs of tea when they think they are not on view—getting up and walking about when not speaking—clearly attending to other matters—e.g., emails whilst in the hearing. (Judge)

Many of the concerns relating to fairness and upholding the gravitas of the court were caused, or exacerbated, by the practical problems of managing telephone and video technology for remote hearings. The responses to the three consultations suggested that the technology to support remote hearings did improve over time but it was apparent that the family court system in England and Wales lacked consistent high-quality IT equipment and connectivity. That gave rise to basic difficulties in hearing and seeing people, including identifying who is speaking. These difficulties affected professionals as well as parents. Judges and magistrates requested better technical support, as well as improvements to the technology itself (better hardware, better sound, better connectivity).

However, the majority of concerns related to the difficulties that parents experienced in fully participating in hearings. The pandemic highlighted issues of digital poverty as it became clear that many parents in public law care proceedings did not have access to laptops, reliable Wi-Fi, or smart phones.

Many of my clients may not have Wi-Fi, no credit on their phones, phones that are infrequently charged and no access to laptops nor iPads. They live in social deprivation, and their housing may be shared or not sufficiently private for a hearing to be conducted. (Barrister)

The vast majority of parents received no help in accessing the technology to take part in the hearing and there was a lack of clarity where the responsibility for support lay.

Both consultations revealed wide variations in practice across different courts and geographic areas in terms of the practicalities of how remote hearings are organised.

I sit in one large court and one small court. The smaller court is very badly organised and has to be prompted in relation to each case to make arrangements. There is no awareness of what constitutes a fair remote hearing shown by the office staff. The larger court has systems in place which result in daily lists being presented with all necessary information, video hearings set up and supported on the basis of directions given and electronic bundles supplied. This is much more effective. I suspect that the difference is due to leadership. (Judge)

Many respondents made suggestions for practical measures that would make hearings run better, such as guidance for lay parties about the court process and the format of the hearings, better support to access the relevant technology and clarity about who was responsible for providing assistance to lay parties and parents. Some of the recommendations for improved practice were remarkably modest, such as being sent the links of hearings the day before, having an usher to manage attendance and ensuring all bundles of evidence have been sent out in advance.

THE EXPERIENCE OF OTHER COMMONWEALTH JURISDICTIONS

Commentators upon the unparalleled speed of development of remote family hearings via phone or video-link in other jurisdictions have reflected many of the issues raised in the NFOJ consultations, namely:

- improved efficiency and productivity;

- accessibility to the court in terms of parties having appropriate technology and the ability to use it;
- failures or limitations of technology generally;
- the informality of the process detracting from the ‘symbolism’ and ‘ritual’ of the court;
- ‘Zoom fatigue’ as participants, including judges, struggle to concentrate;
- the special complexities inherent in family cases in terms of empathy and relationship-building.

Interestingly, there are two additional broad areas of discussion within the Commonwealth literature which did not feature at all in the NFJO consultations. Firstly, there are strongly expressed views regarding the limitations which remote hearings present to the concept of ‘open justice’. Those arguments are particularly significant and complex for jurisdictions where, unlike England and Wales, the right of unrestricted public and media access to the physical court room is established and important but where, for example, allowing unfettered public access to a video-recorded hearing gives rise to real anxieties around the protection of the privacy interests of the child and other participants. The second area of concern abroad revolves around the protection of valuable and delicate digital data, particularly within jurisdictions placing reliance upon commercial platform providers.

CONCLUDING DISCUSSION

Prior to the pandemic, influential commentators, such as Richard Susskind in *Online Courts and the Future of Justice* (OUP 2019) were already asking challenging questions about the urgent need for reform of the justice system in the digital era. ‘Is Court a place or a service?’ is one of those questions.

There is now no simple turning back to pre-Covid systems. The momentum for change is real. The debate about conducting family law hearings by video or telephone tended previously to polarise into whether they were ‘good’ or ‘bad’. There is now a more nuanced understanding of when it is and is not appropriate for hearings to take place

remotely. For example, by June 2021, there was a strong consensus among respondents that, whereas administrative hearings could safely be held remotely, final hearings in care cases should not.

While there are some definite practical advantages to remote hearings, there are also serious concerns about the fairness and justice of some hearings being conducted remotely. However, some of the difficulties that parents and relatives had with being able to fully participate in remote court hearings are equally likely to be evident in face-to-face hearings.

There is value in ‘holding up a mirror’ to be able to understand practice in family justice, bringing together a wide range of perspectives, particularly at a time of enormous change and challenge. The President of the Family Division in the courts of England and Wales commented on the power of this process to inform practice:

I am confident that all who are interested in Family Justice at this time will read [it... The process of research has held a mirror up to what we are currently doing. I hope that its publication will stimulate informed discussion and debate. The process of reading the document, and seeing what is said there, may well act as a corrective for future hearings – either by identifying occasions when a remote hearing may have been less than satisfactory, or by flagging up suggestions for improvement – in a more subtle and effective manner than any formal guidance might achieve.

A FINAL CAVEAT

At this stage, more than two years after the pandemic began, we are not able yet to assess the extent to which the process of ‘holding up a mirror’ has influenced practice across the family justice system in England and Wales in the way that the President of the Family Division envisaged. Courts are beginning to re-open and more face-to-face hearings are starting to be heard. Our impression is that there remain considerable variations in practice, both geographically and depending upon the level of the judge hearing the case. It is too soon to judge whether the insights gleaned by the NFJO consultations have had a lasting impact on the way hearings are organised and run.

THE NOBLEMAN, THE POODLE, THE SANDWICH ISLANDS, THE OLD BAILEY AND THE INTERNET: A TALE OF SERENDIPTY

Thomas S. Woods, a retired Judge of the Provincial Court of British Columbia and the editor-in-chief of the Commonwealth Judicial Journal. In slightly different forms, this article has appeared in the CAPCJ Journal, The Advocate, and TEDR – The Journal of the Academy of Experts.

Abstract: *The author offers a whimsical account about serendipity, Internet rabbit holes and the curious ways in which one's legal interests can be piqued unexpectedly.*

Keywords: Serendipity – whimsy – antique shops – engraved prints – Gerard Frederick Finch Byng Esq – The Old Bailey – petty theft – sentencing

INTRODUCTION

I may be the first to have strung those particular terms together in a single line. As an article title, its relevance to judges and magistrates will not be immediately apparent. But bear with me. This little narrative meanders, eventually, into the precincts of the law.

As much as anything, this tale is about serendipity and about how a chance happening can set one on a pathway of inquiry that leads, eventually, to surprising and interesting results. The Internet is an important player in this narrative. It is a mysterious and powerful tool that even one with as Dickensian a world view as mine can happily embrace. The Internet enables one to embark upon a cascading sequence of queries, often without ever having much sense of where that sequence will lead. The contents of the libraries and galleries of the world, and sometimes the rantings and ravings of cranks, are decanted right into your own home. Amazing.

HOW IT ALL BEGAN

It all began, as they say, after leaving the fish shop near Hastings and Penticton Streets in East Vancouver. I thought I had parked the car up the street. My beloved was quite sure that we had left it *down* the street. As usual I was wrong. But in plodding up the street in my pig-headed way, straining in vain to see where I had parked, I made a discovery. A new antique shop had appeared in the neighbourhood. Near

to *our* neighbourhood. For people like us, this is an event. It became evident, upon closer examination, that the proceeds from the shop were targeted for charities serving women in distress. Even better.

It was a modest little not-for-profit shop, dealing more in junk than antiques if truth be told. But it had pretensions to greatness. Worth a look for sure. One never knows what treasures repose in dark corners in these places. I didn't have to look long before something caught my eye. A framed print. Clearly of an age, the image was a coloured engraving of an aristocratic, tow-headed youth, his name and armorial crest appearing below. It may or may not have been a reproduction. One could see the depression left in the paper by the plate at the time of the striking but my instincts told me that it likely was a later re-strike. The lettering was in beautiful copperplate, and the portrait artist and printseller's names—and the date of publication, 1798—were all visible though very finely inscribed.



The individual portrayed is Gerard Frederick Finch Byng Esq^r, identified as Page of Honour to His Royal Highness the Prince of Wales. The engraving is credited to ‘Ozias Humphry, R.A., Portrait Painter in Crayons to His Majesty’ and it was published in 1798 by Anthony Molteno, Printseller to her Royal Highness the Duchess of York. The address of Molteno, the printseller, is given as No. 76, St. James Street.

I was pleased to pay \$50 for artwork the proprietor seemed to have fairly priced at \$50. It was a little piece in a somewhat battered and comparatively modern frame, after all, not apparently printed in a limited edition and of unknown actual age and provenance. We straggled back to the car with a new treasure.

I wondered about the name ‘Byng’—whether there was a link to be found between the engraving’s subject and Lord Byng, Governor General of Canada from 1921 to 1926, for example. His name adorns the high school my daughter once attended, and his stately wife lent *her* name to a trophy presented to hockey players who distinguish themselves by playing in a gentlemanly way. (Now there’s a little exercise in social engineering that has had rather modest results, but her Ladyship cannot be faulted for trying.)

DOWN THE RABBIT HOLE

Enter the Internet. It is the perfect tool for finding out what, exactly, one has brought home when serendipity touches down unexpectedly, like a butterfly on one’s shoulder. There was barely time to put the fresh Arctic Char in the fridge before the research began.

The youthful Gerard Frederick Finch Byng may have been a distant forebear of Lord Byng’s, but it quickly became evident that our Governor General would have been in no hurry to point out the connection. The good-looking kid in the engraving grew up to be a fop, a dandy, an embarrassment, a subject of ridicule.

Further peregrinations on Google revealed that that head of curly hair earned Gerard Frederick the unenviable nickname of ‘Poodle Byng’. None other than the iconic Beau Brummell gave it to him and it stuck. A terrible gossip, Byng was also sometimes styled ‘Paul Pry’.

Born in 1784, Poodle Byng was the fifth son of the fifth Viscount Torrington. His family money guaranteed that he would endure few exertions. It is said that he was often seen sitting in the window of White’s Club in the company of Brummell,

passing judgment on the fashion sense of passers-by. One can imagine his dismay were he ever to have imagined that his graven image would one day be up for sale in a junk shop in a gentrified East Vancouver neighbourhood.

One historian records:

As a Gentleman Usher of the Royal Chamber, he was appointed by George Canning to escort ‘their savage majesties’ of the Sandwich Islands [now known as the Hawaiian Islands] during an unexpected visit to London in 1824; the Hawaiian King Kamehameha II’s given name Liholiho was thought by the British to mean ‘dog of dog’ so the appointment of ‘Poodle’ Byng as advisor and escort was a joke which some found amusing at the time.

As my research progressed, I found my interest waning in Poodle Byng himself, but I wanted to know more about my print and its provenance, so I moved on to run Google queries about the artist and the print-seller. I found that Ozias Humphry was, indeed, appointed a ‘portrait painter in crayons to the King’. The appointment came in 1792. That was borne out by the ‘Gazette and Civil Promotions’ column in the scanned copy of *Gentleman’s Magazine* for that year that, remarkably, can be accessed online. And I also learned that he and William Blake were correspondents. It is evident that crayons have fallen a long way down the social and artistic ladder since the 1790s and Humphry’s time. Crayons clearly deserve more of our respect. Who knew?

Investigations into Anthony Molteno, the print-seller, led to even more interesting discoveries. Molteno immigrated to London from Milan just before the French Revolution. He prospered as a bookseller and print-seller in and around Pall Mall. Many of his prints hang to this day in the National Gallery, including one of William V, Prince of Orange. This discovery unsettled my Irish Catholic blood ever so slightly until I recalled that the infamous King Billy of the Lambeg drum was William III. But ... similar works to my East Hastings charity shop discovery hanging in London’s National Gallery?

THE SOMETIMES HARSH PRECINCTS OF THE LAW ARE REACHED

Traces of Mr. Molteno, I found, lurk in other nooks and crannies on the Internet. He was prolific as a printmaker especially and his works live on after him. But, as a successful businessman in unruly, late-18th century London, he was also a victim of crime. Cases involving him as a complainant and a witness turned up on a site that makes digitised court records from the Old Bailey dating back

centuries available to people like you and me.

One of Molteno's servants, a William Barnett Collyer, was indicted for stealing a number of prints, some framed and glazed, from Molteno, his master. Collyer came on an indictment before Lord Chief Baron Richards and a jury on January 15, 1823. The report of the case available online includes summaries of the witnesses' evidence, including that of Molteno:

I am a print-seller, and live in Pall Mall - the prisoner was my servant. One Tuesday in January, I received a message from Mr. Conalghi; I went to him, and saw some of my prints - a man was there, who had offered them for sale. I went with him towards my house to find the person who sent him with them; I thought he was following me, but when I got to my door I found he was not. I immediately ran up to the public-house, and saw the prisoner run from there; I called out, 'Thomas, stop,' and the moment he heard my voice, he increased his speed; I called 'Stop thief,' and came up to him in Norris street; somebody having stopped him, and he attempted to fall on his knees - I took him to the watch-house, where he was searched, and twenty-six duplicates found on him, by which I found part of my property in pawn. I missed a great deal of my property while he was with me, but had not missed these prints, as they were tied up and put in the back kitchen.

Some of the stolen prints were pawned and then redeemed. Collyer was identified by the pawnshop proprietors and his defence that he had been given the prints by another rogue to sell was rejected. The court determined the value of what had been taken from Molteno to be 39 shillings. Collyer's sentence? He was transported. For 14 years.

As I have noted, Molteno was also involved in other cases at the Old Bailey, but as a witness. On one, three years earlier, a Robert Claxton was indicted for stealing silver spoons valued at £11. The case was prosecuted by William Arabin who, after being appointed, became notorious for his peculiar and amusing pronouncements from the bench. Arabin's sayings have been immortalised by Sir Robert Megarry in his very entertaining *Arabinesque-at-law*. Among them are 'They will steal the very teeth out of your mouth as you walk through the streets - I know it from experience' and 'Prisoner, God has given you good abilities, instead of which you go about the country stealing ducks'.

Various witnesses implicated Claxton in the theft

of the silver spoons. One of them saw him toss something on the ground in the vicinity of Molteno's print shop during his flight from his pursuers. Molteno was among the last to testify before a jury and Justice Park. He said:

I keep a print-shop at the corner of John-street, St. James's-square. Between three and four o'clock of the 26th of March I heard a great rush and ran to the door - I saw a spoon lying in the street, and some more in the area. I secured the property, and gave it to the constable, who returned it to me two or three days after. I produced them.

Claxton was convicted of the theft. It was a different world in 1820. He was sentenced to death. Claxton was 18.

Just one up from Claxton's in the sequence of reports for that day in 1820 is the account of the case against 22-year-old Thomas Thorp. He was convicted of stealing various items of clothing and he, too, was sentenced to death by the first Middlesex jury, in this case before Baron Wood. Unlike Claxton's report, however, Thorp's ends with the hopeful words 'Recommended to Mercy'.

REFLECTIONS ON SERENDIPITY

To think this desultory tale began with a faulty memory of where the car was parked, coming out of a fish shop, on a sunny summer Saturday in East Vancouver. Remarkable.

So it goes. Serendipity. There's nothing quite like it.

A trip to the appraiser is now on the cards. I have no sugar plums dancing in my head, just yet, but who knows what I'll learn? If I find that I have stumbled onto something that is of sufficient quality to warrant inclusion in the National Gallery's collection, then I will have spent my \$50 well. It will be only fitting then that I should make a sizeable donation to the junk shop on upper East Hastings that is struggling to make a go of it and help out women in distress into the bargain. I think Lady Byng, and perhaps even Poodle Byng, would see that as being 'sporting'. The fruits of serendipity are something to be shared, I reckon.

POSTSCRIPT

The Arctic Char was magnificent, lightly sautéed in a pan on the stovetop in butter, parsley, capers, lemon and a little Sauvignon Blanc.

HUNT THE TRAVAUX: THE COURTS AND INTERNATIONAL CONVENTIONS

Professor Emeritus David McClean, CBE, QC (Hon), FBA, is a past Chair of the Editorial Board of this journal. He served, before his retirement, as a member of the Faculty of Law at the University of Sheffield and, as well, as that university's Pro-Vice-Chancellor. Prof McClean has been a frequent advisor to the Commonwealth Secretariat on matters of international legal cooperation.

Abstract: *A court required to rule on the meaning of an international treaty or convention may be referred to documentation produced before, during or after the negotiation of the text. This article examines what might be available and points to issues as to its usefulness and reliability.*

Keywords: Treaties – conventions – interpretation – negotiations – *travaux préparatoires*

INTRODUCTION

Courts are increasingly faced with issues which concern the interpretation of international conventions. In the common law tradition, international treaties can only have legal effect if they are given effect by an Act of Parliament. The necessary legislation may make provision in national law so as to give effect to the convention, without reproducing the text of the convention word for word; or it may reproduce the convention in the Act, commonly as an Annex or Schedule.

Whichever form is used, there are special questions which arise when the statute falls to be interpreted by the courts. As Lord Diplock pointed out in *Fothergill v Monarch Airlines Ltd* [1981] AC 251 (HL):

The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law.

The Vienna Convention on the Law of Treaties provides in art 31 that 'a treaty shall be interpreted in good faith in accordance with

the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

That may prove a difficult task. To what extent may the courts examine not only the text of the convention but also the *travaux préparatoires*, explanatory reports and the minutes of negotiating meetings? There are practical questions: what documentation is actually available, and how useful would it be to the court?

THE LEGAL QUESTION

In some cases, this question may have a statutory answer. So, the Wreck and Salvage Act 1996 of South Africa, giving effect to the International Convention on Salvage, provides in section 2(5): 'Notwithstanding anything to the contrary in any other law or the common law contained, a court of law or any tribunal may, in the interpretation of the Convention, consider the preparatory texts to the Convention, decisions of foreign courts and any publication'.

The common law position was examined in *Fothergill*. There, all members of the House save Lord Fraser endorsed a more liberal approach than that which prevailed in the usual domestic case. Lord Wilberforce prescribed two conditions: that the material involved is public and accessible, and that it clearly and indisputably points to a definite legislative intention. Lord Diplock said that where the text of the convention itself was ambiguous or obscure, an English court should have regard to any material which the convention delegates would expect to be available to clear up possible ambiguities or obscurities. But he warned against reliance on single speeches: 'Machiavellianism is not extinct at international conferences'. Lord Scarman also emphasised the need for a discriminating use

of material: working papers or memoranda submitted by delegates would seldom be helpful, but an agreed conference minute of the understanding on the basis of which the draft of an article of the convention was accepted could be of great value. Similar principles apply in many Commonwealth jurisdictions (see, *e.g.* *Commonwealth v Tasmania* [1983] HCA 21 and *Tasman Orient Line CV v New Zealand China Clays Ltd* [2009] NZCA 135).

The types of documents that are produced and the value to be attached to them depends on the practice of the body producing the convention; those practices are surprisingly varied.

NOTHING FOUND

Sometimes there are no, or hardly any, published *travaux préparatoires*. Bilateral negotiations, for example for an extradition treaty or air services agreement, often begin with one State presenting a text, its standard negotiating text, and that will often dictate the shape of the negotiations. There will usually be no published account of the discussions.

Another, more alarming, example is provided by the process, called rather confusingly the European Convention (in the sense of a convened assembly) which produced the ill-fated draft Constitutional Treaty for Europe. The Convention was made up of representatives of the Governments of the Member States and of the ‘candidate States’, of their national Parliaments, of the European Parliament and the European Commission, 102 members in all. From February to October 2002, the time was spent in what were called the ‘listening’ and ‘deliberative’ phases, with no text. A Preliminary Draft was then prepared by the Praesidium, but actually it was only Part I, the general material, and contained none of the details about the powers of the various institutions. That eventually appeared in May 2003, with only one plenary session for its discussion.

As drafts of the treaty were published, any member could propose amendments to the text. In a legislature, you would expect a marshalled list of amendments to be issued, showing that if, say, amendment 1 were carried, amendments 2 to 5 would fall, and

so on; and there would be debate and voting accordingly. But the European Convention never voted on anything. The amendments proposed to a set of articles were discussed, all together, for an hour or so, and that was that. The Praesidium eventually produced, in mid-June, a new text, said to reflect the debate, and that was declared adopted by consensus on 10 July after one final plenary session.

THE HISTORY OF A CONVENTION

Most EU legal instruments are prepared with much greater transparency. The relevant Directorate-General will commonly work with a working group of experts to produce draft legislation. The papers of the expert group will not be published but the draft they produce, when that is adopted by the commission, will be published as a reasoned Proposal, often accompanied by one or more Staff Working Papers. These, and the discussions in the European Parliament and the positions taken by the Council are published in the *Official Journal of the EU*.

Other bodies have comparable practices. So, the much-used Montreal Convention of 1999 on carriage by air was examined at various stages of its preparation by successive meetings of the Legal Committee and then the Council of the International Civil Aviation Organisation (‘ICAO’).

The Hague Conference on Private International Law, despite its misleading name, is an international organisation with 89 member States. One of its most successful conventions, that of 1980 on Civil Aspects of International Child Abduction, has a long ‘paper trail’: a report and questionnaire prepared by the expert Permanent Bureau of the Conference; the replies of Governments; the report of a Special Commission which in March 1979 agreed the main lines of a future convention and in November of the same year agreed a Preliminary Draft Convention; a full Explanatory Report on that draft; and further Government observations.

These documents enable the history, one might say the archaeology, of a convention to be traced. That may show how particular

issues arose, and perhaps how various possible approaches were considered until one emerged as the most satisfactory. I would suggest that in many cases this material is of more value in a doctoral thesis than in the courtroom. The court's focus must be on the eventual text of the convention and extensive, and no doubt expensive, research into the history may not assist the court.

THE NEGOTIATIONS

Potentially much more useful are the records of the actual negotiations. It is increasingly the case that the records of Diplomatic Conferences at which conventions are finalised are close to being verbatim transcripts. This has long been the practice of the Hague Conference and the practice was followed, for example, by ICAO in the case of the Montreal Convention and by the UN in respect of the proceedings of what was technically an Ad Hoc Committee charged with producing a convention, that on transnational organised crime, and three Protocols dealing with trafficking in persons, the smuggling of migrants, and the control of firearms. Lord Diplock's warning against reliance on single speeches must be borne in mind, but these records can show very clearly what was in the mind of the negotiators.

It can be the case that the discussions of legal drafting are illuminated by informed contributions from NGOs in attendance. Notable examples are those of the work at The Hague on inter-country adoption and child support. In contrast, the work on the UN Protocol dealing with trafficking in women was marked by passionate debate, not central to the work of the delegates, between warring groups of NGOs, one group pressing for strong international action to deal with the movement of women abroad for the purpose of prostitution and the other seeing 'sex work' as a legitimate choice of professional activity, a choice which could include working abroad. Some of this peripheral material may reduce the usefulness to a court of the records.

AGREED MINUTES

Lord Scarman attached importance to 'an agreed conference minute of the understanding on the basis of which the draft of an article of the convention was accepted'. Such statements

are seldom found, and some related practices are of limited use or are positively unhelpful.

In the case of the UN Transnational Organised Crime Convention and Protocols, one device used in an effort to ease the negotiating process was that of the Interpretative Note. More than one hundred such Notes were agreed, their purpose being to provide a gloss on phrases and whole paragraphs in particular Articles. The value of such Notes is, of course, that they show the reasoning that led the negotiators to adopt a particular approach and so make for a uniform interpretation of the text. This assumes that the Notes are read: many published texts of the Convention and Protocols make no reference even to the existence of such Notes, and some commentators have misunderstood the meaning of the text as a result.

The practice does, however, have its dangers. If a minority concern threatens to hold up negotiations, the negotiators may too readily agree to place it in an Interpretative Note, which may actually give more weight to the minority view than it was accorded by the Committee. Even worse, the Interpretative Notes are at times scarcely consistent with the text, and this has given rise to great uncertainty on at least one key point, the extent to which some provisions apply beyond the core area of organised crime.

Another example of a statement, formulated to satisfy the delegates but of no use to a court, is to be found in the records of the Montreal Convention 1999. The example also shows that a study of the speeches may give a false impression of the balance of opinion. The issue concerned a phrase in the earlier Warsaw Convention 1929, 'wounding or any other bodily injury', which translates the French text '*de blessure ou de toute autre lésion corporelle*'. The matter was complicated by differences of opinion as to the exact meaning of the French text, but what was in issue was whether to use language which would include mental as well as physical injury. After discussion in the ICAO Legal Committee the Chairman initially ruled that there was a clear majority of the Legal Committee in favour of the term 'personal' rather than 'bodily'. After some further debate a vote showed 33 votes in favour of 'bodily and psychic'; one vote for

the term ‘personal’. The text to emerge from the Diplomatic Conference has ‘bodily injury’, a text reached after intensive discussions which are not recorded. The Conference agreed a Statement for the record, saying that the expression ‘bodily injury’ was included on the basis of the fact that in some States damages for mental injuries were recoverable under certain circumstances, that jurisprudence in this area was developing and that it was not intended to interfere with this development, having regard to jurisprudence in areas other than international carriage by air. That really takes the matter no further.

EXPLANATORY REPORTS AND COMMENTARIES

In the UK and elsewhere, some reports are given statutory recognition. Section 3(3) of the Contracts (Applicable Law) Act 1990 provides that ‘the report on the Convention on the law applicable to contractual obligations by Professor Mario Giuliano and Professor Paul Lagarde which is reproduced in the Official Journal of the Communities of 31st October 1980 may be considered in ascertaining the meaning or effect of any provision of the Rome Convention’. In different language to the same effect, section 16(3) of the Civil Jurisdiction and Judgments Act 1982 (as amended) provides ‘that the expert reports relating to the 1968 Convention may be considered and shall, so far as relevant, be given such weight as is appropriate in the circumstances’.

Explanatory Reports to Hague Conventions, notably Professor E. Pérez Vera’s report on the Child Abduction Convention, have no such recognition. This has not prevented that report being cited in very many cases under the Convention, including those that have reached the UK Supreme Court and the highest appellate courts in other jurisdictions. Although such Hague reports are not approved by the delegates or by a subsequent Special Commission, it is known that they will be produced by the Rapporteur who has been present at every relevant meeting and reviewed by the staff of the Conference, and this gives them great value and reliability. Similarly, the commentaries by Sir Roy Goode on the Cape Town Convention and its related Protocols, though ‘official’, depend for their authority on that of the author.

There is no authoritative explanatory report on the UN Organised Crime Convention and its Protocols. There is a detailed Commentary, but it is a purely commercial venture, commissioned and published by a university press. I wrote it, with full access to the documentation, but I took no part in the negotiating process. While it could be cited in court as can any academic work, it has no higher status. I contributed to another commentary, that on the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. That is published as a UN document, with a preface by the Secretary-General, so appears to have some real official status; but it was substantially written, almost ten years after the date of the convention by two academics who had taken no part in the work leading up to the convention.

FOLLOW-UP WORK

Article 31(3) of the Vienna Convention provides in part:

There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

It is the practice of the Hague Conference to convene meetings of Special Commissions to review the workings of some of the conventions produced by the Conference; since 1980 there have been seven meetings of Special Commissions to review the working of the Child Abduction Convention, and those meetings have approved the several volumes of a *Good Practice Guide*. Special Commissions are made up of delegates appointed by the parties, usually persons whose work is directly related to the operation of the convention in question. They have no ‘diplomatic’ standing and so may not quite fit the language of s 31(3) (a), but they are nonetheless both useful and authoritative.

On a continuing basis, the Conference maintains an online International Child Abduction Database containing decisions of national

courts in cases under that Convention. The importance of this lies in the fact that you can find, in the case law of almost every country, pleas for uniformity in the interpretation of international conventions. In *Great China Metal Industries Co Limited v Malaysian International Shipping* [1998] HCA 65, Kirby J provides an Australian example:

The approach of this Court to the construction of an international legal regime such as that found in the Hague Rules [on Bills of Lading] must conform to settled principle. Reflecting on the history and purposes of the Hague Rules, the Court should strive, so far as possible, to adopt for Australian cases an interpretation which conforms to any uniform understanding of the Rules found in the decisions of the courts of other trading countries. It would be deplorable if the hard won advantages of international uniformity, secured by the Rules, were undone by serious disagreements between different national courts.

Easier said than done. In the same case McHugh J pointed out that uniformity of interpretation had not been a feature of the Hague Rules. In particular, courts in the United States and Canada on one hand and in France, Germany, England and Australia on the other had diverged in their approach to what causes of damage can be described as perils of the sea for the purpose of the Rules.

HIDDEN DIFFICULTIES

The task of interpretation is made more difficult by two external factors. One is simply that of language. Many international organisations have a number of official languages; the EU has 24. A convention may have only one authentic language version but it is increasingly the case that authenticity will be attributed to several. Translation is not an exact science. The discussions about *lésion corporelle* in the air law conventions not only illustrated that but also revealed differences of understanding

between native French speakers.

Really hidden are differences between legal traditions, between the ‘of course’ assumptions of lawyers brought up with different mindsets. Suppose that a lawyer moves to work in a different country and sends by air freight a quantity of household goods for his greater comfort. Suppose they arrive damaged. The Montreal Convention 1999, like its predecessor the Warsaw Convention, makes the carrier liable for loss or damage to cargo. The lawyer, aware of this, will naturally claim compensation and, if the carrier will not pay, will bring an action in the appropriate court.

If he sues in England, New Zealand, and probably in Australia or the United States he will succeed. But if he sues in France, or most other countries on the European mainland, or in Guyana, Hong Kong, Israel or South Africa, he would almost certainly fail; the courts there would say that of course the only proper plaintiff was someone who was a party to the contract, and the ‘consignor’ would be a freight forwarding company and not the owner of the goods. And arguments about the rights of undisclosed principals seem to cut no ice. No amount of research in the *travaux préparatoires* and the negotiating records will help. Every delegate knew what the text meant but no one realised that their certain knowledge pointed in different directions.

CONCLUSION

I think the conclusion of all this is that, both in their creation and their interpretation, international conventions are in many cases a less secure and predictable form of instrument than domestic legislation. Courts are free to seek to resolve ambiguities and points of difficulty by reference to the documentation accompanying the convention, but that varies in quantity, reliability and usefulness.

JUDICIAL EFFICIENCY, BEFORE AND AFTER THE PANDEMIC

Justice John Logan RFD, a judge of the Federal Court of Australia and of the Supreme and National Courts of Justice of Papua New Guinea. This article is based on a presentation made by the author at the CMJA's virtual conference held in September 2021

Abstract: *When the subject of judicial efficiency arises for discussion, it is well to remember that the word 'efficiency' connotes more than just economic efficiency. While undoubtedly the current pandemic will have some lasting positive effects upon the efficiency of court processes, care must be taken to ensure that essential features of those processes are not eroded in the pursuit of economic efficiency to the ultimate detriment of the just and fair administration of justice.*

Keywords: 'Efficiency' and its various connotations – innovations to court processes made necessary by the pandemic – the need for a rational assessment of the lasting costs and benefits of those innovations when deciding which will persist as the legacy of the pandemic – importance of preservation of in-person court proceedings in actual courthouses where possible and otherwise justified

INTRODUCTION

The word 'efficient', I suspect, is a much-misunderstood word, especially by Treasury or Finance Department officials but also by some in the political class, in the media and perhaps also in the judiciary.

That is because it is apt to be assimilated with but one of its measures, *economic* efficiency.

That great repository of the English language we share, the *Oxford English Dictionary*, tells us that, as used adjectively, the word 'efficient' means:

Making, causing to be; that makes (a thing) to be what it is; chiefly in connection with cause.

Our shared 'thing' is the independent exercise of judicial power according to law, without fear, favour, affection or ill-will.

THE DEFINING CHARACTERISTICS OF JUDICIAL POWER

As we each now contemplate the exercise of judicial power in the aftermath of this latest of the many pandemics that have periodically afflicted the human species, it behoves us, I respectfully suggest, first to reflect on that which makes judicial power what it is. Only if we truly understand that can we assess what, if anything, the experience of the COVID-19 pandemic offers in relation to the 'efficient' disposal of cases after that pandemic has run its course.

My peerless sometime leader and adversary at the Bar, sometime Federal Court of Australia colleague and, as a judge of the High Court of Australia, present hierarchical leader, the Honourable Justice Patrick Keane AC, once pithily observed extra-judicially in a speech entitled 'The Challenges of Communication' delivered to the Judicial Conference of Australia Colloquium, Noosa, on 11 October 2014:

An accused person who is tried, convicted and sentenced is not being provided with a service. And when a civil court resolves a dispute between citizens or between a citizen and the State, the parties are not being rendered a service; they are being governed. And the decision which resolves their dispute is the most concrete expression of the law of the land and saves further litigation because it enables the profession to advise their clients so as to avoid litigation.

Whatever our position in a judicial hierarchy, we exercise one aspect of the sovereign power of the nation we serve. The display of the national (or State or Provincial) coat of arms and crest in a place where we sit is not for personal aggrandisement but a reminder to each of us and those whose cases come before us of the nature of the power that falls for exercise is sovereign. Within its remit, the

judicial branch governs.

This basal feature of judicial power must, I suggest, be the paramount determinative in reflecting on what the efficient disposal of cases holds for us after COVID-19. To ignore this feature by continuing, uncritically, practices the adoption of which emergency conditions dictated during the pandemic may result in our shared 'thing' of judicial power no longer being, or being perceived to be, sovereign but merely a service to which one subscribes such as Netflix, Prime, Fox Sport and the like. Indeed, some looking for one of our supposed services may come, unwittingly, to subscribe to the 'Discovery Channel'!

EFFECTS OF COVID-19 ON COURT PROCESSES IN AUSTRALIA AND PAPUA NEW GUINEA

In Australia, over the course of the first 18 months of the pandemic, successive, pervasive lockdowns of varying duration have been imposed by State and Territory governments for public health reasons. These have been married with international and interstate travel restrictions and related quarantine periods. Even when such draconian measures have not been in place, other public health measures such as spatial separation, 'social distancing' as it is called, gathering limits, digital check-ins and the wearing of face masks have been imposed. The impact of these on the manner of exercise of judicial power has varied not just according to the particular public health measures of the time but also according to particular features of the jurisdiction concerned.

In Australia, we have come increasingly to Balkanise the exercise of judicial power between national or 'federal' courts on the one hand and State and Territory courts on the other. The analogy with the United States or Canadian justice systems is an imperfect one, as some federal jurisdiction may still be exercised by State and Territory courts but, ever increasingly, there are jurisdictional carve outs from these courts to the national courts. Of the national courts, the Federal Court is the principal, national trial and intermediate appellate superior court. There is a separate national, specialist, matrimonial causes court, which also exercises some other federal jurisdictions in more minor cases.

For the Federal Court, the impact of the COVID-19 pandemic has been profound. The court has judges resident in each of the Australian capital cities. The court's jurisdiction is national. Reflecting this, judges do, as occasions require, sit interstate to exercise original jurisdiction, especially in particular specialist jurisdictions such as taxation, intellectual property and native title. Even more so in relation to the intermediate appellate jurisdiction exercised by the court do judges travel interstate during appeal sitting periods and for special fixtures so as to constitute a Full Court. Reflecting the national nature of the court's jurisdiction, it is much more frequent than in State or Territory courts for counsel and often also instructing solicitors whose principal place of practice is interstate to travel for the purpose of appearing in court.

The pandemic has led to the prohibition or circumscription of travel for such purposes. Further, prudence occasioned by the unpredictable occasion for the imposition of public health prohibitions and restrictions and quarantine periods has made it fraught in any event to travel interstate.

The necessary, reactive result of this has been a pervasive, sometimes near-exclusive use of audio-visual means to constitute the court and for appearances of practitioners and witnesses before the court. Sometimes, this has been via the use of dedicated video links from one courtroom to another; sometimes via computers linked via Microsoft Teams, our preferred software platform; sometimes by a combination of these; and sometimes by telephone alone. All Australian courts have used these alternatives at some stage during the pandemic but the more local the jurisdiction exercised, the greater has been the opportunity to retain physical appearances in court houses.

During the more severe lockdowns, the conduct of jury trials in criminal cases had to be suspended. These have returned but, presently, courtrooms have had to be adapted so as to achieve prescribed spatial separation. Jury trials apart, spatial separation and related gathering limits have generally impacted upon the number of persons who can be inside a courtroom at a given time. That has limited the number of members of the general public who can attend so as to observe court proceedings.

Lockdowns have also meant that many judges, registrars, associates, personal secretaries, library and registry staff have been obliged to undertake their duties from home via remote internet links, sometimes for extended periods. Opportunities for direct collegial contact with fellow judicial officers and informal exchanges with personal and other court staff have become commensurately infrequent during lockdowns.

There is a separate conference session especially devoted to problems with remote hearings. Both for that reason and another, I do not intend to dwell overmuch on that subject. The other reason is that we all know that a hearing, be that in the exercise of original or appellate jurisdiction, is but one manifestation, an obviously important one, of the disposal of cases in the exercise of judicial power. There is a myriad of pre-hearing and also post-hearing procedures entailed in the disposal of a case. Indeed, many a case is disposed of without ever proceeding to a hearing or with only a truncated hearing: in the criminal jurisdiction for example, via a sentence hearing rather than a trial; in the civil jurisdiction via compromise after some pointed exchanges about prospects at a first case management hearing, perhaps coupled with an early referral to mediation.

I do wish to share with you two experiences of a remote hearing.

One occurred during the height of lockdown periods in several States in case managing an application for prerogative, or what we have come latterly to call in Australia, ‘constitutional’ writs in respect of an exercise of judicial power by an inferior tribunal. A senior officer of the Executive, represented by senior counsel, was the respondent party. The hearing was conducted via the internet using Microsoft Teams. As the audio-visual link opened, fortuitously at the appointed time, there was the Silk, appearing from his chambers. In itself, that was routine enough in those times. What was not routine, even for a case management hearing, was the sight of counsel wearing, as he was obviously wont to do in his chambers, his favourite cardigan! That casual attire was not deliberate, as his all too evident, genuine embarrassment demonstrated when I announced I would adjourn briefly so he could attire himself correctly.

The other experience occurred in relation to an exercise of appellate jurisdiction by a Full Court. In pre-COVID-19 times, that jurisdiction would have been exercised in person in the State where the case had arisen. However, travel to that State was subject to the most severe restriction on public health grounds. The Full Court was constituted virtually by me, resident in Brisbane, another judge resident in Sydney and another resident in Melbourne. Each had to participate from home, given the lockdowns then in place in those locations. The day prior to the hearing date, I was rather nonplussed when my associate relayed to me as presiding judge a question from the appellant’s counsel as to what was expected to be worn under robes? Lockdowns had also dictated that counsel appear remotely. He was then based in what was at any time of the year, apt to be a very hot part of Australia. Briefly and unworthily, the one-word answer, ‘Something’, was given. That was followed in short order by the recollection that newsreaders under hot studio lights had once adopted the practice of suitcoat, shirt and tie and football shorts, the latter not visible under the desk to the viewing public! Regaining composure, I requested my Associate to convey that the tropical rig adopted in pre-air-conditioned days in Far North Queensland and to this day in Papua New Guinea of barrister’s robe over long-sleeved white shirt, bands and dark trousers would suffice.

These anecdotes have their humorous side, but they also convey a more serious truth, related to the nature of judicial power. It is not a casual affair. Yet remoteness is conducive to casualisation in ways in which physical attendance is not.

Recognition of this is a deliberate design feature of courthouses. The robes worn by judges and counsel reinforce this, as does the court officer’s cry, ‘Silence. All rise. The [named] court is now in session’ (or words to this effect). All of this emphasises that sovereign power falls to be exercised.

Make no mistake, there will be calls in the aftermath of the current pandemic that there is no need, or a reduced need, physically to attend court. These can be expected to come under the guise of the ‘efficient’ disposal

of cases and reducing the cost of justice. They will emanate both from within the executive branch and even also from within the practising profession, especially from those within the solicitor's branch who have come to believe that the practice of a learned profession is measured in six minute units. It will be said that the experience of the pandemic has proven that. Courthouses, expensive to build and maintain, will be claimed to be redundant. Lawyers need no longer spend time in traveling from chambers or office. Parties and other witnesses can appear remotely. We need to move with the times!

At best and benignly, this, I suggest, is a call for economic efficiency, not for the efficient disposal of cases.

PRE-PANDEMIC OPENNESS OF COURT SYSTEMS TO TECHNOLOGICAL ENHANCEMENT

The judicial branch is not populated by Luddites. Even prior to the pandemic, it was increasingly recognised, and as resources permitted *adopted*, that there were aspects of the efficient disposal of cases that were enhanced by the adoption of modern technologies. (See, in this regard, Chief Justice J.L.B Alsop's article, 'Technology and the future of the courts', (FCA) [2019] FedJSchol 4.) During my judicial lifetime, I have seen not just the Federal Court of Australia but also, truly impressively, the Supreme Court of Papua New Guinea and now, increasingly, the National Court of Papua New Guinea adopt electronic court files.

For some 30 years, the High Court of Australia has offered the alternative of appearances in applications for special leave to appeal by video-link. It has long been routine in pre-trial case management in the Federal Court of Australia for interstate practitioners to appear by video-link. It is likewise hardly unusual to grant applications for particular witnesses based remotely in Australia or abroad to give evidence via video-link. There are challenges in relation to the prepositioning of documents and sometimes as to whether, truly, the witness is quarantined from prompting but nothing which ever has been incapable of resolution on a case specific basis.

All of this has already enhanced economic efficiency in the exercise of judicial power without compromising the efficient disposal of cases.

I am quite sure that the experience of the pandemic will translate into the use of other audio-visual links, some remote from court houses, on a case specific basis and as alternatives for such interactions with the exercise of judicial power, most likely for case management purposes.

Some, supposedly economically efficient aspects court processes, in my view, already at least had a tendency to compromise the efficient exercise of judicial power. Increasingly in recent years, the Federal Court's appellate lists are populated by cases brought by failed asylum seekers. Many appear on their own behalf with little understanding of English, let alone of substantive and procedural law. In the original jurisdiction, as a result of legislative change, we are increasingly encountering judicial review cases concerning the deportation of non-citizen offenders, some of whom have lived in Australia for many decades. By the time litigation has been instituted, most of the latter class are in immigration detention.

ACCESS-TO-JUSTICE ISSUES RAISED BY TECHNOLOGICAL INNOVATION

There is a serious access to justice issue entailed with any adoption of internet-based technology for appearances by litigants in person and also as between well-resourced larger law firms or chambers and smaller firms and sole practitioners. (For a critique of the access to justice issues related to proposed introduction of 'online courts' in the United Kingdom, see C. Denvir and A.D. Selvarajah, 'Safeguarding Access to Justice in the Age of the Online Court' (2022) 85(1) MLR 25-68.)

It is all too easy to assume that there is ready and general access to computers and reliable internet connections. This is just not so, even in generally prosperous Australia, let alone in a developing nation such as Papua New Guinea. Access to and reliability of the internet has greatly improved over the decade I have served in PNG but that access—even access to a computer at all—is far from pervasive.

THE INTANGIBLE, NEVERTHELESS IMPORTANT, BENEFITS OF IN-PERSON ENGAGEMENT WITH COURT PROCESSES

Further and fundamentally, in certain public law cases there can be an inherent tension between the institution of a judicial proceeding challenging the legality of a decision grounding executive detention and the retention of the challenger by the executive during the course of a hearing in respect of that challenge. Production of a detainee before a judicial officer in a courthouse emphasises both to the detainee and to the executive that an independent aspect of sovereign power, namely judicial power, falls to be exercised. Even more so is this true in relation to the production of a prisoner for a criminal trial. Control of the detainee or prisoner is, for the purposes of the exercise of judicial power, passed from the executive to the judicial branch of government.

Even before the pandemic, there were pressures on the judicial branch to yield such control. Economic efficiency and sometimes security issues grounded such pressures. In relation to pre-trial case management including bail proceedings, video link and computer-based internet link methods can serve such grounds without compromising the efficient disposal of cases. But they are not perfect substitutes. A complaint to a judicial officer about conditions of detention or access to lawyers is diminished in its impact or even likelihood, I suggest, if made from the facility where the basis for the complaint, real or imagined, has arisen. The same features can attend a judicial command to remove restraints for the purposes of a hearing, I suggest.

In jurisdictions large and small, judges and magistrates are either out-posted or proceed on circuit—the Assizes of old. Why is this done? It is not just because it enhances access to justice; it is also because justice is best delivered, and just as importantly seen to be delivered, not just in public but locally and by physical attendance. In relation to any exercise of sovereign power, there is a qualitative difference between physical and online attendance. The same is true in relation to the observation of cases by the public.

In relation to sovereign power, that is not confined to its judicial aspect. I have taken

oaths of office before Vice Regal officers at Government Houses both in Canberra and in Port Moresby. In 2020, in respect of my current term of appointment in PNG, the exigencies of the pandemic dictated that this be performed via an internet link to Port Moresby. It was an honour again to take the judicial oath for PNG but the experience was qualitatively different to an attendance in person.

In my home State, Queensland, the most decentralised in Australia, recognition of this desirable, local aspect of the exercise of judicial power has long seen not just magistrates but also judges out-posted to major regional centres. Even more so is this feature recognised and necessary in Papua New Guinea, where rugged terrain greatly impacts on ready regional travel other than by air.

Not just in theory but also in practice with the march of technology, remote court hearings for many cases great and small were possible even before the pandemic. But the sense and society of a remote hearing is qualitatively different to physical attendance.

We humans are social animals. An exercise of judicial power, civil or criminal, original or appellate, is a very particular form of socialisation. No-one who has experience of appearing in court in practice or in the exercise of judicial power in open court needs any reminding of the force which direct judicial involvement brings to a proceeding (Neither have the need for reminding of the tempering quality in terms of judicial behaviour of that power being exercised in public.) Many a civil case never proceeds beyond a first case management hearing and many an offender never re-offends because of the experience of the force of judicial power. Commensurate savings in public funds and private angst are the result. Experienced judicial officers know this. Treasury officials, I suggest, do not.

In modern times, various forms of alternative dispute resolution, mediation especially, have become a feature of the disposal of civil cases. Once again, it needed no pandemic to instruct that in theory and via increasing access to technology in practice, mediation could be conducted remotely. Once again, however, the dynamics of a mediation are very different if remote means are adopted rather than physical

attendance. The reasons also lie in our in-built disposition to society. A pressure cooker atmosphere is hardly enhanced if a real-life pressure cooker is hissing in the background of a remote attendance!

Each of us also knows from experience the benefit in cases great and small in original and appellate jurisdiction of Socratic dialogue between bench and Bar. Attention can quickly be focussed on the real issues for decision. My experience is that the opportunity for this is invariably diminished, even by the most reliable of internet connections. Non-verbal communication signals are muted; interruption is apt to be difficult. Even more this is so where pandemic necessity and the fallibility or unavailability of the internet has dictated the use of the telephone only. With the latter, I have found that an adaptation of long ago learned military radio procedure—to say ‘over’ when finished speaking—is the only way efficiently to exercise judicial power over the telephone. It stops mutually stressful, unintended interruptions, as it does on a military radio net.

In the Federal Court, in 2022, I expect we shall resume generally the discharge of judicial power via in-person hearings for trials and appeals. In Papua New Guinea, that is already occurring in the exercise of original and appellate jurisdiction both at Port Moresby and in provincial centres, and will increasingly occur in the forthcoming year.

Over the last 18 months, as an emergency measure during lockdowns, the PNG Supreme Court adopted as an alternative when requested by the parties the hearing of appeals on the papers. This method is adequate in an emergency but is not truly efficient. A question which occurs on looking at a written submission and which might be answered instantly by Socratic dialogue must either not be answered or, because of the dictates of natural justice, be posed and answered in writing with attendant delays in the disposal of the appeal.

We should not diminish the value of direct collegial contact. In court, in the exercise of appellate jurisdiction, this is well-nigh impossible during the hearing of an appeal. Try monitoring a chat line in conjunction with counsel appearing remotely while navigating the PDF appeal book—possible, yes (*just*). Desirable? Not at all. That is quite apart from the benefit of an informal chat with a colleague over lunch or before or after court. Possible via MS Teams, though not at all desirable.

CONCLUDING THOUGHTS

I wish to conclude by sharing this thought about the pandemic and the efficient disposal of cases after the pandemic.

None of my Federal Court colleagues or court staff has died as a result of COVID-19. Not so in relation to Papua New Guinea. Two of my PNG-resident judicial colleagues died from that illness earlier this year, one a good friend and contemporary, the other younger. Each had a wealth of experience from high level legal practice. There have been deaths due to COVID-19 in the ranks of court officers and administrators and their families in PNG as well. Thankfully, reports of such occurrences are diminishing, perhaps because the pandemic is running its natural course. It goes without saying that none of us is indispensable and each of us must eventually retire. There is a usual turnover in any judiciary. But the premature loss of experienced judges to a bench which is already challenged in numbers to meet the demands of an increasing and increasingly sophisticated population disrupts that usual turnover and has a magnified impact. Those of us in the judiciaries of developed countries need to be sensitive to this occurrence and stand ready to lend support to our developing country colleagues as requested to assist them in doing our shared ‘thing’. That is a good way of enhancing the efficient disposal of cases.

DUNCAN AND ANOTHER V ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

2 February, 12 July 2021

Privy Council [2021] UKPC 17

Lord Briggs, Lady Arden, Lord Sales, Lord Hamblen and Lord Leggatt

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Section 49(1) of the Supreme Court of Judicature Act set out a general rule that where a person convicted of a criminal offence appealed against their conviction or sentence and was unsuccessful, the time they had spent in prison waiting for their appeal to be heard did not count towards their sentence. However, s 49(1) also conferred a discretion on the Court of Appeal in such cases to direct that, notwithstanding the general rule, credit ought to be given for that period in prison in calculating the period remaining to be served under their sentence. In the instant case, the two appellants appealed their convictions and sentence for serious offences, but remained in custody pending the determination of their appeals. The Court of Appeal allowed the appeals against conviction in part but, in affirming the sentences, made an error by failing to consider the exercise of its discretion under s 49(1). Instead, it applied the general rule in s 49(1) and gave a loss of time direction to the effect that the time spent by the appellants in prison waiting for their appeal did not count towards their sentence. Had the Court of Appeal considered the matter, it would have been obliged to direct that the 29 months spent in prison between commencing the appeals against conviction and sentence and the giving of judgment by the Court of Appeal should have counted towards their sentence. The appellants issued a constitutional motion seeking, *inter alia*, a declaration that their continued imprisonment contravened their rights under s 4(a) of the Constitution of the Republic of Trinidad and Tobago 1976 ('the constitution'). Whilst accepting that the Court of Appeal had committed an error of law, the judge dismissed the claim in its entirety on the basis that the right in s 4(a) was a right that the justice system as a whole ought to be fair, not that it should operate infallibly and without error. In this case, the system

itself had been fair because it had provided the appellants with a right to appeal to the Board. The judge held that the constitutional motion was an abuse of process and struck it out. The appellants appealed to the Court of Appeal which held that although the Court of Appeal had erred in law by failing to consider the exercise of discretion under s 49(1), the system as a whole allowed for correction of the error and therefore was fair since there was the possibility of an appeal to the Board. The appellants appealed to the Board where it fell for determination whether there had been a violation of their rights under s 4(a) which arose by reason of the error committed by the Court of Appeal.

HELD: Appeal allowed in part.

The legal system as a whole would be unfair and there would be a breach of the right under s 4(a) of the constitution if there was no avenue allowing a prompt application for bail to be made and heard pending the hearing of an appeal against conviction or sentence, in order to provide the possibility for speedy release where it could readily be identified that a court had made a serious error of law. The 'due process of law' obligation in s 4(a) operated to fill a gap in the general law by providing at local level what could be regarded as a form of constitutional habeas corpus or its equivalent, a right to apply for bail. In the instant case, the failure of the Court of Appeal to consider the exercise of the discretion conferred by s 49(1) and its decision to give a loss of time direction in relation to the appellants had a particularly severe effect on their right to liberty and security of the person, a core interest of individuals protected by the constitution. They were penalised by the imposition of an additional period of imprisonment for bringing proper and legitimate appeals, which

in context amounted to a form of arbitrary detention without justification. It could not be said that the appellants had a fair and sufficient opportunity to vindicate their right to liberty and security of the person by virtue of the fact that they could have sought to appeal to the Board to raise the s 49(1) issue before the Court of Appeal's loss of time direction had a practical impact on them. The state, in breach of its legal obligations, had failed to act to protect the appellants as it should have done at the outset when the Court of Appeal considered their cases, and that breach of obligation created a situation with effects extending far into the future which constituted a serious ongoing interference day-by-day with the appellants' right to liberty and security of the person. The right to the protection by 'due process of law' of individual liberty and security of the person was of such importance that it could not be treated as having been waived by an individual in the position of the appellants who failed to take steps to protect him or herself at an earlier point in the proceedings. As from the date of their notices of appeal, there had been no sound legal

justification for the detention of the appellants, and they were entitled to seek to vindicate their right to liberty at any point thereafter. This was a case in which it was established that, had the appellants been able to get before a court to seek bail pending an appeal, it would have been granted. The appellants had established that they had suffered material harm by reason of the absence of a right to apply locally for immediate release (bail) in respect of their continuing detention, in breach of their rights under s 4(a), and that they were entitled to monetary compensation in respect of that harm from the dates of their formal requests to the Attorney General seeking immediate release (see [38], [43], [45], [46], [49]); *A-G v Ramanoop* [2005] 4 LRC 301, *Independent Publishing Co Ltd v A-G, Trinidad and Tobago News Centre Ltd v A-G* [2005] 1 LRC 222, *Maharaj v A-G of Trinidad and Tobago (No 2)* [1978] 2 All ER 670, *Renne v A-G of Trinidad and Tobago (Civ App 57/2013)* (29 November 2016), *Bhola v State* [2006] 4 LRC 268 and *Ali v State, Tiwari v State (No 2)* [2006] 3 LRC 282 considered.

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BOOK REVIEWS

COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION, 1970-2020: SERVING JUDICIAL OFFICERS IN THE COMMONWEALTH FOR 50 YEARS

Karen Brewer and John Lowndes
CMJA, 2021, 156 pp.

We are all aware that the CMJA, until 1988 the Commonwealth Magistrates' Association, is the independent body for the advancement of the integrity, independence and professionalism of the judiciary of the Commonwealth. (I use the term 'judiciary' to include the magistracy.) But how many of us are cognisant of its evolution to become the effective body that we know today? The CMJA is unique: its membership extends to magistrates and judges at all levels. It is, and was, formed of the judiciary, by the judiciary and for the judiciary.

This work charts the history and achievements of the CMJA in its first 50 years. It is dedicated to Sir Thomas Skyrme, the barrister, civil servant and magistrate who was the principal founder of the CMJA. He was greatly interested in the magistracy. The CMJA is regarded as one of his greatest achievements.

When Skyrme became involved, there were irregular (but nonetheless important and valuable) meetings of the Chief Justices of the Commonwealth. Skyrme was perhaps the first to have the idea that, to be attractive to so many ill-resourced and far-flung judiciaries, the CMJA needed to have major conferences attended by representatives from as many Commonwealth countries as possible. There would have to be excellent working sessions and a superb keynote speaker. The success of the early conferences was secured in part by Lord Denning being the keynote speaker. The conferences became well-established, and the eighteen major conferences are summarised in the opening chapters of this work. They are beautifully illustrated with photographs, some formal and some informal.

As to the benefits of conferences, our editor put it accurately when he wrote in the editorial to this journal in June 2020:

CMJA conferences generate much intellectual ferment as discourse unfolds formally and informally between and among the many Commonwealth judges, magistrates and other justice system players who typically attend them. Personal and professional relationships are forged and renewed. The energy at each CMJA conference is palpable, as are the rewards of productive, intellectual cross-pollination. Attendees depart for all corners of the globe at the end of such meetings enriched and enlightened. And they bring the benefits of their learning and their new insights back to their colleagues at home.

The Chief Justices' meetings are still important, but they are fixed for the day before a conference starts. The conferences have been ways to share information and to get to know each other better. They are held in widely differing locations, whatever the difficulty. One I particularly remember was in Mangochi, Malawi, in 2003. Often the papers are available: I have on my bookshelf two volumes of materials together extending to over 800 pages from the 2006 Toronto conference alone, but today the papers are provided in digital format. The CMJA holds major conferences triennially but it also holds annual conferences for training judges (but not training programmes, which are now conducted by the Commonwealth Judicial Education institute). Not everyone can, of course, attend every or any conference, but this journal often publishes the major papers in article form.

There is much other work, such as the CMJA's work on gender awareness, environmental law, ethics and corruption. This is only possible through the tireless work of Secretaries-General, Directors of Studies and committee members, the trustees of the endowment trust and many others. It would be invidious to give names.

This historical review of the CMJA then provides some detail regarding the Association's work, either alone or with other bodies, in formulating instruments on subjects that affect the judiciary. They include the *Latimer*

House Guidelines for the Commonwealth on Parliamentary Supremacy and the Independence of the Judiciary, which were later distilled into the *Commonwealth Principles (Latimer House) on the Accountability of and Relationship between the Three Branches of Government*. This document was endorsed by the Commonwealth Heads of Government Meeting (the 'CHOGM') in Abuja in December 2003. The CMJA is now regularly an observer at, and reports on judicial independence to, the CHOGM.

This is not all. The CMJA has produced a series of model laws and best practice statements on judicial appointments and judicial service commissions between 2013 to 2016. One of the editors of the present volume, former Chief Judge John Lowndes, was for instance the original drafter of the CMJA's *Guidelines on the Independence and Integrity of the Magistracy* in 2011.

But the CMJA is also concerned with practical action. It has provided guidance to the judiciary on an individual basis, and it has also expressed its concern on several occasions on the erosion of the independence of the judiciary in a number of jurisdictions around the Commonwealth, or the treatment of particular members of the judiciary under pressure from their governments. Recall the period of the late 1990s to 2001, during which (for example) the life of the Chief Justice of Zimbabwe, Justice Anthony Gubbay, was threatened.

The CMJA is a now a well-established Commonwealth institution. The Commonwealth has an important place both in the law and the international order. As the President of the Republic of Trinidad and Tobago, His Excellency Mr Ellis Clark TC, said in his opening speech at the 1982 Port of Spain conference, the Commonwealth is 'something like our Trinidad and Tobago Carnival, you can tell somebody about it but you cannot really convey the flavour of it'.

While this is a serious work, there are also included in it regular anecdotes. For example,

the work explains that at the 1972 Bermuda conference, when the Governor General held a reception at Government House, some of the African delegates pointed out that cannabis was being grown on a large scale in the grounds. It was subsequently discovered that drug dealers in Bermuda had planted it there because it was probably the one place where it would not be spotted!

The work also records the names of officeholders of the CMJA, who have given so much of the time to the CMJA.

To conclude, the editors of this work have clearly gone to a great deal of time and trouble researching information as to the past and writing an immensely readable text. Dr Karen Brewer, Secretary-General, joined the CMJA in 1998 and so is uniquely placed to produce this work. Former Chief Judge Lowndes is a senior member of the judiciary from Australia and your President from 2015 to 2018. The history of the CMJA as recorded in this work shows in spades the wealth of lasting legal commitment to the Rule of Law which the Commonwealth has produced.

I think the work might have merited a snappier title, but without a shadow of a doubt, this is a work that has been lacking for a very long time, and we all owe a debt of gratitude to the editors for taking this initiative. It deserves to be used as a work of reference for the future and as a record, and so I hope the next edition will include an index, although the table of contents is more than usually detailed. The price (at £30) is relatively modest for the immense amount of information it contains. I congratulate both editors on the whole work, not forgetting Dr Brewer's insightful Introduction, and warmly recommend it to fellow members.

Shakespeare, in his play *As You Like It*, wrote that, when something was so good that there was no need to advertise it, it "needs no bush". This work needs no bush.

Reviewed by Lady Arden of Heswall, formerly a Justice of the UK Supreme Court

Anna Dziedzic

Hart Publishing, 2021, 233 pp.

Justice David Baragwanath of the New Zealand Court of Appeal has written of ‘parachuting into others’ society, with responsibility for interpreting their Constitution and administering justice according to their culture and their values’.

He refers to his work as visiting judge of the Court of Appeal of Samoa, an island state with 196,000 people, eighty percent of whose judges are similarly citizens of other jurisdictions. He describes the responsibility as ‘burdensome’, and its objective ‘impossible to achieve completely’, adding: ‘But one’s task is to try’.

Samoa is one of nine Commonwealth common law jurisdictions, with populations ranging from Tuvalu’s 10,000 to over eight million in Papua New Guinea, the focus this study by Anna Dziedzic, based on a University of Melbourne PhD thesis.

Justice William Prentice, an Australian lawyer at that time serving as Deputy Chief Justice of Papua New Guinea, lamented in a 1977 judgment that the task of interpreting its Constitution had ‘somewhat invidiously’ to be performed by a court comprised of expatriate judges. The Constitution-makers ‘deliberately thrust it upon this Court’, he wrote, ‘knowing that its members would for some time be expatriates’.

For the past two decades, three-quarters of judges with constitutional jurisdiction in the nine Pacific islands have continued qualify as ‘foreign’, a status defined by the author simply as ‘not citizens of the state on whose court they serve’.

The author reviews the work of 225 African, Australian, British, New Zealander, Sri Lankan and Pacific Islander judges who sit in Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu, and the rationales for their appointment as interpreters of constitutions other than their own.

They include both ‘fly-in’ judges, present for a particular sitting or case, and expatriates resident for a, usually brief, set term. The author describes their role as likely to continue for some time, particularly in islands with smaller populations, but an ‘exceptional phenomenon’, counter to the ‘general assumption that judges on courts of constitutional jurisdiction will be citizens of the state they serve’.

The concentration by the author on nine jurisdictions in the region, all having common law systems as former colonies, overseas territories or protectorates, and on constitutional law based largely on construction of written documents, provides a narrow focus for a subject which, as she says, has much wider relevance.

As with the common law, written constitutions derive meaning from their context, not just that of the text, but of the community they govern, its culture, customs, and ‘common sense’, and what Holmes called ‘felt needs of the time’.

From more than 80 constitutional decisions by such judges the author finds what she describes as ‘limited integration of custom and constitutional law and a predominantly textualist approach to constitutional interpretation’. This she says supports the conception of foreign judges as limited to acting as ‘technical legal experts with knowledge and skills that are transferable between jurisdictions’.

The courts in question have judicial review powers that enable foreign judges to overrule legislation and executive actions which they find inconsistent with the constitution, thus overriding decisions of elected representatives ‘on politically significant issues or contested social values’, in ways difficult to reverse.

The most obvious justification for appointing foreign judges, described by the author as ‘transition’, is the need of the courts for help pending development of a pool of qualified local candidates, which for smaller islands may never happen.

But the author examines three other offered rationales: ‘capacity building’, the provision of expertise in specialised fields such as

commercial or establishment of family or drug and alcohol courts; ‘reputation’, or enhancement of the standing of the local court by inclusion of well-regarded jurists from abroad; and ‘impartiality’, a quality thought to be enhanced by distance from local issues and interests.

Where, as in the Pacific, ‘transition’ is likely to be long, this aspect does not in the author’s view justify the prevailing practice of making short-term renewable appointments, generally for three years or less, needlessly compromising both the appearance of independence and the stability of the judiciary.

The ‘capacity building’ contribution of the foreign judge is helpful in providing expertise which the court would otherwise lack, but the author is opposed to extension of the role to that of an expert who teaches local judges and lawyers about law and judicial administration. This view carries ‘overtones of paternalism and imperialism’ and the impression that the latter ‘are not sufficiently qualified in their roles’.

With regard to ‘reputation’ or its enhancement as a rationale, the author unsurprisingly again sees this as running the risk of ‘reinforcing colonial assumptions about the qualities and capacities of foreign and local judges’. She welcomes a recent trend to seeking potential foreign appointees in Africa and other Pacific islands.

As to ‘impartiality’, the author says that local judges can be taken as aware of the common law test for disqualification on grounds of partiality, better known as ‘appearance of want of impartiality’, and as capable as others of recusing themselves on that ground. She suggests that impartiality as a rationale has validity only in the sense that foreign judges can be called on when local judges do so.

The work closes with a world view of foreign judges on courts of constitutional jurisdiction, as a global ‘unexplored phenomenon’.

Foreign judges sit in courts of four of the smallest European states for lack of local judicial workforce, also in Bosnia Herzegovina and Kosovo, whose constitutions require three such judges to counterbalance deep ethnic divisions. In Africa they sit in Botswana,

Lesotho, Namibia, Eswatini, the Gambia and the Seychelles. The same is true of the Eastern Caribbean Supreme Court, the courts of the Bahamas and Belize, Qatar and, until 2014, the new breakaway state of Timor Leste.

It is true too of overseas territories, also of the Judicial Committee of the Privy Council itself, almost all of whose judges will meet the author’s definition as ‘foreign judges’, the final court for 12 independent countries and 12 overseas territories.

The author suggests that the legitimacy of ‘foreign judges’ as ‘expert and impartial professionals’ is secure when applying pre-existing law to constitutional disputes. Less so, she says, when ‘understood to extend or change the law through interpretation, reflect customary and community values, or represent the people’.

Note: The Anna Dzedzic title is Volume 2 in the new ‘Hart Series on Judging and the Courts’. Volume 1, *Values in the [UK] Supreme Court: Decisions, Division and Diversity*, by Rachael Cahill-O’Callaghan, was published in 2020.

Reviewed by the Honourable Martin R. Taylor, formerly a member of the British Columbia Court of Appeal and a part-time member of the Court of Appeal for the Cayman Islands

FAKE LAW: THE TRUTH ABOUT JUSTICE IN AN AGE OF LIES

The Secret Barrister
Picador, 2020, 400 pp.

The first book written by the Secret Barrister (the ‘SB’) was entitled *Stories of the Law and How It’s Broken*—a work that examined inefficiencies within the British legal system. *Fake Law: The Truth About Justice in an Age of Lies*—the SB’s second title and the one under review here—defends the judiciary and the British system of law.

The SB has managed to remain anonymous despite the success of these two books and despite having attracted an enormous following on Twitter. It is probable that the SB practises mainly in the criminal courts, and quite likely spends some time in the courts of the north of England. The only certainty is that the SB has a

maggie mind, collecting many legal curiosities with which to sprinkle the pages of his/her writings. As a result of reading *Fake Law* I now know (for example) that the first guide setting out the appropriate damages awards for different categories of personal injury was one produced 1500 years ago by Æthelberht, the Anglo-Saxon King of Kent between the years 589 and 616, and not that produced by the British Judicial College in 1992. I am not sure that this knowledge makes me a better barrister, but it makes me *feel* as if I am a better barrister. After reading both of the SB's books I do indeed wonder whether the SB is a barrister at all, and whether he/she is in fact a judge.

Fake Law is a book that makes a serious point and is much more than a series of interesting legal anecdotes.

An unpleasant effect of the widespread use of social media is the way in which it provides the ignorant and the bigoted with the opportunity and the means to express their outrage at everything and anything with which they disagree. Many journalists have become too lazy to do more than to write about whatever Twitterstorm of outrage is trending on social media. Many politicians looking for votes also rapidly adopt the same carapace of outrage without questioning whether it is justified. Unless readers know more about the subject than the journalist and politician, they are more likely to simply accept what is said as being true and accurate.

Along with football referees, it is members of the judiciary who are the most regular targets for social media abuse from the public, the press and politicians. Judges seldom answer back when their decisions are criticised, preferring instead to maintain their impartiality. At most a judge may waspishly comment that it was a pity that those who criticise a decision did not trouble to take time to read it but, in general, the criticism of the judiciary goes unanswered by the judiciary.

In *Fake Law*, the SB comes to the defence of the legal system and the judiciary. Taking examples from the types of case which cause the greatest degree of outrage, the SB responds on behalf judges. The two defences he/she principally uses are not new.

The first defence is as it should be: the actual facts of each case should be examined more carefully. Such analyses—when held up next to what many politicians and journalists tend to say without drilling down sufficiently into the substance of things—should (but probably will not) leave those politicians and journalists squirming with embarrassment at their stupidity or naiveté. It is not only the obvious targets (such as Chris Grayling, a recent and much criticised Lord Chancellor of England and Wales, and Donald Trump and his acolytes) who have their views torn to shreds. Even His Holiness Pope Francis is revealed to be distinctly fallible. One doubts whether the actual facts will change the opinions of many of those expressing the outrage. They should, however, make the reader realise that much of the outrage is unjustified.

The second defence is at least as old and is the more important one. The Roman jurist Gaius, in the first folio of *The Institutes*, wrote 'The law is what the people order and establish'. However, Gaius then made it clear that does not mean that the person who shouts the loudest decides what the law is; rather, what people 'order and establish' is developed carefully over extended periods of time by legislatures and judges so as to achieve the correct result in any individual case. This is a result which the SB points out is much more likely to deliver up a just answer than one guided by uninformed outrage and knee-jerk reaction. The answer thoughtfully provided applies to all, whether they are good or bad, rich or poor, popular or unpopular.

Worryingly, the SB points out that we are now moving on from a time when politicians simply expressed their outrage when confronted by very dangerous situations. The greatest danger will come when the politicians expressing outrage are able to dismiss the judges they disagree with and to appoint as judges those persons who they know will agree with them. American politicians do not yet remove judges with whom they disagree, but they do appoint judges who they expect to agree with them. Poland and Hungary threaten to go further.

One can only hope that the SB, in this sensible, well-argued and carefully researched book, has helped to protect us against this danger.

Reviewed by Andrew Hogarth QC of 12 King's Bench Walk Chambers, London

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