

Commonwealth

Judicial Journal



Journal of the
Commonwealth Magistrates'
and
Judges' Association

Vol 22 No 3 June 2016

COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION

Established in 1970

Registered Charity (LTK) No. 800367 Company Limited by Guarantee Reg. No. 1942930

PATRON

Her Majesty the Queen

PRESIDENT

The Hon. Chief Judge John Lowndes (Australia)

EXECUTIVE VICE-PRESIDENT

Judge Tim Workman CBE

ACTING TREASURER

Mr Patrick Latham

IMMEDIATE PAST PRESIDENT

His Hon. Justice John Vertes

LIFE VICE PRESIDENTS

Mr David Armati

Lord Hope of Craighead, KT, PC

The Hon. Justice Kipling Douglas

Mr Michael Lambert CBE

The Hon. Judge Sandra Oxner

Her Honour Mrs Justice Norma Wade Miller

CARIBBEAN

REGIONAL VICE PRESIDENT

Justice Richard Williams (Cayman Islands)

COUNCIL MEMBERS

Mrs Nicola Stoneham (Bermuda)

Ms Sue Anne Lovell (Guyana)

ATLANTIC & MEDITERRANEAN

REGIONAL VICE PRESIDENT

Sheriff Michael Fletcher (Scotland)

COUNCIL MEMBERS

Justice Lynne Leitch (Canada)

Mrs Sybil Roach Tennant (England and Wales)

EAST, CENTRAL AND SOUTHERN AFRICA

REGIONAL VICE PRESIDENT

Chief Magistrate Matankiso M Nthunya (Lesotho)

COUNCIL MEMBERS

Justice Patrick Kiage (Kenya)

Sheriff Katrina Walubita (Zambia)

PACIFIC

REGIONAL VICE PRESIDENT

Judge Mary-Beth Sharpe (New Zealand)

COUNCIL MEMBERS

Mrs Linda Bradford-Morgan (Australia)

Judge Richard Cogswell (Australia)

INDIAN OCEAN

REGIONAL VICE PRESIDENT

Justice Balasundaram Rajendran (India)

COUNCIL MEMBERS

Mrs Srinithy Nanadsekarana (Sri Lanka)

Dr Ei Sun Oh (Malaysia)

WEST AFRICA

REGIONAL VICE PRESIDENT

Mrs Olufolake Oshin (Nigeria)

COUNCIL MEMBERS

Justice Francis Korbieh (Ghana)

Mrs Yewande Olayemi Aje-Afunwa (Nigeria)

CO-OPTED COUNCIL MEMBERS

Sheriff Douglas Allan OBE (Scotland)

Sir Salamo Injia (Papua New Guinea)

His Hon. Justice Charles Mkandawire (Malawi)

Mr Justice Winston Patterson (Guyana)

DIRECTOR OF PROGRAMMES: District Judge Shamim Qureshi

SECRETARY GENERAL: Dr Karen Brewer **EXECUTIVE AND ADMIN OFFICER:** Temi Akinwotu

EDITOR OF COMMONWEALTH JUDICIAL JOURNAL

Dr Aldo Zammit-Borda

EDITORIAL BOARD

Dr Peter Slinn (Chairperson) Mr Geoffrey Care Dr Rowland Cole

His Hon. Keith Hollis Mrs Nicky Padfield Justice Thomas Woods

Correspondents: Mr Christopher Rogers, His Worship Dan Ogo, Dr Bonolo Ramadi Dinokopila

CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX, U-K. Tel: +44 207 976 1007

Fax: +44 207 976 2394 Email: info@cmja.org website: www.cmja.org

CONTENTS

EDITORIAL		2
ARTICLES		
<i>Patrick Kiage</i>	Closing Borders, Current Development in Refugee and Asylum Law	
<i>John Thomas</i>	Judicial Independence in a Changing Constitutional Landscape	
<i>Maame Abena S. Mensa-Bonsu</i>	Keeping the Ghanaian Judge from becoming Judex In Causa Sua: 21st Century Challenges	
<i>Martin R. Taylor</i>	‘What’s It All About, Then’: From Magna Carta to the ‘Notwithstanding Clause’	
<i>M Imman Ali</i>	Justice for Children in Bangladesh: Diversion	
LAW REPORTS		
<i>State and Another v Transferees and Another</i>		46
<i>Hunte and Another v State</i>		48
BOOK REVIEWS		
<i>Paths to the Bench: The Judicial Appointment Process in Manitoba, 1870-1950</i>		51

EDITORIAL

In my previous editorial, I informed *Commonwealth Judicial Journal (CJJ)* readers about a study we are undertaking concerning the challenges of what may be termed ‘Austerity Justice,’ which include a reduction in, and lack of, sufficient resources provided to the administration of justice generally, a reduction in areas where legal aid is provided and a concomitant increase in court fees, all of which serve to make access to justice more difficult. This study is being led by Nicky Padfield, a former editor of the *CJJ* and Master of Fitzwilliam College, Cambridge. While we have received some helpful comments on this subject, may I once again appeal to our readers to send us any comments, observations or cases they think may be of relevance to the theme. This will enable us to draw a clearer and more holistic picture of how austerity justice is developing and manifesting itself in different Commonwealth jurisdictions. The study will be published in a future issue of the *CJJ*. Please send all submissions by email to the CMJA email account at: info@cmja.org, or by post to: CMJA, Uganda House, 58-59 Trafalgar Square, London, WC2N 5DX, United Kingdom.

As 21st century technology becomes more and more entrenched in society, this may pose some challenges for the judiciary, as Mensa-Bonsu explores in her article (in this Issue) on social media and judicial independence in Ghana. However, it also brings a host of new resources, including legal and judicial on-line blogs, which often provide real-time and in-depth commentary on legal developments around the Commonwealth and beyond. I am therefore pleased to note that future issues of the *CJJ* will contain regular reviews of legal blogs and other useful online resources and, to this end, we would welcome any suggestions from our readership. If you write or use a legal or judicial blog which you wish to bring to the attention of *CJJ* readers, please do contact us using the contact details above.

Finally, by way of announcements, registration for the CMJA Conference, entitled “The

Judiciary as Guarantors of the Rule of Laws?”, taking place in Georgetown, Guyana on 18 – 22 September 2016 is now open. We urge readers wishing to attend, to register now and take advantage of the early bird offers.

In this issue, the Hon. Justice Patrick Kiage explores international refugee and asylum law, particularly in light of the recent migration crisis in Africa, Europe, and the US, and the act of closing borders by the various governments. The Right Hon. The Lord Thomas of Cwmgiedd considers judicial independence in a changing constitutional landscape, emphasising that transparency and openness are crucial to instilling public confidence in the justice system. Subsequently, Maame Abena S. Mensa-Bonsu discusses the appropriate threshold for bias in an age of Facebook and social media. In the Canadian context, the Hon. Martin R. Taylor assesses the ‘notwithstanding clauses’ in relation to the rule of law principles founded in Magna Carta. Thereafter, the Hon. Justice M Imman Ali examines the Children Act 2013 of Bangladesh, and considers the merit of community-based alternatives and informal methods of disposition for child offenders in Bangladesh. Finally, David R. Percy discusses the emergence of a duty of good faith in the Canadian law of contracts.

The *CJJ* has once again collaborated with the Law Reports of the Commonwealth (LRC) to publish two cases, namely *State and another v Transferees and another*, concerning judicial bias and *Hunte and another v State*, concerning, *inter alia*, the right to fair trial. In this respect, I wish to renew our thanks to Dr Peter E. Slinn and Prof. James S. Read, general editors of the LRC, for allowing us to republish these law reports. I would also like to welcome Katie Green from LexisNexis / Reed Elsevier (UK) Limited.

Finally, this Issue features a review of Dale Brawn’s book *Paths to the Bench: The Judicial Appointment Process in Manitoba, 1870-1950*, which was prepared by the Hon. Justice Gilles Renaud.

CLOSING BORDERS, CURRENT DEVELOPMENT IN REFUGEE AND ASYLUM LAW

Hon. Justice Patrick Kiage, Judge of the Court of Appeal of Kenya. This article is based on a paper presented at the CMJA Triennial Conference in Wellington, New Zealand, September 2015.

Abstract: *This paper traces the underpinnings of international refugee protection and seeks to show the category of persons fleeing, the reasons for flight and the measures governments of the countries receiving them are putting in place to deal with the influx. In particular, the paper considers the act of closing borders by the various governments and to what extent this has been effective. The paper focuses on Kenya, whose Judiciary has been involved in protecting the rights of refugees and asylum seekers at a time where the country has been plagued by terror attacks. Kenya found itself at crossroads but the Judiciary acted as a check to the Executive and Parliament with regard to refugee protection. The paper further looks at durable solutions and changes in refugee and asylum law.*

Keywords: Refugee and asylum law – role of judiciary – migration influx – closing borders – public interest cases

Introduction

The Right to Seek and Enjoy Asylum

In 1948, profoundly influenced by the atrocities of World War II, the right to seek and enjoy asylum from persecution became human right number 14 of the Universal Declaration of Human Rights (UDHR). In particular, the non-admission policy, which had been adopted by many states in relation to German Jews, Roma and others in the 1930s, had catastrophic consequences because Jews and others found nowhere to seek asylum. Any individual should be granted the right to enter the territory of another state to apply for protection. Moreover, it followed logically from several of the other principles embodied in the UDHR that the international community should request countries to afford the right to seek asylum to individuals who were subject to violations of the human rights listed in the

UDHR. Otherwise people would, in some cases, be less inclined to stand up for their rights and to further develop the international respect for human rights norms. The right to seek asylum was reaffirmed at the 1993 UN World Conference on Human Rights in Vienna, and it is part of the draft EU Charter on Fundamental Rights.

The 1951 Convention Relating to the Status of Refugees is the foundation of international refugee law. It defines a “refugee” as someone who has a well-founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group, or political opinion; is outside his/her country of origin; and is unable or unwilling to avail him/herself of the protection of that country, or to return there, for fear of persecution.

The Convention thus sets minimum standards for the treatment of persons who are found to qualify for refugee status. Because the Convention was drafted in the wake of World War II, its definition of a refugee focuses on persons who are outside their country of origin and are refugees as a result of events occurring in Europe or elsewhere before 1 January 1951. As new refugee crises emerged during the late 1950s and early 1960s, it became necessary to widen both the temporal and geographical scope of the Refugee Convention. Thus, the 1967 Protocol to the Convention was drafted and adopted. The Protocol lifted the time and geographic limits found in the Convention’s refugee definition.

One of the main challenges to refugee protection is refugee emergencies. Refugee emergencies are times of crisis for the refugees and often for the country of asylum. UNHCR’s working definition of a refugee emergency is any situation in which the life or wellbeing of the refugees will be threatened unless

immediate and appropriate action is taken, and which demands an extraordinary response and exceptional measures.

More important than the definition is the ability to recognize quickly the development of a situation in which an extraordinary response will be required. Lives are at stake and a speedy response is essential. The country of asylum may be under tremendous pressure, and often under media scrutiny, and may not have had experience in handling the arrival of large numbers of hungry, sick, wounded or frightened people.

Refugee emergencies almost always occur in the context of armed conflict and, in that sense, can be seen as an emergency within a larger catastrophe. The aim of emergency response is to provide protection and ensure that the necessary assistance reaches people in time. The country of asylum is responsible for the safety of, assistance to, and law and order among refugees on its territory. Governments often rely on the international community to help share the financial burden; UNHCR provides assistance to refugees at the request of governments.

As from April 2015, there was a rising number of migrants and refugees crossing to the European Union (EU) across the Mediterranean Sea and the Balkans from Africa, Middle East and South Asia. A number of boats heading to Europe sank in the Mediterranean Sea with a death toll of over 1,000 people. Many of them were fleeing poverty stricken homelands or war torn countries. The entry points were mainly Italy, Greece, Hungary, Spain/Morocco and France. The countries affected by the crisis include Austria, Bulgaria, Croatia, Czech Republic, Germany, Hungary, Latvia, Poland, Italy and Slovakia.

Some countries have embraced the migrants while others resorted to closing their borders and locking out those fleeing from their countries of origin.

Countries Implementing Border Closures Non-Arrival and Non-Admission Policies

New trends developed in the international refugee regime as a result of the increase in the number of asylum seekers in the late 1980s and early 1990s. In particular, the United States and countries in Western Europe introduced a non-arrival or non-entry policy in order to create barriers for the new influx of asylum seekers. In the first period starting in the late 1980s, these policies developed with a multi-faceted approach: visa requirements combined with carrier sanctions (today used by most OECD countries); the creation of international zones in airports (France); isolation of applicants and processing of applications for asylum at military bases abroad (the United States in the case of the Haitians at the Guantanamo base in Cuba).

Notwithstanding the international condemnation of the United States' repatriation policy, nations around the world are increasingly following suit by moving the locus of border enforcement efforts beyond their terrestrial borders and floating such borders into the sea or landing them on territories of foreign countries, in an effort to halt the flow of refugees. In the European Union, some Member States have begun the process of externalizing the EU borders by leveraging the EU joint external border guard agency (FRONTEX) to intercept and repatriate thousands of migrants caught at sea while desperately attempting to reach Italy, Malta, Greece, or Spain's Canary Islands.

EU Member States with borders in close proximity to Africa (such as Spain) have entered into agreements with nations with large emigrant populations (such as Senegal and Mauritania) in order to shift responsibility for refugee flows onto already overburdened developing nations. Nations with large emigrant populations have little choice but to enter into immigration agreements with EU Member States, since development funding or visa-allotment is often tied to acceptance of these agreements.

In addition, the global focus on securitization and enforcement has weakened the refugee protection regime, particularly the obligations

of the 1951 United Nations Convention Relating to the Status of Refugees.

The European Union, like the United States, has cast a wide net in its multifaceted approach to deterring migrants and refugees alike from reaching its land borders. EU Member States no longer wait for refugees to seek protection at their borders. Rather, the European Union proactively sends its forces directly into refugee sending nations (whether by stationing officers at airports or ships in the sending-nation's waters) in order to prevent their citizens from fleeing to its Member States. Individual Member States also negotiate agreements with refugee-producing nations, so that any refugees actually landing on EU soil can quickly be sent south again.

Indeed, some of the techniques for blocking access to the European Union bear striking similarities to the United States' approach to its war on terror. As in the war on terror, much of the EU border externalization is carried out through informal agreements that are not subject to public scrutiny or parliamentary review. FRONTEX operates with little transparency, oftentimes engaging in actions abroad that would be impermissible on European soil.

The European Union's imposition of a unifying refugee protection regime throughout its twenty-seven Member States and its attempt to seal off its southern water borders from Africa similarly undermines access to protection just as the U.S. interdiction policy undermines access to international protection for Haitian boat people.

The UNHCR defines interception as "encompassing all measures applied by a State outside its national territory in order to prevent, interrupt or stop the movement of persons without the required documentation from crossing international borders by land, air or sea and making their way to the country of prospective destination."

France recently closed its borders with Italy to block asylum seekers. The French parliament voted through a new law at the end of May which allows the authorities to expel

asylum seekers more easily. In June 2015 Switzerland threatened to temporarily close its border with Italy to migrants. Hungary finished construction of a fence on its southern border with Serbia in late August 2015 which consists of three strands of NATO razor wire, and is 175 kilometres long. The next phase involves construction of a wire fence which will be approximately 4 meters high. The will deploy 9,000 police to keep illegal migrants out. Bulgaria built a fence along its border with Turkey to prevent migrants from crossing through its territory in order to reach other EU countries. The fence is equipped with infrared cameras, motion sensors, wire and is monitored by the army.

In April 2015, Kenya announced it will proceed with plans to build a wall along its porous border with Somalia to stem the flow of illegal immigrants and security threats into the country, in response to the Garissa terrorist attack. The major reasons fronted for border closures include: the threat of terrorism, safety of citizens of the asylum state, safety of immigrant children, lack of sufficient resources, voter fraud and even racism.

Refugees versus Migrants Narrative: Who exactly is currently arriving in Europe?

Articles 1(2) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problem in Africa expands the definition to include victims of:

- i. External aggression
- ii. Occupation
- iii. Foreign domination
- iv. Events seriously disturbing public order in either part or whole of the country.

The Kenyan Refugee Act 2006 combines both definitions at section 3.

Migrant workers are defined in article 1.1 (a) of the UN Convention on the Rights of Migrants as people engaged in a remunerated activity in a State of which he or she is not a

national. As such it should be understood as covering all cases where the decision to migrate is taken freely by the individual concerned, for reasons of ‘personal convenience’ and without intervention of an external compelling factor (www.unesco.org, n.d.)

The reason for such distinction is that the narrative changes depending on the usage of the word.

Refugee	Migrant
Flee armed conflict or persecution	Choose to move to improve the lives by finding work, education, family reunion etc.
Cross national borders to seek safety in nearby countries because it is too dangerous to return home	If they choose to return home, they will continue to receive their government’s protection.
Internationally recognized and Protected in international law	Individual states deal with them under immigration laws and processes

By closing the borders, asylum seekers and refugees are denied the international protection they desperately seek therefore going against the principle of non-refoulement. Article 33 of the Convention Relating to the Status of Refugees provides that all countries must respect the principle of non-refoulement, which includes: (1) not returning asylum seekers or refugees to a place where their life or liberty would be at risk; (2) not preventing asylum seekers or refugees—even if they are being smuggled or trafficked—from seeking safety in a country, if there is a chance of them being returned to a country where their life or liberty would be at risk; and (3) not denying access to their territory to people fleeing persecution who have arrived at their border (access to asylum). For migrants, the consequences of deportation are not as heavy as those of refugees whom deportation is a matter of life or death.

Effects and Consequences of Border Closures

Asylum seekers and refugees are denied the international protection they desperately seek.

By lumping asylum seekers and refugees with migrants, they all suffer deportation, which puts the former at risk of death while the latter do not face such risk in the country of origin.

In Hungary there are new regulations, in combination with the other amendments made to the asylum law in August, which seriously impede access to asylum in Hungary. As a result of the legal changes, the government declared a state of emergency on September 16 due to “mass immigration.” The new border regime has three key elements:

- It restricts access to asylum in Hungary for those who enter from Serbia and permits quick returns of asylum seekers to Serbia on the ground that it is deemed a “safe country” for asylum seekers;
- National authorities are allowed to declare a state of emergency and close border crossing points. They have already taken that step in four counties with the crossing points; and
- Irregular entry is now a criminal offense, allowing authorities to imprison people who cross the border irregularly for up to eight years, deport them, and bar their reentry.

This means criminal proceedings related to irregular border crossing or destruction of the fence will take precedence over other procedures, including adjudicating asylum claims. The resources used in building the fences and the walls to keep those fleeing away could have been used to assist them rather than keep them away.

Non-Observance of the International Principle of Non-Refoulement

In recent years, European governments have used return as a tool to gain political advantage by appearing tough on asylum at the expense of fairness and efficiency. The drive to return has led to an increased use of detention in the case of asylum seekers whose cases have been rejected for unreasonably long and even indefinite periods of time to prevent absconding. It has also led to destitution for many asylum seekers whose cases have been

rejected, from whom all types of support are withdrawn as an incentive to return. Even where it is recognized by the host country that an individual cannot be returned, many of those whose applications have been rejected do not receive a legal status and find themselves in a limbo situation without the right to work to earn a living and without state support. The result is that asylum seekers whose applications have been rejected form a growing segment of vulnerable, poor and marginalized people in European societies.

Moreover, some of the people fleeing resort to getting harmed or even to harming themselves in a bid to crossing over to their country of desire. For example when dozens of refugees tried to escape police officers at a Hungarian camp on, one camerawoman decided to get involved. While she was filming a father, holding a child in his arms, she tripped both of them. Some people also burn their palms in order to destroy their fingerprints such that their data cannot be included in the system of the country of arrival as their plan is to move on to another country. It provides a breeding ground for smugglers who capitalize on the desperation of those fleeing and they end up risking the lives of those they transport resulting in a number of deaths.

The migrant narrative is entrenched onto the locals of the countries that close the borders. The citizens of such countries do not see them as fellow human beings but as people who will come into the country and strain the resources of those citizens and result in higher taxes to cater for them. They are also seen as responsible for overstressing police resources, who are deployed to keep them at bay. This effectively means that there are less policemen available to cater to ensuring the safety of the rest of the citizenry.

The Development of Refugee Law in Kenya

Kenya is a signatory to the 1951 UN Refugee Convention, 1967 Protocol and the 1969 Organization of African Union (OAU) Refugee Convention. Article 2 (5) and 2 (6) of the Constitution of Kenya 2010 imports and

domesticates all international treaties. Kenya enacted the Refugee Act in 2006.

Refugee Situation in Kenya

Kenya hosts about 650, 610 persons of concern many of whom are refugees and asylum seekers from neighboring countries with the largest population of over 400,000 is from Somalia. Dadaab and Kakuma refugee camps were set up in the early 1990s. The camps have been described as “small cities” of thatched roof huts, tents, and mud abodes. Living inside the camp has been equated to prison and exile. Once admitted, refugees do not have freedom to move about the country but are required to obtain Movement Passes from the UNHCR and Kenyan Government.

“Essentially, the refugees are confined to the Kakuma camp area: they are not allowed to move freely outside of it, and they may not seek education or employment outside of it” (see generally Jamal Arafat, *“Minimum standards and essential needs in a protracted refugee situation: A review of the UNHCR programme in Kakuma, Kenya,”* (2000)). Inside this small city at the edge of the desert, children age into adulthood and hope fades to resignation. To be quite frank, it is more or less a kind of hostage life for many refugees.

However, some refugees who manage to get movement permits now live in urban areas. They can however not take part in gainful employment.

Kenya in Turmoil

Kenya has experienced several terrorist attacks in the period 2011-2014 e.g. the Westgate Mall and the Garissa University attacks most of which are believed to have been undertaken by the Al-shabab militia group. This is believed to be mainly as a result of porous Kenyan borders and the peace keeping mission by African Union Mission in Somalia. It is believed that terrorists pose as refugees and use the refugee camps as entry points where they conduct recruitment and then infiltrate urban centers and carry out attacks and sneak back into Somalia.

Government Response

The Government of Kenya enacted the Security Laws Amendment Act in December 2014. Section 45-48 of the Act provided for enforcement of the encampment policy and a cap on the number of refugees in the country.

In June 2015, it was proposed that a 700km anti-terror security wall separating Kenya and Somalia be built. The Government also ordered the closure of Somali hawalas - informal money transfer - and froze accounts of prominent Somali business men in April 2015. Five hundred and ten (510) NGOs were deregistered with 15 being accused of money laundering and financing terrorism. Operation 'usalama watch' by security forces started its operations in April 2015 and has been stated to have been marred by serious human rights violations e.g. extrajudicial killings, arbitrary detentions and torture.

The 2015/2016 budget estimates focused on security, the allocation to the military and police was increased to \$2.28 billion from \$2 billion to cater for this.

Public Interest Litigation

The Court of Appeal in *AG & Anor Vs CORD & others* (Civil Application No. Nai 2 OF 2015 (UR 2/2015)) was faced with an application seeking to stay the orders of the High Court which had suspended various sections of the Security Laws (Amendment) Act pending the hearing and determination of the main petition. In dismissing the application, the Court stated:

"...that in enacting or amending any law that touches on national security (or any other law for that matter), Parliament (i.e. the National Assembly and the Senate) must ensure that there is no violation of the people's rights and freedoms that are spelt out in the Bill of Rights and which are, moreover, part and parcel of what national security entails as per the Constitutional definition. It must always be borne in mind that the rights and fundamental freedoms in the Bill of Rights are not granted by the State and therefore the State and/or any of its organs cannot purport

to make any law or policy that deliberately or otherwise takes away any of them or limits their enjoyment, except as permitted by the Constitution. They are not low-value optional extras to be easily trumped or shunted aside at the altar of interests perceived to be of greater moment in moments such as this. Article 20 of the Constitution is explicit that the Bill of Rights applies to all law and binds all State organs and all persons. The interplay between State security and citizens' enjoyment of their rights and freedoms in a suit challenging the constitutionality of a key statute such as SLAA, particularly in turbulent times as we are living in, calls for a very careful navigation by the Court."

Courts in Kenya have also been faced with certain crimes that have called for the application of Art. 24 of the Constitution in their pronouncements. The crime of terrorism for instance presents certain peculiarities, which result into serious issues of national security, peace and unity. Courts must take into account the possible effect of the court order on the well-being of individual suspects, their families, their communities and the nation at large.

In *Coalition for Reform and Democracy (CORD) & Anor v Republic of Kenya & Anor* ([2015] eKLR) the High Court was faced with the determination of whether various sections of the Security Laws (Amendment) Act No. 19 of 2014 were unconstitutional for violation of, among others, the right to freedom of movement under Article 39 and the rights of refugees under Articles 2(5) and 2(6) of the Constitution and International Conventions.

The High Court held that Section 48 of SLAA which introduced Section 18A to the Refugee Act, 2006 is unconstitutional for violating principle of non-refoulment as recognized under the 1951 United Nations Convention on the Status of the Refugees which is part of the laws of Kenya by dint of Article 2(5) and (6) of the Constitution.

In its pronouncement, the High Court found that the State had "...not demonstrated the rational nexus between the limitation and its

purpose, which, we reiterate, has been stated to be national security and counter-terrorism; has not sought to limit the right in clear and specific terms nor expressed the intention to limit the right and the nature and extent of the limitation...”

Present Day Refugee status in Kenya

As of September 2015, Kenya had not closed its borders and was within the principle of non-refoulement. Although political statements in the past indicate its desire to do so due to their porosity. There is an ongoing review of the Refugee Act 2006 to meet the insecurity concerns raised during the period that Kenya was in turmoil with regard to terror attacks.

Conclusion

Times of insecurity create dilemmas in any constitutional legal system that honors and protects its individual human rights. Perhaps, somewhat paradoxically, it is times of crisis that bring individual human rights to full focus, enhancing the formation of safeguards to protect from infringement of basic freedoms. Acute life and death situations often bring about the need to combine social goals with individual rights which strengthen the fabric of democratic life. There is still much that needs to be done with in the area of Refugee Law.

Based on the experience and developments over the years, the majority of essential needs are expected to remain in the areas of life-saving and life-sustaining support, and the pursuit of sustainable and durable solutions.

The main priorities are projected to be in: preserving access to asylum and international protection for asylum-seekers and refugees; delivering essential life-saving services in safety and security; providing basic shelter, primary health care, clean drinking water, sanitation and hygiene services; enabling access to education, acquisition of marketable skills, and work opportunities; as well as supporting voluntary repatriation, resettlement and requests for alternative residency status.

Strategies to achieve the desired outcomes include engaging and coordinating with interested stakeholders to provide technical

and material support to governmental, non-governmental and community-based awareness-raising and capacity-building efforts as part of a broader and integrated solutions’ framework for refugees and host communities. Community-based, protection-compliant approaches in law and order as well as child protection and sexual and gender-based violence prevention and response activities will also be implemented.

Root causes for migration need to be addressed as nations come up with humane policies that provide legal pathways of entry to those fleeing for various reasons. Striking a balance between obligations to refugees and respecting the economic concerns of citizens also plays a big role in international refugee law. Willingness of states to share the costs and divide the burden is also an important factor for consideration.

Finally, each country needs to prepare itself for climate change displacement that will result in migration and influxes in some points. Case in point are the Nepal and Haiti earthquakes, Tsunami and floods. Countries need not have knee jerk reactions to such catastrophes. Disaster management should now look at the impacts of such displacements.

Non-Governmental Organisations can file Public Interest Litigation to propel the arms of government into action. For example in the Europe crisis, a number of Public Interest cases would have seen decisions emerge from the courts that would have made a difference in the way the crisis progressed. The Judiciary has a role to play too. Judiciary can enforce the rule of law without strict interpretation of the law but by developing jurisprudence that creates a balance for all parties involved. More so in Public Interest cases.

DOROTHY WINTON TRAVEL BURSARIES FUND

WE NEED YOUR DONATIONS!

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

“She had considerable knowledge of the Commonwealth, a genuine interest in its people and she was prepared to travel extensively to promote the Association, being especially concerned that people from the less well developed countries should be able to play a full part.”

Stated Brenda Hindley, former Editor of the CJJ.

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

We WELCOME ALL CONTRIBUTIONS the Bursary fund.

Contributions should be (by cheques drawn on a UK bank, bank transfers- making clear what the transfer is related to or bankers draft made payable to CMJA) and should be sent to the

Commonwealth Magistrates' and Judges' Association at
Uganda House, 58-59 Trafalgar Square, London WC2N 5DX, UK.

Please remember that as a registered charity, the CMJA can reclaim tax paid by UK tax payers. If you include your name and address (eg on the back of the cheque), we can send you the form to fill in for gift aid purposes - a simple declaration and signature.

JUDICIAL INDEPENDENCE IN A CHANGING CONSTITUTIONAL LANDSCAPE

The Right Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales. This article is based on a speech delivered at the CMJA Triennial Conference in Wellington, New Zealand, September 2015.

Abstract: *This article posits that judicial independence must not mean judicial isolation. The judiciary must explain the centrality of justice and why it matters. Transparency and openness are crucial to instilling public confidence in the justice system. In so doing, the emphasis has to be on demonstrating the real-life impact, rather than relying on high-level constitutional principles. The article considers that the judiciary needs to engage with the other two branches of State within the confines of the Constitution, and such engagement is particularly important when it comes to protecting judicial independence and the proper funding of justice. Finally, the article notes that the judiciary must be reflective of the society it serves and actively take steps to ensure that the processes of the courts take proper account of diverse societies.*

Keywords: Judicial independence – Latimer House principles – constitutional law – three branches of governance – engagement – funding of justice

Introduction

Before turning to explain, by reference to my own jurisdiction of England and Wales, what I see as the key tasks that face the judiciary in achieving judicial independence in a changing constitutional landscape, I want to outline four key themes that underpin my address:

i. The centrality of justice to our societies and the independence of the judiciary cannot be taken for granted: To all of us the centrality of justice to a State is obvious. The provision of justice is, we all know, a core duty of a State. But that is a view we should not take for granted. As judges we have a great deal to do to explain its importance and relevance. We have a key role as advocates actively to point out and explain the role and function

of the judicial branch of the state. Again, the necessity for judicial independence is obvious to us all. We know it is central to the rule of law. In each of our nations, to a greater or lesser extent, we have to protect it or to fight for it.

- ii. Strong judicial leadership and engagement is needed: Judges cannot expect others to do all that is necessary to protect the position of the judiciary and the justice system; a proactive stance led by the judiciary is required. This is entirely compatible with the Latimer House principles and with other ethical duties.
- iii. The judiciary must reflect society to maintain legitimacy: The maxim, “Justice should not only be done, but must also be seen to be done”, is ordinarily taken to require transparency, impartiality, fairness and propriety. But in a broader sense, it must also encompass the principle that the public needs to have confidence in the judiciary that serves it, so as to strengthen the legitimacy of the judicial process. It is axiomatic, therefore, that one important way of gaining and maintaining the public’s confidence is making sure that the judiciary is reflective of society in its composition and in the issues it takes into account.
- iv. Independence will be safeguarded: In a changing constitutional landscape, each of the above is essential if the judiciary is to safeguard its independence in a way that enables it to uphold the rule of law for the benefit of each of our respective nations.

The Relevant Changes

Constitutional change has been a long but generally slow process. Although we have celebrated the 800th anniversary of Magna

Carta, it was a very long time before the clauses to which we attach so much significance had any real effect. It therefore may seem initially strange that after a long period where the UK had seen little by way of constitutional change, it has since 1998 been in a period of rapid and continuing change. I would like to highlight four of those changes which are most relevant to the position of the judiciary:

- i. The structure of the Union of the four nations: the position of Wales. Scotland has always had its own court system, as has Northern Ireland. Thus the re-creation of legislatures with full law making powers in devolved fields could easily be accommodated. Wales has not had its own court system since 1830. Although the effect of the grant of full law making powers in devolved fields in 2011 has taken some time to work its way through, the unitary court system of England and Wales is having to adapt to administering laws passed by two different legislative bodies, one of which legislates bilingually.
- ii. The status of fundamental rights: Although it can be said that the courts of the UK have always recognised through the common law the fundamental nature of some rights, the period since the coming into force of the Human Rights Act has gradually highlighted the difficult role that the courts are called upon to play outside the traditional areas of the protection of personal liberty, protection of property and free speech and the right to a fair trial.
- iii. The relationship with the European Union and its Court of Justice and the European Court of Human Rights: Although the UK has been a member of the European Union for over 40 years and of the Human Rights Convention since its creation, it has taken time for the influence of EU legislation and the interpretation of that legislation and the Union Treaty to have a broad impact outside trade and business law.
- iv. The governance of the judiciary and its relations with the other parts of the state: It is to this topic I must turn in more detail to explain the key themes.

The position of the judiciary

The tradition in England and Wales

Until 2005, the Lord Chancellor – an ancient Office of State that had existed since at least the eleventh century – was the Head of the Judiciary with extensive powers in relation to the judiciary. With at least nominal disregard for the separation of powers, he was also the Speaker of the House of Lords and a senior member of the Government cabinet. However anomalous it might have been, the office was the “buckle or linchpin” between the judiciary and the other two branches of the State. It gave the judiciary a certain degree of comfort and stability. The holder of the office had for some centuries been a lawyer of great distinction who also had significant political experience. Judges could therefore generally leave to him (and it always was a him) the relations with the other branches of State, ensuring the position of the judiciary on issues was understood at the highest levels of government: the delivery of reform, the appointment of judges, their dismissal and most functions relating to the organisation of the justice system and the judicial branch of the State. It was a relatively comfortable position.

However by the end of the last century, this position was already under strain and all of this changed with the passing of the Constitutional Reform Act 2005 (Constitutional Reform Act 2005 (c.4)) which in addition to other major changes (in particular the creation of the Supreme Court of the United Kingdom in place of the Judicial Committee of the House of Lords) recast the office of Lord Chancellor and the organisation of the judiciary. A decade later, even though changes are continuing, it is possible to assess the very different position which the judiciary of England and Wales now has.

Governance

The legislation made the Lord Chief Justice the Head of the Judiciary and President of the Courts of England and Wales in place of the Lord Chancellor. Vested in the office of Lord Chief Justice were very considerable powers and responsibilities over discipline, deployment, training, welfare and duties including making representations to Parliament and government.

Having transferred these various powers, responsibilities and duties for organising, leading and representing the judiciary from the Lord Chancellor to the Lord Chief Justice, the Act was otherwise largely silent about how these responsibilities should be discharged by the Lord Chief Justice. This was deliberate, at least on the part of the judiciary, as it left to the judiciary the opportunity to create its own leadership and governance structure. What is evolving is a system under which the general policies of the judiciary are by and large arrived at through the Judicial Executive Board, a group of 8 or 9 senior judges chaired by the Lord Chief Justice, with the advice of the Judges' Council, a long established body which was recast to bring together the various judicial associations of the different types and levels of judge. The Judicial Executive Board or individual judges who, acting on behalf of the Lord Chief Justice, lead on matters ranging from diversity and relations with the regulator of the legal professions to training and international relations implement the policies. Whereas in the past all judges were by and large concerned with discharging their judicial function, at senior levels in particular – but also throughout the various tiers of courts and tribunals judiciary – the judiciary of England and Wales has had to create and refine a new leadership structure for itself, trying to avoid the clashes that can easily arise given the hierarchy that is the basis of the distribution of court work and the appellate structure. Its own civil service, the Judicial Office of England and Wales, supports the leadership judiciary.

The last is essential, as the principal task of all judges is to dispense justice through managing and trying cases or hearing appeals; any activity of an administrative or leadership nature, however important, is time spent away from court. Of course, that is not to say that judges should not undertake such activities – on the contrary, they should and they must – but it must be proportionate and they must be able to rely on the strong support of the Judicial Office to implement matters on their behalf.

In addition to a host of other statutory functions that transferred from the Lord Chancellor to the Lord Chief Justice as a result of these changes, of particular importance for my talk

is a statutory duty placed on the Lord Chief Justice in 2013 to take such steps as he or she considers to be appropriate for the purpose of encouraging judicial diversity, a topic to which I will return.

Residual powers of the Lord Chancellor and court administration

The major changes, however, preserved some of the responsibilities and functions of the Lord Chancellor who is now also Secretary of State for Justice, though they have been the subject of yet further change. For example, judicial discipline is a joint function of the Lord Chief Justice and Lord Chancellor (as representing the public interest); appointments are the function of an independent appointments commission, though appointments to some leadership posts are a joint function of the Lord Chancellor and the Lord Chief Justice; each also has powers to reject candidates for good reason.

One of the most important functions that was preserved was the responsibility of the Lord Chancellor to obtain the funds for the court administration. In a complex agreement reached in 2008 between the judiciary and the Government, the judiciary obtained a small role in the allocation of funds by the Finance Ministry and, more importantly, a joint responsibility for the running of the court administration. The court administration is now operated on a day-to-day basis by a board chaired by an independent person, accountable to both the Lord Chancellor and the Lord Chief Justice. The judiciary therefore takes a far greater role than before. This has been a beneficial change, given that the judiciary can utilise its practical and operational insight. The judiciary has been active in analysing practices, considering, initiating and evaluating reform proposals and driving the implementation of reform.

Relations with Parliament and the Government

Although the Lord Chancellor and other ministers are bound to uphold the rule of law and judicial independence, and indeed the Lord Chancellor's traditional oath has been adapted to reflect those responsibilities, the judiciary now have, of necessity, adopted a much more active role in relation to government and Parliament.

There are regular meetings between leadership judges and the government. In addition, informal engagement occurs almost continuously between the civil servants in the Judicial Office and their counterparts in the Ministry of Justice and other government departments.

There is formal engagement with Parliament as illustrated by the Lord Chief Justice's Annual Report, which is laid before Parliament, and annual appearances by the Lord Chief Justice before Parliamentary Committees shortly after its publication, as well as ad hoc appearances by other members of the judiciary that also form part of this formal engagement.

Conclusion

The result of these major changes to the position of the judiciary, as Professor Robert Hazell of University College, London has correctly concluded in a recently published study, *The Politics of Judicial Independence in the UK's Changing Constitution*, has produced a paradox. Under the system prior to 2005, judges could rely on the Lord Chancellor, a member of the executive and legislature, to protect their independence and did not have to engage with those other branches of State. Under the new system, which has produced a clear and formal separation of powers, judicial independence is best served by more, not less, day-to-day engagement with government and Parliament. It has also necessitated a much more proactive stance by the judiciary in promoting an understanding of the importance of justice and in taking more proactive steps in many areas it might traditionally have left to others.

Thus we can see that, in the changing constitutional landscape, this new approach is necessary to protect judicial independence, particularly in securing adequate resources for the justice system and in explaining to the public why it is a judge's duty to make decisions in accordance with law in a way which might not appear at the time to be in accordance with popular sentiment.

The Centrality of Justice: The Public's Understanding

The perception

As I have mentioned, as judges and magistrates, we all understand the importance of the system of justice. In Europe, and I can only speak first hand of this, the public tends to take the provision of justice for granted. Most will never need to rely directly on the system of justice. The court systems by and large seem to work and are perceived to uphold the rule of law. With varying degrees of speed, those who are alleged to have committed crimes are tried and their guilt or innocence determined. Government is generally held to account by the courts and rights by and large protected and developed. Judges generally command a very high degree of trust; not only is this evidenced by surveys, but by the fact that politicians often turn to judges when they need an independent public examination of a difficult problem. The public do not readily see the serious problems that face the system of justice, such as the inordinately high cost of using the courts, which puts access to justice out of the reach of most, and a system that has not been modernised so as to meet the needs of ordinary citizens (whether or not as litigants in person) and SMEs.

Across Europe, governments face increasing pressures to curtail expenditure. The competing pressures are well known. In the United Kingdom, as in many other countries, we have since the financial crisis in 2008 lived in a time of austerity and restricted budgets. The inevitable consequence of these measures is a reduction in State expenditure on justice.

Indeed many see the courts and the court administration – its buildings, people, and resources – as yet another public service in the way that schools, medical practices and infrastructure are public services, rather than as central an aspect of the State as Parliament and the Government. At a time when the control of expenditure is under pressure, the benefits of spending on education, health and infrastructure are obvious, but the benefit of spending on justice and its modernisation, and the remedying of its problems, are not.

The lack of knowledge

Moreover the work of the courts, tribunals, and judges remains a mystery to so many. Any understanding is unlikely to be aided by its portrayal, or the portrayal of the legal system more broadly, in the media. However, given that much of the court estate belongs to a different era and court processes and procedures are blighted by often unnecessary convoluted, not to mention the complexity of the law, such mystery is perhaps unsurprising.

And it is not only the public at large that is unfamiliar with the work of the judges. There can also be a lack of understanding in both the legislative and the executive branches of the State of the important and central role that justice equally plays.

Our task

As a result of the changes to the constitutional position, and particularly in these times of reducing budgets, never has it been more important for the judiciary, as an institution, to become more outward-looking and play a more educative role within the proper confines of the Constitution. In particular, judges in England and Wales have to explain the centrality of justice and what is necessary to ensure that the courts can deliver it. Judges have to be active in relation to decisions concerning the adequate provision of judges and court administration and explaining why these go hand-in-hand with maintaining judicial independence and defending the rule of law.

Leadership In Engagement

Explaining why justice matters

Arguments about abstract, albeit important, principles concerning the constitutional significance of an independent judiciary will, without more, likely fall on deaf ears. Justice and judges must be, and must be seen to be, relevant. And it is for the judges to explain their relevance. By way of simple illustration drawn from the UK:

- i. Relevance to small traders: Civil claims with sums in dispute in excess of £10,000 (US\$15,000) will, most likely, be heard in England and Wales on the fast track of the County Court. Imagine you are a sole trader or small business – a builder, a manufacturer, a supplier of some sort – and you have unpaid debts totalling

£15,000 (US\$23,000). That sort of debt could have a serious impact on your cash flow and might, in turn, cause you issues with your creditors. A year to resolve the issue through court proceedings might be several months too many.

- ii. Relevance to investment and the financial markets: Investment will not be made and financial markets cannot operate without an effective and independent system of justice. In the UK, there is an additional factor, as the UK legal services market generated £22.6 billion (US\$34.5 billion) for the economy in 2013.
- iii. Social relevance: Often when the justice system appears in the media, it is about very, very sensitive issues that are of concern to many: serious crime, taking children in care, eviction, deportation, bankruptcy. Few people would choose to have anything to do with the justice system at all, but it is important to make clear that a just and fair society requires an efficient and expeditious system of justice.
- iv. Constitutional relevance: Lastly, the principled arguments must be aired, but not in the abstract. Access to justice matters. It matters because courts and tribunals are the means by which individuals are able to assert their rights against others, against the government, for each has equality before the law. An accessible and timely system of dispensing justice is required; otherwise the rights become meaningless. Acting with independence, judges are guardians of the rule of law and serve as a check on the exercise of executive power as part of the complex system of checks and balances that underpins our modern democracy.

How is this to be done – making speeches, engaging with the media through the Judicial Press Office and bringing those that need to understand the courts into the courts to see the work that judges do. One scheme that has recently been launched places Members of Parliament in courts or tribunals to observe hearings, with the opportunity of discussing the judicial process with the judge.

Engaging in ensuring effective delivery of justice and bringing about judge led reforms

Explaining why justice matters is not in itself sufficient, unless the judiciary also ensures that, within the resources provided to it, justice is delivered effectively and, where reforms are needed, reforms that judges can initiate are initiated by the judges.

It is not easy to ensure that the courts within a State are acting effectively, but it is, in my view, essential for the leadership judges to monitor closely the time different types of case take, the time that elapses before a case can be tried, the number of interlocutory hearings that take place, the workload individual judges bear and the time that judges take to deliver judgments.

Inevitably in a time when technology is advancing at an ever-increasing pace, court systems need reform to keep pace and to develop more cost effective ways of delivering justice and modernising procedure. The judiciary has taken the initiative in establishing new courts (a planning court and a financial court for international markets) and in making extensive procedural reforms, even though constrained at present by the funds necessary to take proper advantage of modern technology.

All of this assists in instilling confidence in the judiciary and the justice system. In particular, improved awareness of the everyday and constitutional role of the judiciary, the ability to assert rights, and how to access justice is itself protective of the rule of law. In addition, as public understanding of the role of the judiciary and the justice system increases, so too will understanding of the need for their independence to be protected.

Judicial engagement and assistance in reform that is the province of the government and Parliament

However, there are many areas of reform that are not for the judiciary, but are properly for the executive and legislature. Some might say that once it is accepted that the particular matter is not within the scope of what judges can properly do on their own, then judges should leave matters entirely to the executive and the legislature.

I do not agree. The judiciary has a real role to play in offering what I have described as technical advice. There will often be choices that are for the politicians to make, but that is not to say that the technical feasibility of reforms are matters on which judges should not assist by giving advice. Guidance about assistance to Parliament has been issued, and, as a result of a series of seminars with senior civil servants, further Guidance will be issued later this year about appropriate engagement with the government on policy matters.

There are many other illustrations which time does not permit me to give. But you may ask why the judiciary should do this. The answer in my view is clear – our changing constitutional landscape has necessitated this to safeguard and to reinforce the centrality of justice and an independent judiciary in the proper functioning of a State.

Diversity

Doing all of the above will, in my view, not be enough. We also actively engage in ensuring that the judiciary itself and what it does reflect our increasingly diverse societies

Judicial diversity

In the past ten years there have been major changes to the judicial appointments process. An independent Commission that is required to appoint on merit now runs it. The judiciary is working actively with the appointments commission in increasing judicial diversity, in particular to remove the barriers to entry to the judiciary and open-up applications to the widest pool of candidates.

In 2013, a Judicial Diversity Committee was established to assist in discharging the duty to encourage diversity of which I have spoken. We have put in place 90 Role Model Judges who undertake outreach and mentoring work; we hold specialist outreach events targeted at underrepresented groups; we have organised a specialist mentoring scheme for first-time judicial applicants or those seeking to progress to higher office. We put in place this summer a scheme to encourage, through mentoring, a much wider pool of applicants for appointment as deputy High Court Judges and early appointment to the High Court Bench.

We are beginning to bring about a change, particularly with appointments of female judges, but there is still a great deal to do.

We also have Diversity and Community Relations Judges across England and Wales. Beyond diversity work with aspirant judges, they actively seek to dispel myths surrounding the judiciary and act as a link between the courts and local communities. In addition, they play an important role in informing and educating people – communities, schools, universities – about the reality of what it is to be a judge, which helps to remove the myths and misconceptions that prevail. We have recently increased the number to 123.

Cultures and languages

I mentioned at the outset the changes in the Union of the nations that form the UK. May I illustrate this by reference to Wales. Legislative and constitutional changes have given Wales a legislature and restored Welsh as a language of the courts and of legislation after an interval of over 400 years; these changes and other factors have restored Wales as a nation with a more distinct identity within the unitary system of England and Wales. On many different levels, the judiciary has therefore made changes to the operation of the legal system to reflect the constitutional change.

Legal systems and common cultural problems

I also mentioned the impact of our membership of the EU. This means not only a parallel, though much more occasional, dialogue with the institutions of the EU, but for present purposes a readiness to understand and adapt to cultures and legal methods different from that of the UK and the common law. Of the many examples, may I take victim's rights? Most continental civil systems have a very different investigative process, but also accord to victims many more rights, such as the right to appeal against the failure of the prosecutor to prosecute. Political decisions were made to try and provide the same minimum rights for victims across Europe. Technically difficult though it was to set minimum rights, what proved to be more difficult was addressing the common cultural problem that each state had - the failure to keep victims informed throughout the whole process of what was happening and to take into account their concerns when

dealing with cases. Thus although we may have to reconcile the diversity of legal systems, it is sometimes common cultural problems that the judiciary and the broader legal system needs to address.

Conclusions

So, what conclusions can be drawn?

- i. Judicial independence must not mean judicial isolation;
- ii. The judiciary must explain the centrality of justice and why it matters. That task cannot be left to others. Transparency and openness are crucial to instilling public confidence in the justice system. In so doing, the emphasis has to be on demonstrating the real-life impact, rather than relying on high-level constitutional principles;
- iii. The judiciary needs to engage with the other two branches of State within the confines of the Constitution, and this strengthens, rather than undermines, judicial independence as it increases shared understanding and shared respect;
- iv. Engagement with the public and the other branches of the State is particularly important when it comes to protecting judicial independence and the proper funding of justice;
- v. The judiciary must be reflective of the society it serves and actively take steps to ensure that the processes of the courts take proper account of our diverse societies.

KEEPING THE GHANAIAN JUDGE FROM BECOMING JUDEX IN CAUSA SUA: 21ST CENTURY CHALLENGES

Maame Abena S. Mensa-Bonsu, Barrister and Lecturer of Constitutional and Criminal Law, Lancaster University, Ghana

Abstract: *Technology has transformed our access to information, while reality TV and social media have changed our attitudes toward privacy. This piece argues that the changed nature of social media and interactions may make the appearance of bias in a judicial officer easier to construct. Therefore, the burden of proof for bias cases in this century may have to be set higher than may have been necessary in the past. Ghana's test, set at the high standard of real likelihood of bias in Sallah v Attorney-General is now, if not previously, commendable as it allows for meritorious concerns of bias to be addressed without undue expense to the integrity of judicial officers.*

Keywords: Judicial independence – applicable threshold – social media – real likelihood of bias

Introduction

The rules of natural justice enjoy pride of place in procedural law. In jurisdictions like Ghana, the Gambia and Nigeria, they have achieved constitutional status. The rules ensure that procedures meant to place litigants at par for the duration of litigation are not defeated by the prejudice of the adjudicator. They impose rather high standards of objectivity on judges and other adjudicators, which, in the past, were not too difficult to meet, since one could easily anticipate matters capable of impugning the integrity of one's judgments. In this century, technology and modern trends in public social interactions are creating new and less predictable of ways in which the perception of impartiality in a judge may be impaired.

In this paper, I examine how the recent arrest of KKD, a TV celebrity in Ghana and the trial of South African Olympian Oscar

Pistorius, demonstrate the difficulties that a 21st century judge faces in the fulfilment of her natural justice obligations. I focus on two aspects of the *nemo judex* principle, namely, the prohibition on foreknowledge of the facts and the duty to judge only between strangers. I argue that the test of 'real likelihood of bias,' chosen for Ghana by the seminal case of *Sallah v Attorney-general* (1970) 2 G&G (2d) 1319, is now, more so than when it was propounded, the appropriate standard of proof in allegations of judicial bias given the impact of modern technology, the now entrenched sensationalism of reality TV and the extended superficial networks enabled by social media.

The Sallah Case And Proving 'Real Likelihood Of Bias'

In 1970, the government of Ghana, relying on a transitional provision of the 1969 Constitution dismissed 508 public officers from their post. Mr. Sallah, who was one of them, contested the dismissal as unconstitutional before the Court of Appeal then sitting as the Supreme Court of Ghana. The Attorney-General objected to the presence of Mr Justice Apaloo and Mr Justice Sowah on the Panel. Apaloo JA was allegedly friendly with the plaintiff. Sowah JA's brother-in-law was, one of the 508 affected by the government's action. He was alleged to have discussed his in-law's plight with a Minister of State while playing golf with the latter. The application for recusal was dismissed as unsubstantiated.

The Court held that the applicable test was *real likelihood*, not reasonable suspicion of bias. They stated that a social relationship between a judge and a party, without more, was not enough to ground an accusation of bias. In the end, they said, it was a question not of suspicion, nor of possibility of bias. It was a question of immediate probability. The

applicant was held not to have proved such a degree of familiarity between Apaloo and the plaintiff that impartiality was unlikely. He established a cordial, social, relationship, without proving the two were particularly close. In Sowah's case, the Court stated that Ghana was so small that any matter affecting a large number of people was likely to have some connection with practically everyone else in it. Thus, excluding a judge from a panel simply because he knew a non-party in similar straits would render such matters impossible to adjudicate. Facts that apply with equal force to a large swath of the community, cannot be relied upon to establish a danger of bias.

The ruling rightly attracted strong criticism from the legal fraternity and the general public. When the case was decided, the factors that I will hold up below as validating this standard now did not exist then. In the first place, it is not self-evident why a personal social relationship with a judge must involve a high level of intimacy to justify fear of prejudice in an opponent. Again, it is hard to see where or why the fact of a person, who having had his family loyalty invoked, has gone so far as to act to address the matter as requested, falls short of suggesting a real likelihood of bias. To say a party's reasonable misgivings about the fairness of the trial are irrelevant unless she can prove the likelihood of such misgivings actually playing out may serve to undermine judicial legitimacy. In such circumstances, it will be of little importance to, and impact in, the society that justice is in fact done. It will have failed to be 'manifestly done' as Lord Hewart CJ put it. For all these reasons, the *Sallah* test deserved the criticism it got. For the time in which the ruling was made, the reasonable suspicion of bias test would have fostered better relations between the public and the judiciary. Neither the *Sallah* decision nor its similarly decided predecessors (such as *Ex Parte Barimah* 1968 GLR 1051), have ever been able to brush off the criticisms they received concerning the lightly dismissed accusations of judicial prejudice.

Twenty-First Century Challenges

Fast forward to this first half of the 21st century. Many parallel developments are changing the way humans interact with each other and with their institutions. First there is technology, which is breaking new bounds every year. And unlike the inventions of the previous century, such as the telephone that diffused into Africa and the developing world slowly, the inventions of the 21st century are disseminating faster and faster, even to the least developed countries. The general pace of life and particularly of information and communications has multiplied several times over. The effect this has had on the judicial function has been by and large positive. For example, Ghana's automated high courts, known as the fast track division, even with its now near obsolete technological facilities, has become a highly patronised division. Even though specialised courts exist, this court of general jurisdiction is popular across the board because the automation has increased the speed of service there. E-versions of law reports are making the practice and study of the law more efficient, less painful. Half a century ago, Ghanaian law students would copy passages out of texts and law reports in order to have personal copies of them. Today, they take pictures of relevant pages with their camera phones. These developments have all had a salutary effect on the nature of, and access to, the justice system.

But as with everything else, it has brought new challenges that need to be addressed to prevent the weaknesses from undermining the benefits. The ease of information would not have by itself been problematic but for the modern fascination with other people's lives. Reality TV has become more pervasive than anybody estimated. From people seeking to pursue particular careers (eg American Idols), to people competing for culinary supremacy (eg Chopped), to people trying to lose weight (eg The Biggest Loser), to people doing mundane things like driving long distances (eg Truckers), to people merely showing off their possessions or bodies (eg MTV Cribs), right down to people doing nothing in particular for long periods (eg Big Brother), there is a reality show about

everything. And everyone can be part of it. Celebrities, ordinary people, gifted unknowns, adults, children. Nor can it be said to be 'a Western thing' that we, in Africa, merely consume without participating in. There are African reality shows everywhere. One of the more disturbing recent ones was 'The Pulpit, a reality show from Ghana, the purpose of which according to the network (TV3) allowed adolescents and young teens to 'showcase their charisma through preaching' and crowned the most promising child Christian preacher among the contestants.

Springing from these two phenomena, a third relevant phenomenon has been spawned: the practice of sharing the intimate details of one's life and following the lives of one's friends, acquaintances, friends and acquaintances of friends and acquaintances etc. quickly, easily and globally. Examples of this include the selfie culture and the various platforms that cultivate it (Instagram, Facebook, Whatsapp Viber etc), posting videos of bits of one's life on the internet, on Youtube, personal web channels etc, and thinking aloud via blogs and Twitter etc. The implications all this easy access to information, coupled with sensationalist narcissism and voyeurism, hold for a judge's ability (a.) to have no foreknowledge of a matter before her and (b.) to have no personal link whatsoever with any party or subject matter to a suit are significant.

Late in 2014, a well-known Accra-based TV personality by name Kwesi Kyei Darkwa alias KKD was arrested on a charge of rape. Less than twenty-four hours later, the news was public knowledge. Radio stations, websites, and other media houses began frantically ferreting out details of the sexual escapade in a mad race to know more, faster. The accused denied rape, contending that it was consensual sex. Meanwhile, a media house procured the CCTV footage from the hotel in which the incident happened and finding images of obviously consensual foreplay in the hallway announced to the world the falsity of the rape allegation. Intimate details were vividly retold by media house after media

house. The footage is on Youtube. The tide of public opinion, originally firmly condemnatory of KKD turned. The information overload of this century is a real impediment to judicial isolation and thus, objectivity. Was the first time the Magistrate heard the facts really when the charge was read? If so, how did Her Worship achieve it? Would the ubiquitous public discussions of the complainant's 'folly and wickedness' have had any impact on the appeal to the Human Rights Court for bail? Though the complainant withdrew her complaint before the Human Rights Court ruled on the application, the concerns raised nonetheless merit discussion.

The voyeurism masquerading as community concern was even more dramatic in the Pistorius case. Not only was the killing hashed and rehashed in Technicolor, every possible nugget of information about his victim and their romantic relationship that could be found was unearthed and discussed ad nauseam. The trial received full live coverage with panel discussions and public messaging sections. There was even a cable TV channel dedicated to the Pistorius trial. During the sentencing proceedings, defence counsel called the public condemnation and rejection as victimisation and punishment that rendered formal hard treatment inequitable and unnecessary. The obligation to be a tabular rasa as far as a matter is concerned appears nigh impossible under such circumstances. Was Judge Masipa able to avoid all reportage of the event before she was assigned the case? Did she really succeed at insulating herself from the public reaction to the verdict? If not, how did she (did she?) manage to prevent it from influencing her sentencing decisions?

In light of these facts, the question of how a judge avoids contravening the ban on foreknowledge of facts becomes a weighty one. It no longer suffices to keep one's distance from interested parties. It has become less easy to disavow a personal connection with a party; he might be your 'Facebook friend' or a 'Facebook friend' of your 'Facebook friend'. Suspicion of bias hinged on any of these

facts could be quite reasonable. Nevertheless it could, and it is submitted that it will increasingly become, disconnected from the real chances of prejudice operating on the judge. For example, discovering that the judge previously 'liked' (ie endorsed) pictures of a party to one's suit on Facebook could be deeply disconcerting. But the judge could have 'liked' it simply because of a third party in the picture. Perhaps she was appreciating the quality of the photography. Requiring such a judge to recuse herself on these facts would be ridiculous, though the party's feeling of unease would not be in itself absurd.

With this state of affairs, it is submitted that the test of real likelihood of bias raises the bar to the appropriate height. The test does not now, as it did then, demand near certainty of bias. Instead, it compels parties to look beyond the superficial familiarity with persons and facts, so prevalent presently, to establish reasonable grounds for believing that a live connection with a party or subject matter, in fact capable of sowing prejudice in the judge exists. It is not suggested that the degree of intimacy should now count. Rather, it is being advocated that the authenticity of the relationship be established. Likewise, it is advocated that actual foreknowledge of relevant facts rather than general accessibility of the information should be the critical component of a successful case against bias. Otherwise, Facebook, entertainment news segments, Instagram and the like are apt to become tools of judicial reputation/character-assassination.

It Is Only A Matter of Time

The scope of the problem discussed in this piece has not yet been fully appreciated in Ghana. Part of the reason for this lack of concern in Ghana is that our judicial officers are generally older than the proliferation of these new technologies. Consequently, their use of, and interaction with, new technologies is not extensive. 60% of Ghana is still rural according to the 2010 population and housing census. The predominance of rural environments, coupled with the workload

volume and infrastructural handicaps facing the sub-region have slowed down the rate at which life here has become dependent on information technologies and trends of popular culture. Few Ghanaian judges have active - or even dormant - Facebook pages, blogs, Twitter, Instagram, Foursquare, Hangout and other such social platform accounts. Similarly, it is plausible to assert that judicial patronage of internet gossip, reality shows, live or even reported coverage of court proceedings in Ghana is very low. In the result, the negative connotations that these developments portend for the judicial obligations of natural justice have not become pressing.

But this state of affairs will not continue for very much longer. The next generation of Ghanaian, and indeed, West African judges belonging, as they invariably will, to the educated, Google-reliant, instant-messaging strata of society, will have a long trail of contact with innumerable persons - most of whom they may not have interacted with recently, and in some cases, may have never met. Their network will stretch across more places than they have ever been to.

The Need For Resilient Institutional Checks Against Unfounded Bias Allegations

It is submitted that the test of real likelihood of bias as put forward by the court in the *Sallah* case should be held on to in Ghana and adopted in the sub-region. By raising the threshold to objective standards, it excludes the large spectrum of circumstantial evidence easily assembled in these times, which while prima facie convincing, holds no water on closer examination. The sensationalism which is all the time seeping deeper and deeper into popular culture, can very easily hijack the judicial process if level-headedness is not forcefully inserted into the functioning of the system. Thus the *Sallah* test will say to parties requesting recusals, 'this Facebook trail or Twitter comment may suggest a relationship with the other party or a foreknowledge of facts. But is that really the case? Or does it just look like it is?'

It is not suggested that the stringent *Sallah* test no longer carries the potential for abuse it was accused of bearing in times past. Indeed the effortlessness with bias may be simulated could well lead to a judicial tendency to make light of bias applications. However, it is sincerely believed that in the prevailing conditions, the *Sallah* test will go a significant distance to ensure that the rules do not become a default technique for drawing out suits, manipulating panel compositions or paralysing the courts. The self-same information disseminating tools and trends which make the impression of bias so easy to imitate make an injustice easy to bring to the attention of the public. This will act as an effective check on the court when it is faced with an application for recusal.

Additionally, a firm Supreme Court can assert active control over judicial officers' application of the test to minimise its potential for thwarting justice. For their part, the Ghanaian Supreme Court has shown inclination to hold the Bench to the highest standards of detachment. In *Ex parte Agbesi Awusi I & II* ([2003-2004] SCGLR 864) the Supreme Court issued both a prohibition and a scolding to the judge who descended so deep into the arena. The Supreme Court's stern tone in the Agbesi Awusi case has become a reminder to the judicial corps that the Supreme Court will be firm about professional standards in the exercise of judicial functions even by Superior Court judges. Such monitoring will contribute meaningfully to keeping the high level of proof required by the real likelihood test from becoming a shield from accountability for judges.

Conclusion

Natural justice will be no less important in the future than it has been in the past. However, the burden it puts on a judge to present an impartial front to the public is much heavier and will continue to grow as times and human behaviour change. Technology and its impact on information dissemination have rendered the task of convincing all parties of one's detachment as an adjudicator herculean. It is submitted that the *Sallah* test returns the

hurdle back to a reasonable level for the judge who has to overcome it. For the party who seeks reassurance, the real likelihood of bias test obliges him to exert himself to confirm the veracity of appearances. Thus, it does not actually impose a higher degree of familiarity or foreknowledge than the reasonable suspicion test. It merely addresses the question which facts establish that degree and in so doing adapts the means of making a claim of bias to the realities of our time. This method of parsing chaff from really damning events is commended to all jurisdictions in the West African sub-region.

The potential for abuse or misuse of *Sallah*'s real likelihood of bias test to deny parties the fair hearing to which they are entitled still remains. Nevertheless the supervision of a truly independent Supreme Court, particularly in a republican order, will limit the incidence of such cases. It is therefore submitted that the *Sallah* test of real likelihood of bias after three decades of unsuitability, has finally found a time to which it belongs; the 21st century. It is hoped that the Ghanaian courts will stick firmly to it and in so doing protect the judicial process from unnecessary attack while still being bound to possess and project utmost integrity.

BECOME A CMJA INDIVIDUAL MEMBER TODAY

BENEFITS OF MEMBERSHIP

- You will be able to enhance your judicial knowledge via your own personal copies of the Commonwealth Judicial Journal (CJJ) and Electronic Newsletter both produced twice a year. The CJJ contains learned articles about developments in the legal and judicial fields. The electronic Newsletter contains information about the work and activities of the Association.
- You will be able to exchange views and experiences with like-minded individuals throughout the Commonwealth through the CMJA's network by using the CMJA's Membership Area and Message board as well as gaining access to reports produced by the CMJA from their conferences.
- You can contribute to the advancement of the rule of law in the Commonwealth by providing articles for publication in the CJJ or CMJA News or in the Gender Section Newsletter.
- You can support the advancement of the independence of the judiciary and the good administration of justice through the CMJA which is accredited with the Commonwealth and represents the judiciary when judicial independence is under threat in a Commonwealth jurisdiction. of the CMJA.

For further information on becoming an individual member go to <http://www.cmja.org/joinus.html> or contact the CMJA Secretariat on +44 (0)207 976 1007 or via email: info@cmja.org

‘WHAT’S IT ALL ABOUT, THEN’: FROM MAGNA CARTA TO THE ‘NOTWITHSTANDING CLAUSE’

Hon. Martin R. Taylor, Q.C., Hunter Litigation Chambers, Vancouver, British Columbia, Canada. Previously, Judge of the Supreme Court of British Columbia and of the British Columbia Court of Appeal. This article (in a slightly different version) first appeared in the November 2015 edition of the *Advocate*, a publication of the Vancouver Bar Association. It is republished with permission of the author and the Vancouver Bar Association.

Abstract: *This article considers that the promises made in Magna Carta stand today for the benefit of all without discrimination, as an assurance now of the fundamental principles identified with the rule of law. The task of the courts is to ensure that they not be overridden except by the demonstration of democratic consent required by the constitutional amending formula on behalf of all for whom they stand. The article concludes that, with acceptance by the Supreme Court of Canada, that essential rule of law principles founded in Magna Carta may be implied within the written constitution, we can be confident that the courts in Canada will perform this function for the centuries that remain.*

Keywords: Rule of law – Magna Carta – Canada – constitutional rights – ‘notwithstanding clause’

Introduction

Recognized at once by the driver when getting into a London taxi, we are told, Bertrand Russell, philosopher, mathematician and anti-nuclear activist, was asked: “well, what’s it all about then, gov”; we don’t know in how many words Russell answered, but had it been the equally-famous Lord Denning there would surely have been only two: “Magna Carta”.

At the opening of the Vancouver Law Courts in September 1979 Lord Denning said that Magna Carta “founded the rule of law, not only for England but for all the territories to which the settlers from England had gone”. This was a statement mirrored three years later in the preamble to the Charter of Rights and Freedoms, that “Canada is founded upon principles that recognize...the rule of law”, or possibly that recognize “the supremacy of the rule of law” because the Charter speaks of “the supremacy of God and the rule of law”.

The Charter was enacted by the Westminster Parliament in 1982 as part of Canada’s new Constitution Act along with a formula under which all future constitutional amendments are to be enacted in Canada—usually with consent of the Canadian Parliament and the legislatures of seven of the 10 provinces having at least 50 per-cent of the country’s population. As a condition of support for the 1982 constitutional changes several provinces insisted that most of the rights and freedoms guaranteed by the Charter nevertheless be subject under s. 33(1) to the right of Parliament or a legislature at any time to enact statutes having force for indefinitely renewable five-year periods which may offend a Charter provision but contain a declaration that they shall operate “notwithstanding” that provision.

The celebration of the 800th anniversary of Magna Carta, and of the fundamental freedoms which have since long before the Charter been associated with Magna Carta and the rule of law, highlighted the significance of s. 33(2), which provides that any statute containing such a “notwithstanding” clause shall have “such operation as it would have had but for the provision of the Charter referred to in the declaration”.

The Status of Magna Carta

At the opening of the Vancouver Law Courts, Lord Denning mentioned the two most famous provisions of *Magna Carta*: (i) that no-one shall be deprived of freedom or possessions except by lawful judgment of their peers (s.39), referring primarily perhaps to the criminal process, and (ii) that to no one shall justice be sold, denied or delayed (s.40), drawing no distinction between criminal and civil processes (the references to Magna Carta here and later are to a translation of the 1215 document

reproduced in Arlidge and Judge, '*Magna Carta Uncovered*'). .

These, said Lord Denning, are the foundation on which the law is administered today both as between individuals and between individuals and the state.

The constitutional importance of *Magna Carta* lies in its acceptance that the Crown is itself subject to law established for the most part by custom and also bound to administer the law fairly, but neither in England nor Canada is *Magna Carta* itself treated as a constitutional enactment. This makes sense, if only because most of *Magna Carta* is concerned with "ordinary" law, "Crown" law or "administrative" law, not with what could be called "constitutional" law. Insofar as *Magna Carta* deals with non-constitutional law--for instance, forestry and fishing--some of its provisions have effect in Canada today as part of the ordinary common law and are subject to change by ordinary federal or provincial legislation.

Of its 63 clauses, sections or "chapters", 13 are concerned primarily with criminal and civil justice, 10 with remedying of administrative abuses, nine with taxation and compulsory service, five with property rights, three with now-obsolete freedoms, five with the positions of widows, minors and heirs, the remainder with subjects as diverse as attachment for debt, estate administration and establishment of standard weights and measures.

Insofar as it establishes the rule of law, by its assurance of a fair trial and its acceptance that the sovereign is subject to the written and for the most part unwritten law, *Magna Carta* has come to be regarded in both countries as central to the "unwritten constitution", the "constitutional common law" or, as Lord Bingham puts it, the "constitutional landscape".

Walter Boytinck of our Bar, long-time champion of fundamental liberties in Canada, provided two memorable letters for the Law Courts Inn *Magna Carta* celebration.

In the first, written in 1959, Prime Minister Diefenbaker says that there is no need to re-enact *Magna Carta* because it already forms part of Canada's "unwritten constitution." In the second Mr. Chretien, writing in 1980 as Minister of Justice, gives an assurance that the "basic principles underlying" *Magna Carta* would be incorporated into our own

Charter and, as requested by Mr. Boytinck, that consideration would be given to including trial by jury.

In his apology to the Japanese Canadian community on behalf of the nation in 1988, six years after introduction of the *Charter*, Prime Minister Mulroney characterized the Second World War internment and dispossession of its members as a violation of their fundamental rights, another unqualified acceptance at the highest political level that fundamental liberties identified with *Magna Carta* had always been part of our unwritten constitution.

The *Charter* seems carefully worded to ensure (i) that it take away no fundamental right that may already exist in Canada, and (ii) that to the extent that s. 33 permits suspension of rights and freedoms this applies only to the *Charter* guarantees, and does not apply to any underlying constitutional right or freedom that might already have existed at the time of adoption of the *Charter*. It seems impossible that the *Charter* could be properly construed as intended to abrogate or cut down constitutional rights that might already exist.

Section 26 says: "The guarantee in this *Charter* of certain rights and freedoms shall not be construed as denying any other rights or freedoms that exist in Canada."

Section 33 (2) says that any statute in which a Section 33(1) declaration is made suspending *Charter* guarantees will have "such effect as it would have had but for the provision of this *Charter* referred to in the declaration." To the extent that the statute would violate any pre-*Charter* constitutional right, it would have no effect.

Implied Fundamental Rights

There are three pre-*Charter* cases--*Alberta Statutes Reference* (1938 CanLII 1 (SCC)), *Switzman v. Elbing* (1957 CanLII 2 (SCC)) and *Saumur v. City of Quebec* (1953 CanLII 9 (SCC)) -- in which individual judges of the Supreme Court of Canada held that fundamental liberties associated with the rule of law, in those cases freedoms of belief, speech, and the media, lay beyond the reach of particular provincial legislation by reason of the nature of the constitution established by the *Constitution Act* of 1867.

Five years after introduction of the *Charter*, in *Ontario v. Ontario Public Service Employees Union* (1987 CanLII 71 (SCC)), a case based

on pre-*Charter* law involving freedom to engage political action, Mr. Justice Beetz for the first time adopted this view with support of a majority of the Court, a decision of profound potential importance.

If the s. 33 “notwithstanding clause” were to be invoked in a matter of national consequence, these cases will assume renewed significance. At their heart is a view of the Westminster system, contrary to that of Professor A.V. Dicey, which holds that “supremacy of parliament” as a principle of our form of government relates to the absolute authority of parliament over the executive and other legislative bodies, not to the authority of parliament over the individual. This view reflects a belief that the distinguishing feature of the system is not majority rule, which we share with both free democracies and populist autocracies, but rather the rule which denies government absolute authority over the individual.

The principles developed from *Magna Carta* and now recognized by the *Charter* as part of the rule of law contemplate that, except so far as justified in times of genuine emergency, certain liberties cannot be abrogated by ordinary legislative vote.

The 1938 *Alberta Statutes Reference* involved measures that included the 1937 *Alberta Accurate News and Information Act* which would impose penalties on newspapers for failure to publish material provided by the government, or failure to disclose the sources of other information published. These included fines, indefinite suspension of publication and prohibition on publication of information emanating from designated persons.

The Supreme Court of Canada avoided the fundamental issue directly raised. It held the Act to be *ultra vires* as part of a legislative scheme for introduction of monetary reforms which invaded federal fields of banking and trade and commerce.

But Chief Justice Duff, supported by Mr. Justice Davis, held in *obiter dicta* that the Act would in any event also be *ultra vires* as a measure interfering with the freedoms of public discussion and debate essential to the operation of the constitution contemplated by the Act of 1867, and thus necessarily “not exclusively a provincial matter”.

Fifteen years later in *Saumur*, the Court dealt on non-constitutional grounds in 1953 with conviction of a member of the Jehovah’s

Witness sect for distributing religious material without police permission, a decision memorable for *dicta* of Mr. Justice Ivan Rand again invoking the nature of the constitution contemplated by the *BNA Act*.

Four years later, in 1957, the Court dealt in the *Switzman* case with the validity of the *Quebec Communist Propaganda Act*, the once-famous Quebec “Padlock Law”.

Five members of the Court found the legislation *ultra vires* as an invasion of the criminal law field. Mr. Justice Rand, a Canadian judicial immortal, relied again on the nature of the 1867 constitution as embodying parliamentary democracy “with all its social implications”. The extent to which political action was capable of legislative regulation would have to “await future consideration”, said Mr. Justice Rand. It was enough for the present purpose that this did not fall within the legislative jurisdiction of a province. Mr. Justice Kellock and Mr. Justice Abbott concurred, the latter at last explicitly adding what had to be said: “*Parliament itself could not abrogate this right of discussion and debate*”.

So things stood for 20 years until, speaking for a majority of the Court in *Dupond v. City of Montreal 1978* (CanLII 201 (SCC)), a case involving municipal regulation of public gatherings, Mr. Justice Beetz delivered what seemed at the time a death blow to the idea of implied constitutional freedoms. None of the freedoms of speech, assembly, association, the press or religion, he said, “is so enshrined in the constitution as to be above the reach of competent legislation”.

We can only speculate why it was that no Supreme Court majority was prepared before 1982 to embrace the idea of fundamental rights, particularly following the Second World War and Canada’s ratification of the *Universal Declaration of Human Rights*--Eleanor Roosevelt’s *Magna Carta for the World*.. It seems inconceivable, after everything the country had fought for, that fundamental liberties in Canada could be at risk of ordinary legislative interference. But had the Court then recognized implied constitutional rights this would have involved a significant extension of judicial authority--it would have placed judicial decisions on the nature and scope of fundamental rights beyond democratic review in Canada.

The prospect of constitutional protection for fundamental freedoms seemed slim until, four

years after Dupond, Canada acquired both Charter and an amending formula.

The Impact of the Charter

The *Charter's* declaration that Canada is founded on principles associated with the rule of law supported Prime Minister Diefenbaker's 1959 statement that *Magna Carta* formed part of the "unwritten constitution", Prime Minister Mulroney's statement in 1988 to the Japanese-Canadian community, and the views of those Supreme Court judges who had held fundamental rights to be entrenched by reason of the nature of the constitution of 1867.

Five years after introduction of the *Charter* and--equally importantly--the amending formula, came the 'conversion', if such it was, of Mr. Justice Beetz in *OPSEU*.

Without reference to his decision nine years earlier in *Dupond*, speaking in *obiter dicta* but for all but one of the Court, Mr. Justice Beetz cited the *Alberta Statutes Reference* and *Switzman v. Elbing*, and venturing well beyond the field of political activity and associated rights involved in the case then before the Court, said:

"Speaking more generally, I hold that neither Parliament nor a provincial legislature may enact legislation the effect of which would be to interfere with the operation of this basic constitutional structure".

The words "*speaking more generally*" are significant. So, too, the emphatic words "*I hold*". Surely this was a reversal, at least a clarification, of the view expressed in *Dupond*.

His reasons suggest that Mr. Justice Beetz had in mind the potential frailty of the "guarantees" granted by the *Charter* of fundamental rights, many of these being subject to suspension by ordinary legislation under s. 33--even the freedom of thought. "Quite apart from *Charter* considerations", said Mr. Justice Beetz, "legislative bodies in this country must conform with these structural imperatives, and can in no way override them".

Insofar as these views might affect the operation of s. 33--the *Charter's* 'elephant in the corner'--Mr. Justice Beetz was particularly careful in his choice of words, and may one day be found to have been particularly perceptive (

The case before the Court had been argued on pre-*Charter* law, said Mr. Justice Beetz, but

reliance in future would normally be placed on freedoms guaranteed by the *Charter* which were broader than those inherent in the structure of the constitution. Implied rights would not, it seemed, necessarily defeat a s. 33 over-ride, but the effect of a s. 33 override might be restricted to the area of judicial interpretation or application of rights and freedoms on which differing views may reasonably be taken. It was only the central core of rights inherent in the nature of the constitution that would be protected by implied entrenchment.

This would be a high note, indeed, on which to end. But there were difficult passages still ahead, and such 20 years later was the decision in *Imperial Tobacco (British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49 (CanLII))*.

Imperial Tobacco and the 'Fair Civil Trial'

In *Imperial Tobacco*, the Court found in *obiter dicta* that the rule of law was lacking in clarity, incapable of creating rights additional to those recognized by the *Charter*, and probably ineffective to invalidate legislation, and since the *Charter* guaranteed a fair trial only in criminal cases there was no constitutional right to fair trial in civil proceedings.

The decision in *Imperial Tobacco* appeared to reject an important aspect of the rule of law which finds recognition in *Magna Carta*--the assurance that justice will be done in all judicial proceedings. This is expressly recognized in the Diefenbaker *Bill of Rights* of 1960 and had Mr. Boytynck mentioned fair trial in civil proceedings in his letter to Mr. Chretien in 1980, like the right to jury trial it would perhaps have found a place in our *Charter*.

In *Trial Lawyers Assn. of BC v. BC (the Vilardell case)* (2014 SCC 59 (CanLII)), the Court last year wrestled with its decision in *Imperial Tobacco*, and quite directly with the difficulty created in 1982 by provincial governments which determined there should be no constitutional agreement without the hastily-constructed s.33 'notwithstanding clause'.

In *Vilardell* the Chief Justice says for the majority in reference to civil proceedings that "legislation which effectively denies people the right to take their cases to court" raises concerns about maintenance of the the rule of law "that are not abstract or theoretical".

Without access to the civil courts, the Chief Justice says, “creation and maintenance of positive laws will be hampered as laws will not be given effect.” Since the Court had found in *Imperial Tobacco* that there are no fundamental rights except those identified in the Charter, the Chief Justice gives effect to the rule of law by reading ‘access to justice’ into s. 96 of the *Constitution Act*, through an implied term that court fees not be imposed in such amounts or on such terms as to deny would-be civil litigants of modest means access to the superior courts.

Mr. Justice Rothstein, in vigorous dissent, accepts that although s. 96 provides only for the appointment and remuneration of superior court judges it *does* go so far as impliedly to require that “the existence and core jurisdiction of the superior courts be preserved”.

But in applying what Mr. Justice Rothstein describes as “an unwritten principle”, although the rule of law itself is referred to in the preamble to the *Charter*, to expand the ambit of s. 96 so as to protect access for civil litigants, “the majority subverts the structure of the Constitution and jeopardizes the primacy of the written text.” The majority does that, he says, which it said in *Imperial Tobacco* could not be done, in using the rule of law to strike down legislation. It also created a right of access to the courts for civil purposes which, being outside the *Charter*, had stronger protection than the right to a fair criminal trial guaranteed by the *Charter* which is subject to qualification in s. 1 and suspension under s. 33.

Assuming that “access to justice” means more than access to a court, and means access to a judicial process applying principles of fundamental justice, the finding in *Imperial Tobacco* that there is no constitutional right to a fair trial for civil litigants may now prove not to have been the Court’s last word on this important subject.

Conclusion

As Lord Denning told us at the new Law Courts on that unforgettable occasion, the rights and freedoms developed from *Magna Carta* and now identified with the rule of law did not come to Canada with Confederation in 1867 or with the *Charter* in 1982.

These were held by the Privy Council as early 1722, almost a century and a half before Confederation, to belong to all settlers in

every British territory and their descendants; *Magna Carta* is said to have “followed the flag” so that, as an American commentator put it in 1764, “every British subject in North America” enjoyed the same “natural, inherent and inseparable rights of our fellow subjects in Great Britain” (Arlidge and Judge, ‘Magna Carta Uncovered’ (page 154)).

The first section of *Magna Carta* declares, in stirring language: “We have granted to all the freemen of our realm, for ourselves and our heirs for ever, all the liberties written below, to have and hold, them and their heirs, from us and our heirs”. The 61st section says: “We shall procure nothing . . . by which any of these concessions or liberties shall be revoked or diminished, and if any such thing is procured, it shall be null and void.”

Its closing words say: “Wherefore we wish and firmly command that . . . the men of our realm shall have and hold all the aforesaid liberties, rights and concessions . . . for them and their heirs of us and our heirs, in all things and places, forever.”

Little honoured in its time, many times breached over intervening centuries including here in Canada, the promises made in *Magna Carta* stand today for the benefit of all without discrimination, heirs to the King’s subjects of 800 years ago, as an assurance now of the fundamental principles identified with the rule of law. The task of the courts is to ensure that they not be overridden except by the demonstration of democratic consent required by the constitutional amending formula on behalf of all for whom they stand.

With acceptance by the Supreme Court that essential rule of law principles founded in *Magna Carta* may be implied within the written constitution, we can be confident that the courts in Canada will perform this function for the centuries that remain.

JUSTICE FOR CHILDREN IN BANGLADESH: DIVERSION

Hon. Justice M Imman Ali, Supreme Court of Bangladesh.

Abstract: *This article provides an analysis of the Children Act 2013 of Bangladesh and argues that international instruments on the rights of children have provided many beneficial provisions, ideas and suggestions that can be fruitfully utilised for the benefit of children who come into contact with the law. The Children Act 2013 of Bangladesh brings in much innovation, but will only be fruitful when the law can be properly and fully implemented. By motivating the community and with the help of the government in setting up the necessary infrastructure for the community-based alternatives and the informal methods of disposition, children in Bangladesh can have a promising future.*

Keywords: Bangladesh – Children Act 2013 – children rights – alternative sentencing – community service order

Introduction

Most of us have experience of what children are like, but we will have forgotten what we were like when we were children. Everyone is aware that a child is in every way a full-fledged human being and s/he is entitled to, more or less, the same rights as an adult. Unfortunately, children, because of their size, their inherent weakness and incomplete mental and intellectual development, are generally treated in a demeaning manner by adults. Sometimes our attitude towards children is truly shocking. Children are beaten, even killed for the pettiest misdemeanour. There is a stark difference in our behaviour towards children other than our own. We are less forgiving when it comes to the deviant acts of those ‘other’ children. When the child is not our own, we demonise him/her and seek the most severe punishment for them. There is an air of hostility and the resulting danger of exclusion, thus creating a cycle of deviant/criminal behaviour. If only we would stop to think why children act in the way they do and what we would do if it were our kith and kin that was in trouble.

Similarly, we readily take a near relative’s destitute child under our wings, but not so for a child whose origins we do not know, a child who is alleged to have, or is found guilty of having, committed an offence. We fear that s/he would bring trouble and misguide or lead astray our own children. We do not consider that a misguided child who has not had the opportunity of receiving proper guidance may benefit from our help and become good, just like our own child. We also do not have the foresight to consider that a misguided child, unless treated properly, is liable to become much more troublesome and a burden on society and more of a threat to our peace and security. Unless treated properly and brought back to our norms, today’s petty thief will become tomorrow’s robber and perhaps even a murderer.

Children do not come into contact with the law of their own volition. No child is born a thief, beggar or a street-child nor wants or expects to be a victim of any crime. We must realise that young offenders are usually also victims, not just of crime, but also of neglect and abuse. The reality is that children come into contact with the law as a direct or indirect consequence of the activities of adults. They become petty thieves due to poverty and lack of proper guidance from their parents. Children who come into conflict with the law are, in reality, invariably victims. They are usually victims of extreme neglect, exploitation, seduction or threats.

It is internationally recognised that children need protection. The United Nations Declaration of the Rights of the Child, 1959 indicated that, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.” It is with this view in mind that several international instruments have been formulated by the United Nations, including the Beijing Rules, Riyadh Guidelines, Havana Rules, Tokyo Rules and the Convention on the Rights

of the Child (“CRC”). These instruments provide guidelines as to how children should be dealt with when they come into contact with the law, either as offenders, in need of care and protection, victims or witnesses.

The underlying theme of all the above instruments is to ensure that children do not face the rigours of the criminal justice system and that they should not be kept in any kind of detention, and if detention is felt inevitable then it should be considered only as a measure of last resort and for the shortest appropriate period of time (Article 37(b) CRC).

Article 39 CRC enjoins the State to provide for the recovery and reintegration of a child of any form of neglect, exploitation, or abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment.

Article 40.3 CRC enjoins the State to establish laws, procedures, authorities and institutions specifically applicable to children alleged as, or recognised as having infringed the penal law, and in particular to have measures for dealing with such children without resorting to judicial proceedings.

Article 40.4 CRC suggests dispositions such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care.

Thus international law requires States to have a system for diverting children in conflict/contact with the law from the juvenile and criminal courts and also from detention in prison or other forms of institutionalised care.

Diversion from Judicial Proceedings

Diversion is routing someone or something from one path (usually harmful or detrimental) to another path (more beneficial). By definition it is planned and purposive, with a goal in mind. Often multidimensional investment is made for a greater long-term benefit for individuals as well as the community at large.

The Beijing Rule 11.1 provides that juvenile offenders shall be dealt with, wherever possible, without resorting to formal trial. Trial within the criminal justice system tends to stigmatise children as ‘criminal’, often leaving them marginalised and is liable to

leave an indelible adverse impression on their mind for the rest of their lives. Often they are acquitted after trial, but going through the trial, in our societal context, leaves them with a bad reputation for life. Rule 11.2 enjoins that Police, Prosecution or other agencies shall be empowered to dispose cases without formal hearings. In many countries there is provision for specially trained police units to deal with children, for example D11 in Malaysia, the Youth Offending Unit in New Zealand.

In New Zealand 75-80% of cases involving child offenders are dealt with by the police and criminal trial is avoided. Depending on the gravity of the offence alleged, the police may send the child home with a warning, or call the child’s parent/guardian and release the child on obtaining a bond. In case of a more serious offence, they may make a formal entry in a register and release the child. Where possible, the victim might be called and the matter settled with reparation and apology. This may be termed an optimum solution for all concerned as the matter is settled without leaving any acrimony or want for reprisal. In cases involving serious allegations, the matter is referred to other informal methods of disposition or to the Court.

In response to UNCRC Article 40.3(b) many countries have set up informal methods of disposition, such as Family Group Conferencing (FGC) in New Zealand. There is an official coordinator who convenes a meeting of the child offender and his parents with the victim and any other person whose presence is deemed beneficial. When the question of placing the offending child in the care of anyone other than the parent comes into the equation, then other close relatives of the child are included in the FGC, so that the family can decide what course of action would be best suited for the child.

In Scotland there is the system of hearing before a Children’s Panel, comprising three trained persons from the community who decide on the best course of action for the child. In Malaysia, the ‘Court for Children’ comprise one Magistrate and two other lay persons, of whom one must be a woman; and in India the ‘Juvenile Justice Board’ shall comprise a Magistrate, who must have knowledge or training in child psychology or child welfare,

and two social workers of whom at least one must be a woman, and the social workers must have been actively involved in health, education, or welfare activities pertaining to children for at least seven years.

In Bangladesh the new Children Act of 2013 has introduced, among other beneficial concepts enjoined by international instruments, the Child Affairs Desk and the Child Affairs Police Officer (CAPO) in every police station. Most important of all, the concept of diversion, including Family Group Conferencing (FGC) and Alternative Dispute Resolution (ADR) mechanisms, has been included in the statute and will be fully functional when the enabling Rules are passed by Parliament. The CAPO, with the assistance of the Probation Officer, has been given wide powers to effect diversion from the police station where the child is produced upon arrest. This method will enable dealing with children outside the criminal justice system, which has proven to be a beneficial system worldwide. It will serve the best interests of the children and at the same time save all the expenses necessary from beginning of the trial process till completion of the sanction ultimately awarded.

Diversion by the Prosecution

The prosecutor may decide in appropriate cases that the child should be dealt with other than by trial in the court system. This saves public money and conforms to international norms. Diversion should be considered as a matter of course in case of first offenders and where the offence alleged is not so serious. Again, other less formal methods of disposition may be chosen. Although Bangladesh does not have an independent prosecution service as for example in the UK, it is hoped that in time with awareness building, the Public Prosecutor's office will, in appropriate cases, consider diversionary measures rather than proceeding with arraignment and trial.

Diversion by the Judge

The Children Act 2013 of Bangladesh empowers the judge conducting the trial to decide at any stage of the proceeding that the case in hand is better suited for disposition through diversion (see section 49). In addition, in cases involving less serious offences, the

judge has the power provided by section 37 to refer the case to the Probation Officer for dispute resolution by bringing together the offender and the victim.

Alternative sentencing

The Children Act 2013 contains provisions for a different sentencing scheme for child offenders. Even in cases where the child offender is adjudged to have committed an offence carrying the sentence of death or life imprisonment, the sentence that may be awarded is one of detention for a minimum of three to a maximum of ten years in a certified child development centre (see section 34). For offences carrying a lesser sentence than life imprisonment or the death penalty, the maximum of three years' detention in a development centre may be awarded. Other than cases of murder, rape, robbery, dacoity, dealing in drugs or other heinous offences, the child may be released from the detention on reaching 18 years of age considering his behavioural improvement. Apart from cases of offences carrying the death sentence or life imprisonment, the court may, instead of sending the child to a development centre, discharge him with a warning or release him on issuing a probation order. The sentencing provision is, of course, not dependent on framing of Rules and is already in force.

Dispositions suggested by the Beijing Rules

There shall be a large variety of dispositions available to the competent authority allowing flexibility in order to avoid institutionalisation so far as possible:

- (a) care, guidance and supervision orders;
- (b) probation;
- (c) community service orders;
- (d) financial penalties, compensation and restitution
- (e) intermediate treatment and other treatment orders;
- (f) orders to participate in group counselling and similar activities;
- (g) orders concerning foster care, living communities or other educational settings

The scope of implementing some of the dispositions mentioned above already exists in Bangladesh, whereas the others might be profitably utilised if enabling laws were enacted. Thus, for example, community service orders could be introduced in our country as a way of disposition that would avoid institutional care for the child and involve the community in caring for the children.

As an illustration we may look at, in particular, the community service orders and other dispositions used in New Zealand (obtained from the internet):

Community-based sentences are Orders of the Court; they have mandatory conditions that must be adhered to. The Court can also impose additional conditions to them.

A representative from the local authority's social work department is allocated to supervise the order. If the offender fails to comply with the conditions of the order, they can be taken back to Court under breach proceedings.

Community Service Order

Community service requires the offender to perform unpaid work that benefits the community. As a comparison, we find that under Scottish law, a community service order (CSO) can only be made as an alternative to a custodial sentence.

The length of a CSO can vary from 80-300 hours. They are designed as a penalty, with the offender paying back the community for their crime; however, many offenders develop new skills and benefit from the experience.

Restriction of Liberty Order

With the advent of technological development, which has reached the far-flung village, other innovative dispositions may be put in place. One such method is commonly known as tagging. A restriction of liberty order (RLO) requires the offender to wear an unobtrusive transmitter (tagging device), which signals their whereabouts to a central computer. The computer will be alerted if the offender leaves the area they are restricted to or tampers with the transmitter. Under an RLO, an offender's movements can be restricted for up to 12 hours a day for a maximum of 12 months. Although we do not at present have the resources or the

level of technology required for such measures, we can hope that the rapidly advancing technologies will be available to our law enforcing agencies in the not too distant future.

These are in fact a reflection of the dispositions suggested in the Tokyo Rules.

Use of the Community

The Tokyo Rules provide for a set of basic principles to promote the use of non-custodial measures. They intend to promote greater community involvement in the management of criminal justice, specifically the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society (Rule 1.1 and 1.2). Consideration shall be given to dealing with offenders in the community avoiding as far as possible resort to formal proceedings or trial by Court (Rule 2.5). Public participation should be encouraged as it is a major resource and one of the most important factors in improving ties between offenders undergoing non-custodial measures and the family and community (Rule 17.1). Public participation should be regarded as an opportunity for members of the community to contribute to the protection of their society (Rule 17.2).

The possibility of utilising the community in Bangladesh is immense since the extended family system still exists and there is still a sense of communal co-operation particularly in the rural community. Each child belongs to his immediate community, namely his family, and a larger community, comprising his extended family, and even a wider community, his co-villagers. We also have the advantage of having the local government structure in place, the Union Parishad, with responsible government officials, including the Chairman and UP Members. In addition there will be respected persons within every community, for instance teachers, imams, doctors and the village elders etc. With a minimal amount of training in child psychology and relevant legal provisions, the 'community force' would be more than adequate to deal with any number of children coming into contact with the law. That would also help alleviate the problems faced due to paucity of probation officers.

The Riyadh Guidelines go one step further and provide methodology for preventing children from developing criminogenic attitudes. The underlying idea here is to engage and motivate the parents and the community to provide activities for the children that will develop their personality and good human characteristics and thereby prevent them from developing deviant behaviour. The guidelines expose the phenomenon that is labelling a young person as “deviant”, “delinquent” or “pre-delinquent” often contributes to the development of a consistent pattern of undesirable behaviour by young persons. The guidelines provide that community-based services and programmes should be developed for the prevention of juvenile delinquency. They enjoin governments to establish policies that are conducive to the bringing up of children in stable and settled family environments. Families in need of assistance in the resolution of conditions of instability or conflict should be provided with requisite services. Where attempts to create a favourable environment within the family or the extended family fail, alternative placements, including foster care and adoption, should be considered. Though ‘adoption’ in the Western sense is not allowed by Islam, there is no reason why concepts such as kafalah should not be considered in the Bangladesh context. The guidelines further provide that the communities should provide a wide range of community-based support measures for young persons, including community development centres, recreational facilities and services to respond to the special problems of children who are at social risk. Voluntary organisations and sports organisations should be created at the local level in order to engage the youth in projects and sports. Schools should be encouraged to remain open after hours to facilitate extra-curricular activities.

Alternatives to institutionalisation

Keeping children in detention centres or homes as a means of correction has the reverse effect. They tend to feel stigmatised and alienated and as a result they lose their self-esteem and develop anger and despondency. They often tend to self-harm. Putting destitute, abused and neglected children into institutional care results in negative effects on their personality, and makes a bad psychological situation even

worse. Moreover, children in institutions are at risk of physical and sexual abuse and also tend to develop into gangs, which tend to increase their criminogenic behaviour.

Conclusion

If our attitudes towards children in need of protection, including those who have developed deviant behaviour, change favourably, then there are great prospects ahead for all the children of our country. The international instruments have provided many beneficial provisions, ideas and suggestions that can be fruitfully utilised for the benefit of our children who come into contact with the law. Our new law also brings in much innovation and hope, but will only be fruitful when the law can be properly and fully implemented. By motivating the community and with the help of the government in setting up the necessary infrastructure for the community-based alternatives and the informal methods of disposition, one believes that the children of this country can have a great future. With a healthy and law-abiding youth population we can all look forward to a safe and secure society. Let us strive to do better for our children, as it is they who will carry on our legacy.

THE EMERGENCE OF A DUTY OF GOOD FAITH IN THE CANADIAN LAW OF CONTRACTS

David R. Percy QC, Borden, Ladner Gervais Chair of Energy Law and Policy, University of Alberta

Abstract: *In November 2014, the Supreme Court of Canada, in *Bhasin v Hrynew*, advanced two propositions concerning the law of contracts : (1) good faith contractual performance is a general organizing principle of the common law of contract; and (2) as a particular instance of this organizing principle, there is a common law duty to act honestly in the performance of contractual obligations. The purpose of this article is to analyze the decision in *Bhasin* and its implications. The article sets out the approach taken by the Supreme Court of Canada in this case and contrasts the direction that Canada has adopted with the approach of the courts in other Commonwealth jurisdictions. It concludes that, while most common law courts in the Commonwealth apply the existing range of contract doctrines and accord no separate role to the principle of good faith, the weakness of the common law is that it tends to deal with good faith issues only indirectly through devices, such as the interpretation of contracts. The adoption of an express duty of good faith forces courts to examine closely the types of conduct that they wish to discourage.*

Keywords: Law of contracts – interpretation – good faith – duty to act honestly – long-term relational contracts

Introduction

The law of contracts usually develops in relative obscurity. Even potentially far-reaching developments in the law of third party beneficiaries, which extended the range of people who can take advantage of contracts to which they are not parties, tended to pass without any public notice (see the Supreme Court of Canada trilogy of *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299; *Edgeworth Construction Ltd v ND Lea & Associates Ltd*, [1993] 3 SCR 206; *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3 SCR 108). It was thus remarkable in November 2014 that a contracts decision of the Supreme Court

of Canada featured in the pages of Canada's national press on consecutive business days (Jacquie McNish, "Supreme Court of Canada ruling makes honesty the law for businesses", *The Globe and Mail*, (14 November 2014), online: <www.globeandmail.com>; Adrian Myers, "Supreme Court ruling on contracts will spark more lawsuits – and that's okay", *The Globe and Mail*, (17 November 2014), online: <www.globeandmail.com>). Within a week, just about every Canadian law firm had published client newsletters and bulletins on the implications of the decision. What was the cause of this unusual excitement? On November 13, 2014, in *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 SCR 494 at para 33 [*Bhasin* (SCC)], the Supreme Court of Canada advanced two propositions. First, good faith contractual performance is a general organizing principle of the common law of contract. Secondly, as a particular instance of this organizing principle, there is a common law duty to act honestly in the performance of contractual obligations.

While this landmark decision caused shockwaves in Canada, other Commonwealth countries are still wrestling with the role played by good faith. In England in 2013, the Court of Queen's Bench took an approach that proved to be remarkably similar to that adopted by the Supreme Court of Canada, but there is little support for the general principle of good faith at appellate levels. In Australia, there are signs of a greater role for good faith, although the courts see the agreement of the parties as its only source.

The purpose of this article is to analyze the decision in *Bhasin* (SCC) and its implications. Section B will set out the approach taken by the Supreme Court of Canada and Section C will set out a critical assessment of its impact. Section D will contrast the direction that Canada has now adopted with the approach of the courts in England and Australia. Section E will offer some concluding remarks on this development.

Bhasin v Hrynew

The Nature of the Dispute

Like many cases that involve the extension of contract doctrine, the controversy in *Bhasin* (SCC) came close to a number of established categories of contractual relief without falling precisely into any of them. In particular, the agreement in question was very similar to a franchise agreement, which would have been governed by a statutory duty of fair dealing under provincial law, but it lacked some essential elements of a franchise. It was not a contract of employment, aspects of which can attract the requirement of good faith performance in Canadian law, but it contained some elements akin to employment. Instead, it was an ordinary commercial contract, characterized as a dealership agreement.

The case involved Canadian American Financial Corp. (“Can-Am”), which marketed education savings plans to investors through individual dealers known as enrolment directors. Bhasin had been a successful enrolment director for Can-Am since 1989. Under his last dealership agreement, signed in 1998, Bhasin was obliged to sell Can-Am investment products exclusively and owed a fiduciary duty to Can-Am. Can-Am owned all of its dealers’ client lists and maintained responsibility for branding and for policies that applied to all enrolment directors. It was also a term of the dealership agreement that Bhasin would not dispose of his dealership without Can-Am’s consent, which could not be unreasonably withheld. The agreement extended for a term of three years and was automatically renewed unless either party gave six months’ notice to the contrary.

Hrynew was also a Can-Am enrolment director. He had proposed a merger of his business with Bhasin on a number of occasions, but Bhasin was not interested. In 1999, the Alberta Securities Commission began to question whether Can-Am’s enrolment directors were in compliance with provincial securities legislation. The Commission required Can-Am to appoint a single provincial trading officer (“PTO”) to ensure that its enrolment directors were acting in compliance with securities laws. Can-Am appointed Hrynew to that position, but Bhasin and another enrolment director objected to allowing Hrynew, a competitor,

to review the confidential business records of their dealerships.

Bhasin’s refusal to allow Hrynew to audit his records led Can-Am to provide the required six months’ notice that the dealership agreement would not be renewed when it reached its termination date in 2001. As a result of the non-renewal, Bhasin lost the value of his business. At first sight, the case appeared to involve a decision on the part of Can-Am to exercise its unfettered right not to renew the agreement. Under normal principles, this decision would be difficult to contest, unless Can-Am’s conduct fell within one of the established principles of contract law that allowed relief, such as misrepresentation or estoppel.

Two major factors took this case out of the ordinary mould. The first involved Can-Am’s conduct in appointing Hrynew as PTO. Can-Am tried to overcome Bhasin’s objections by stating that the Securities Commission had rejected the use of an outsider in this position and assuring him that Hrynew was obliged to treat all information confidentially. Both of these assertions were untrue (*ibid* at para 12). The second involved Hrynew’s persistent attempts to take over Bhasin’s business through a merger. Unknown to Bhasin, Can-Am had presented the Securities Commission with a new structure for its Alberta operations which clearly showed Bhasin working for Hrynew’s agency. When Bhasin first questioned a company representative with respect to a possible forced merger, the representative equivocated and did not tell him the truth that, as far as Can-Am was concerned, the merger was then a “done deal” (*ibid* at paras 12, 100). These factors led the trial judge to find that Can-Am had exercised its rights under the non-renewal clause in a dishonest and misleading manner and for an improper purpose (*ibid* at para 26). However, the judgement encountered difficulties when it came to explaining how these factors could create a contractual liability on the part of Can-Am.

The trial judge found that the dealership agreement did not require good faith performance as a matter of law, because it was neither a franchise agreement nor an employment contract. However, it was closely related to these established categories

and, according to the trial judgment, this allowed the court by analogy to imply a term as a matter of law that required good faith performance on the part of CanAm (*Bhasin v Hrynew*, 2011 ABQB 637, 96 BLR (4th) 73 at paras 72, 86 [*Bhasin* (QB)]). Alternatively, the trial judge was willing to imply a term of good faith performance in order to give business efficacy to the agreement (*ibid* at para 101).

The Court of Appeal gave short shrift to these reasons. It found that there is no general duty to perform contracts in good faith and that the dealership agreement was not an employment contract. Even if it had been an employment contract, in the view of the Court of Appeal, the Canadian version of the duty of good faith in employment contracts applies only to the manner in which the contract is terminated, not to the reasons for termination (*Bhasin v Hrynew*, 2013 ABCA 98, 362 DLR (4th) 18 at para 27 [*Bhasin* (CA)]). The trial judge's decision to imply a term of good faith performance did not satisfy the normal tests for the implication of a term and, even if it did, it was barred by an entire contract clause in the dealership agreement, which declared that there were no representations, terms and conditions other than those expressly contained in the dealership agreement (*ibid* at para 29. The entire agreement clause is set out at para 23).

The Recognition of a Duty of Good Faith

The emphatic decision of the Court of Appeal neatly crystallized two competing views of the role of good faith in contracts and placed them squarely before the Supreme Court of Canada in a case that involved dishonest and misleading conduct by one of the parties. The conventional view was that good faith is required in certain recognized relationships, such as franchises, employment and fiduciary relationships, and in certain established categories of contract doctrine. As the case did not involve one of the recognized relationships, the question was whether it fell into one of the established categories. The court adopted a tripartite classification, first suggested by Professor McCamus, of the established categories of good faith that exist in Canadian law. The courts have readily found a duty of good faith performance in three broad situations : (1) where the parties must cooperate in order to achieve the objects of the contract;

(2) where one party exercises a discretionary power under the contract; and (3) where one party seeks to evade contractual duties (John D McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law Inc, 2012) at 840-856, cited in *Bhasin* (SCC), *supra* at para 47).

Can-Am's decision to provide six months' notice that it would not renew the contract did not fall into any of these categories. The Court accepted Can-Am's argument that its decision was not an exercise of contractual discretion, but that it was simply relying on an unfettered right of termination (*Bhasin* (SCC), *supra* at para 72). As a result, in order to find Can-Am liable, the Court was required to recognize an overriding principle of good faith that was not limited to certain types of relationships and to existing categories of liability.

The Court found that the existing categories of liability were examples of the existence of an underlying organizing principle of good faith, which requires that parties "generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily" (*ibid* at para 63). It went to some lengths to emphasize that an organizing principle differs from a legal rule. The principle is a standard that underpins specific contractual doctrines, that explains existing law and helps it develop in a coherent and principled way. It requires a contractual party to have appropriate regard to the legitimate contractual interests of its contractual partner to the extent that it must not undermine those interests in bad faith (*ibid* at paras 64-65). Although the principle generally applies in the three existing categories described by Professor McCamus, it can extend beyond them "where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs" (*ibid* at para 66).

The Court found that the case before it did not fall into any of the existing categories. However, it chose not to find liability in the conventional way, which might have pointed out a close relationship to an existing case of liability or a small extension of an existing principle. Instead, the Court held that there was a common law duty of honesty in contractual

performance that, in its view, flowed directly from the organizing principle of good faith. The duty of honest performance requires the parties not to lie or to knowingly mislead each other about matters directly linked to the performance of the contract. The duty of honest performance does not arise from the parties' intentions or from an implied term of the contract, but is imposed by the court as a minimum standard of conduct. In *Bhasin* (SCC), the defendant's breach of duty resulted from its failure to be honest in exercising the non-renewal clause and its general dishonesty relating to the performance of the contract (*ibid* at paras 94, 108).

In order to gain some appreciation of the type of conduct that will amount to dishonesty, it is important to outline the facts which the Court found to constitute a breach of the duty of honest performance. They arose from two circumstances. The first involved Can-Am's comments relating to the company's position on a forced merger of the agencies separately owned by Bhasin and Hrynew and on the renewal of Bhasin's dealership agreement. Can-Am consistently failed to deal honestly on these matters and, when questioned about its intentions with respect to the merger in August 2000, Can-Am equivocated and failed to tell Bhasin the truth that the merger was in fact a "done deal." The second instance of dishonesty consisted of Can-Am's untruthful statements that the Securities Commission would not allow the appointment of an independent PTO and that Hrynew was bound by a duty of confidentiality in any audit of the agencies owned by Bhasin and others.

The Court found that, as a result of these breaches, Bhasin suffered damages that were assessed on the basis of the finding of the trial judge that, but for Can-Am's dishonesty, Bhasin would have acted so as to "retain the value in his agency" (*ibid* at para 109), rather than see it effectively turned over to Hrynew as a result of the nonrenewal of the dealership agreement. The Court skirted the problem created by the inability of Bhasin to dispose of his dealership without Can-Am's consent by pointing out that in the assessment of damages, the trial judge had taken into account the difficulties created by Can-Am's "almost absolute controls" on its directors and the fact that it owned their books of business (*ibid* at para 109). Although it is difficult to

imagine how Bhasin might have been able to sell his dealership, the Court adopted the finding of the trial judge that, notwithstanding these difficulties, its value around the time of non-renewal was \$87,000 (*ibid* at para 110).

An Initial Assessment of a Generalised Duty of Good Faith Performance

The unusual coverage of the *Bhasin* (SCC) decision by mainstream media provided a sign that this was far from a run of the mill contracts case. A deluge of academic commentary emphasizes that the case has effected a substantial change in contract doctrine and created a major practical impact on business and contract planning. The implications of the decision can be assessed under four broad headings. Firstly, it affects the traditional concept of freedom of contract and the ability of the parties to stipulate the rules that will apply to their relationship. Secondly, it contains a hint that the principle applies mainly to long term contracts. Thirdly, it creates an indeterminate principle that is described only in general terms in the judgment. Fourthly, it recognizes that the principle that the parties may modify the principle, but requires an examination of how the parties can limit their good faith obligations. Each of these issues will be addressed in turn.

Freedom of Contract and Party Autonomy

The Court's recognition in *Bhasin* (SCC) of an overriding principle of good faith in the performance of contracts at first sight creates a conflict with the idea of freedom of contract. The parties did not stipulate a term of good faith and the Court was at pains to emphasize that the duty did not arise from a term implied as a result of the parties' supposed intentions. Instead it was implied in law, as an obligation imposed by the Court.

The apparent violation of freedom of contract has been the source of some of the most vociferous criticism of the decision, but much of this criticism is overblown. It neglects the fact that the idea of contract as a pure manifestation of the intentions of the parties had long vanished and was probably never fully realized. Although in the nineteenth century contract law was viewed "principally as the facilitation of voluntary choices by giving them legal effect" (Hugh Collins, *The Law of Contract*, 4th ed (London: LexisNexis

UK, 2003) at 6), even at that time the parties did not enjoy complete contractual autonomy. Their autonomy was undermined by the fairness principles that underlie the doctrines of duress, undue influence and unconscionability. Senior courts have recognized that the rationale of many other contractual principles also include elements of fairness. The Australian High Court has stated that the rationale of estoppel is “good conscience and fair dealing” (*Walton’s Stores (Intrastate) Ltd v Maher*, [1988] HCA 7, 62 ALJR 110 at 129, 138, described by Steyn, “The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?” (1991) 6 Denning LJ 131 at 134). The Supreme Court of Canada has recognized that fairness also plays a role in the process of interpreting contracts and implying terms (*Bhasin* (SCC), supra at para 42). The view that *Bhasin* (SCC) involved an unwarranted interference with freedom of contract also fails to take into account the Court’s careful attempt in the judgment to limit the intrusion of the duty of good faith on the autonomy of the parties. This attempt took three principal forms. The Court made an effort to define of Can-Am’s duty with a degree of precision. It hinted that a generalized duty of good faith may not have a role in all types of contracts and it emphasized that the parties retained a limited ability to determine their own standards of acceptable conduct. Each of these features will be examined in turn.

The Nature of Can-Am’s Duty

A major ground for the decision of the Alberta Court of Appeal to grant Can-Am’s appeal was that a finding of liability would be inconsistent with the provision that allowed either party to terminate the dealership agreement prior to the expiry of the three-year term (*ibid* at para 28). The judgment of the Supreme Court also carefully recognizes the primacy of the non-renewal clause. The Court emphasized that Can-Am retained an unfettered right to terminate the contract. Its breach of good faith lay in its failure to deal honestly with Bhasin in exercising its right of termination. Can-Am was found liable for its dishonest conduct, not for its decision not to renew the dealership (*ibid* at para 103). The Court’s finding did not override any rights stipulated in the contract, but merely prevented Can-Am from exercising those rights in a dishonest manner.

The Type of Contract in Question

By the time of termination, the relationship between Bhasin and Can-Am had existed for 10 years. The court recognized that “the general organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange” (*ibid* at para 69). This paragraph hints that good faith might have a different role in a long-term contract than in a one-off transaction.

There is considerable support for the idea of that good faith may be required in the performance of a contract that governs a long-term relationship, commonly known as a relational contract. As discussed earlier, the dealership agreement between Bhasin and Can-Am did not fit within any of the traditional categories, such as a fiduciary relationship, which would result in the imposition of a duty of good faith. However, the parties had made a substantial commitment to a relationship that had endured for a decade and their agreement can be readily classified as a relational contract. In the English case of *Yam Seng Pte v International Trade Corporation Ltd*, [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321 at para 142 [*Yam Seng*], Leggatt J commented that relational contracts:

“may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties’ understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long-term distributorship agreements.”

Although the reasons for judgement in *Bhasin* (SCC) refer less directly to the existence of a relational contract than those of the court in *Yam Seng*, the dealership agreement clearly fits within the typical description of a relational contract. The notion of a relational contract arose from the work of Professor Ian Macneil. A relational contract is contrasted with a contract that arises out of a single exchange transaction, such as the cash sale of a bulk generic good, when there may be no further contact between the buyer and seller (David

Campbell, “Good Faith and the Ubiquity of the ‘Relational’ Contract” (2014) 77:3 Mod L Rev 475 at 480, citing Ian R Macneil, “Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a Rich Classificatory Apparatus” (1980) 75:6 Nw UL Rev 1018 at 1025–1027). Macneil explained the difference between the two types of contract by coining the obscure term “presentation” to describe the single transaction contract (Ian R Macneil, “Restatement (Second) of Contracts and Presentation” (1975) 60 Va L Rev 589 at 594). In the single transaction contract, the parties can be expected to identify and allocate the risks of nonperformance at the time of contracting. In contrast, in a long-term relational contract, there are barriers to identifying and allocating the various risks that might emerge over the life of the contract (Campbell, *supra* at 480)). Thus, when Bhasin and Can-Am entered their first agreement in 1998, neither of them could reasonably have foreseen the 1999 investigation by the Alberta Securities Commission or the possible appointment of a competitor with the power to audit Bhasin’s business. They certainly could not have foreseen that a merger between the agencies of Bhasin and his competitor might emerge as a possible resolution of the investigation. The parties could not realistically have dealt with this type of risk at the time of contracting, but they would be expected to deal with newly emerging risks as they arose in the manner described by Justice Leggatt. We cannot know how the parties would have dealt with unforeseeable risks, but in a relational contract it would be reasonable to expect that they would deal honestly with each other when they confronted the issues that occurred in 1999 (*Yam Seng*, *supra* at para 135, cited in Campbell, *supra* at 482).

It must be admitted that the existence of a relational transaction was not central to the decision in *Bhasin* (SCC). The court did little more than mention the difference between a relational contract and a single transaction contract. It merely pointed out that a duty of good faith might have different implications in the former. However, in its brief comment, the court relied on two academic sources that point out that the duty of good faith is particularly appropriate in relational contracts (*Bhasin* (SCC), *supra* at para 69, citing Angela Swan & Jakob Adamski, *Canadian Contract*

Law, 3rd ed (Markham: LexisNexis Canada Inc, 2012) at s §1.25; Bill Dixon, “Common law obligations of good faith in Australian commercial contracts - a relational recipe” (2005), 33 ABLR 87 at 94-95). It must also be conceded that the existence of the distinction between the two types of contract remains controversial at common law and is refuted by senior academic commentary (Ewan McKendrick “The Regulation of Long-Term Contracts in English Law” in Jack Beatson and Daniel Friedmann, eds, *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995) at 323) and judicial authority in England (*Baird Textile Holdings Ltd v Marks and Spencer plc*, [2001] EWCA Civ 274, [2001] CLC 99 at para 16, discussed in Campbell, *supra* at 477-478).

Despite this lingering controversy, there is a kernel of truth revealed by the brief comment of the Supreme Court of Canada. Courts are more willing to find a duty of good faith in a relational contract and it is safe to conclude that the long-term nature of the relationship was an important factor in the *Bhasin* (SCC) decision. In other cases, such as the English case of *Yam Seng*, which will be discussed in more detail below, the classification of the contract as relational was pivotal. It is unfortunate that the Supreme Court did not expand its discussion of the role of good faith in relational contracts. A more definitive treatment might well have limited the potential scope of the good faith principle and provided a degree of certainty that is only hinted at in the judgment.

Indeterminacy

The recognition of an organizing principle of good faith performance is necessarily vague. The Court provides some operational content when it describes good faith as exemplifying the notion that “in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner” (*Bhasin* (SCC), *supra* at para 65). The Court is aware of the danger of indeterminacy and made it clear that the principle must be developed in a way which avoids “ad hoc judicial moralism or ‘palm tree’ justice” and “should not be used as a pretext for scrutinizing the motives of the contracting parties” (*ibid* at para 70). It envisages that most

cases will fall within traditional relationships and existing categories but recognizes that the categories of good faith are not closed and that the principle of good faith will be developed “where the existing law is found to be wanting and where the development may occur incrementally in a way consistent with the structure of the common law of contract” (*ibid* at para 66).

The language relating to the development of good faith is both expansionary and cautionary. It bears some resemblance to the paragraphs in which Lord Macmillan uttered his famous words that “the categories of negligence are never closed” (*Donoghue v Stevenson*, 1932 AC 562 at 619). The clear indication is that the case lays out the organizing principle of good faith performance and leaves the task of putting flesh on the bare bones of the new doctrine to future courts. While this is probably inevitable, it does suggest a certain symmetry in the approach to the disparate subjects of Torts and Contracts. In marked contrast to Torts, the function of Contracts is more oriented towards planning than litigation. The object of the vast majority of contracts is to avoid litigation if at all possible. The open-ended discussion of the duty of good faith and the expectation that its full meaning will be revealed through subsequent cases suggests that *Bhasin* (SCC) creates more uncertainty than most contract planners would desire.

The Limitation of Good Faith Duties

The generalized approach to the definition of the duty of good faith performance is also reflected in the Court’s treatment of the extent to which the duty can be excluded, limited or defined by the parties. The decision of the Alberta Court of Appeal that *Can-Am* was not liable for any breach of the dealership agreement was explained in part by the entire agreement clause. The Court found that evidence of the parties’ expectations and assurances could provide no relief to *Bhasin* because the entire agreement clause prevented *Bhasin* from relying on any oral promises by *Can-Am*. It recognized that the clause barred only good faith obligations implied in fact, but took the traditional position that good faith obligations imposed by law were restricted to established categories of contract (*Bhasin* (CA), *supra* at paras 28-32).

The Supreme Court of Canada judgment on this point clearly highlights the extent to which the duty of good faith recognized by the Court departs from the traditional position. The Court imposed a generalized duty of good faith, manifested in a contractual duty of honest performance, as a principle of law that operates irrespective of the parties’ intentions. As the duty of honesty is a generally applicable doctrine of contract law it applies, like the doctrine of unconscionability, to all contracts and cannot be excluded by the parties (*Bhasin* (SCC), *supra* at para 75). Initially, this proposition seems to create a further challenge to the principle of freedom of contract because it suggests that the parties cannot stipulate the rules applicable to their own transaction if they contradict the good faith principle. The judgment provides two responses to this argument.

The first response is practical. The Court states that the duty of honest performance will interfere very little with freedom of contract, since parties will rarely expect that their contracts permit dishonest performance of their obligations (*ibid* at para 76). The second response envisages a continuing role that allows the parties to define the scope of honest performance and, in some contexts, to relax its requirements as long as they respect the minimum obligations that lie at its core. The Court suggested a possible model for this principle in the American Uniform Commercial Code (UCC) (*ibid* at para 77). Section §1-302(b) of the UCC states that:

“The parties, by agreement, may determine the standards by which the performance of [good faith obligations] is to be measured if those standards are not manifestly unreasonable.”

In practice, it is not unusual to find provisions which manage to fulfil this exact function, without embarking on a fruitless attempt to exclude liability for bad faith conduct. For example, it is common in commercial leases to stipulate that a landlord must consent to the assignment of the lease by a tenant. At least in Canada, this restriction is often accompanied by a statement that the [l]andlord’s consent to any assignment “may be arbitrarily withheld.” In principle, there is surely no reason why this clause should not be applied in ordinary circumstances. In a recent Ontario case, it was argued that such a clause was overridden by

the duty of good faith, but the argument failed on the ground that the tenant's factum had apparently conceded the validity of the clause. In any event, the judge was not persuaded that *Bhasin* (SCC) disentitled the landlord from relying on an express term of a contract negotiated by sophisticated parties (*Hudson's Bay Co v OMERS Realty Corp*, 2015 ONSC 4671 at paras 6,32). This comment is surely correct, as the tenant must be taken to understand the risk of an arbitrary refusal before entering the lease and there are good reasons why the landlord may require an unrestricted right to choose its tenant.

The Supreme Court's views on restricting the parties' ability to define the extent of their good faith obligations are discussed only in the context of limiting the duty of honest performance. It is as easy to understand why the court is reluctant to allow much deviation from honest performance as it is to envisage the difficulty of drafting a clause that would allow a party to perform a contract dishonestly. However, good faith is a much broader concept than dishonesty. The judgment sees the duty of honest performance as just one example of the more general principle of good faith. It may be relatively easy to judge whether a party has performed a contract dishonestly, but the absence of good faith is much more open to interpretation. In the case of the assignment of a lease, discussed above, it could be argued in some circumstances that, while the landlord's decision not to consent to an assignment was honest, it was nevertheless an exercise of bad faith. This can be illustrated by a fictitious example based loosely on the facts of a well-known Canadian case. In that case, the owner of a shopping centre enticed a department store to move from its existing premises, where it was the anchor tenant in a neighbouring mall, to the owner's shopping centre. As part of the transaction, the owner took an assignment of the existing department store lease, which still had a remaining term of 17 years and owner assumed all the obligations of the department store under the lease. It made no serious effort to further assign the lease or to sublet the former department store premises. Indeed, the owner was quite content to pay the rent and leave the former department store vacant. This greatly reduced customer traffic at the neighbouring mall, and

reduced competition for the owner's shopping centre.

On its real facts, the case was easy to resolve because the owner had entered into an agreement with the landlord of the mall to "use their best efforts" to lease the former department store (*Gateway Realty Ltd v Arton Holdings Ltd* (1991), 106 NSR (2d) 180 at para 80 (SC (TD)), aff'd (1992), 112 NSR (2d) 180 (CA) [*Arton* (CA)]). However, if the best efforts clause had not existed, the original department store lease would have allowed the owner to leave the premises vacant or to assign them to any third party. At the trial level, Kelly J. found, in the alternative, that the owner of the shopping centre was in breach of an obligation to exercise its discretion to sublease the premises in a reasonable manner and in good bad faith. The Nova Scotia Court of Appeal affirmed the decision because failed to use its best efforts to lease the premises and did not comment on the applicability of a duty of good faith performance.

If this case were to recur today, and if there were no best efforts clause, *Bhasin* (SCC) leaves open the question whether the wording of the contract entitled the owner to take actions which advanced its own interests and "had the effect of literally destroying the viability of" the neighbouring mall by leaving its flagship premises vacant for a very lengthy period (*Arton* (CA), *supra* at para 5).

The judgment in *Bhasin* (SCC) is unhelpful on this point. It recognizes that the parties can define the scope of honest (and good faith) performance as long as they respect its core requirements, but provides little further guidance except by stating that the governing principle is similar to that found in §1-302(b) of the Uniform Commercial Code set out above. The court thus signals that both future litigation and contractual drafting in Canada are likely to be guided by the American experience in the interpretation of the UCC. This is a daunting task that invites counsel to embark on a quest into American case law that is unlikely to yield very consistent results. A useful summary by Shannon O'Byrne and Ronnie Cohen (Shannon O'Byrne & Ronnie Cohen, "The Contractual Principle of Good Faith and the Duty of Honesty in *Bhasin* v. Hryniew", forthcoming in (2015) *Alta L Rev* 1 at 27-30) shows considerable tension in

the American case law under §1-302(b). In one influential and well-known decision, the Seventh Circuit emphasized the primacy of the words of the contract. Judge Easterbrook stated trenchantly that “[f]irms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of ‘good faith.’” (*Kham and Nate’s Shoes No 2 Inc v First Bank of Whiting*, 908 F(2d) 1351 at 1353 (7th Cir 1990), cited in O’Byrne & Cohen, *supra* at 28). This approach bears considerable similarity to the literal interpretation which the Alberta Court of Appeal adopted in *Bhasin* (CA) and which the Supreme Court of Canada so decisively rejected. In the American decision, the Court also applied the terms of the contract literally when it upheld the right of a bank to terminate a client’s line of credit upon five days’ notice and found that this right was not blocked by a common law duty of good faith.

This line of authority strongly suggests that the landlord’s decision to refuse consent to an assignment in the example set out above will be enforceable where the contract states that consent may be arbitrarily withheld. However, the fidelity to the text of the contract shown by Judge Easterbrook has been criticized (for a summary, see O’Byrne & Cohen, *supra* at 28-29). In addition, other cases that deal with the contractual duty of good faith outside the UCC context, indicate that an apparently absolute contractual discretion is limited where there is a bad motive, exemplified by the exercise of a discretionary power to destroy or injure “the right of the other party to receive the fruits of the contract.” (*Wilson v Amerada Hess Corp*, 773 A 2d 1121 at 1126-1127 (NJ 2001) citing *Sons of Thunder, Inc v Borden Inc*, 690 A (2d) 575 at 586 (NJ 1997), discussed by O’Byrne & Cohen, *supra* at 29). Cases of this type suggest that in a Canadian context there could be a limit upon the right of the lessee to leave premises vacant in a way that destroys the viability of a neighbouring shopping mall.

The reference to jurisprudence under the UCC as a means of considering limitations on good faith performance is thus open-ended and not particularly helpful to those involved in the interpretation and drafting of Canadian contracts.

Contrasts Between Canada and the Commonwealth

The Supreme Court of Canada sought to justify its embrace of good faith performance in *Bhasin* (SCC) through guarded references to United Kingdom and Australian experience. The Court commented that developments in those two countries “point to enhanced attention to the notion of good faith, mitigated by reluctance to embrace it as a stand-alone doctrine” and that Australian courts have moved towards a greater role for good faith in contract performance (*Bhasin* (SCC), *supra* at paras 57-58). The veiled reference to “enhanced attention” hints that the role of good faith in the United Kingdom and Australia is quite different than the new course adopted in Canada. The extent of that difference will be sketched in the following sections. The first section will show that even before *Bhasin*, Canadian courts had already taken further steps in the direction of good faith than the Commonwealth counterparts. The final two sections will briefly contrast the new Canadian law with the positions taken in England and Australia.

A Different Canadian Starting Point

Despite the public attention that greeted the *Bhasin* (SCC) decision, it did not come as a bolt from the blue to observers of judicial developments in the Canadian law of contracts. Just as in other Commonwealth countries, lower courts in Canada had raised the principle of good faith performance from time to time, although more frequently and in more varied settings than their counterparts in England and Australia. The major difference was that in Canada, the Supreme Court had recognized a freestanding duty of good faith in three major contract decisions dealing with the measure of damages in the years preceding *Bhasin* (SCC).

The first two decisions arose in the context of employment law. In *Wallace v United Grain Growers*, [1997] 3 SCR 701 [*Wallace*], an employer had terminated the contract of an employee without providing reasonable notice. From the moment of dismissal up to the beginning of the trial, the employer maintained that it had dismissed the employee for cause. This totally unfounded allegation caused the employee a great deal of distress, but the existing Canadian law allowed the recovery

of damages for mental distress only in two situations. They could be awarded where the distress was a foreseeable result of the actual breach (which consisted of a failure to provide reasonable notice of termination) or if the actual breach was accompanied by the breach of a separate legal duty arising in contract or tort. In this case, the employee sought to comply with the requirement of breach of a separate duty by arguing that the employer had failed to exercise its power of dismissal in good faith.

The majority of the Court rejected the argument that there was any contractual duty to exercise good faith in discharging the employee (*ibid* at paras 75-78). Instead, it took the unprecedented step of stating that where there was bad faith in the manner of dismissal that caused mental distress, the court has discretion to extend required period of reasonable notice. Although the bad faith nature of dismissal did not amount to an actionable wrong, “employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period” (*ibid* at para 95).

In deciding that bad faith in the manner of dismissal caused mental distress that merited additional compensation, the Court essentially created a free standing obligation of good faith obligation. The obligation does not arise from a contractual or tortious duty, but may give rise to damages for mental distress if accompanied by the contractual breach of failing to give reasonable notice of termination (Shannon K. O’Byrne, “Wallace v United Grain Growers Ltd” (1998) 77 Can Bar Rev 492 at 500-503; see also McCamus, *supra* at 860).

This highly unusual use of a good faith principle that is not linked to a tortious or contractual duty lasted approximately a decade and was highly influential in the Canadian law of wrongful dismissal, where it became known as providing the grounds for “Wallace-damages” (McCamus, *supra* at 861). In a dissenting judgment in Wallace, McLachlin J commented that any obligation to avoid bad faith dismissal could only be grounded in the contract through an “implied contractual term to act in good faith in dismissing an employee.” (Wallace, *supra* at para 135). In

2008, in another wrongful dismissal case, the majority of the court appeared to take up the message of this dissent when it found that any discussion of awarding damages relating to the manner of dismissal must begin by asking “[W]hat did the contract promise?” (*Honda Canada Inc v Keays* [2008] 2 SCR 362 at paras 56-57 [*Keays*]). Although the court did not state it expressly, in that case it clearly based the award of damages for bad faith dismissal on the breach of an implied term which required “the employer to act in good faith when exercising the right to dismiss an employee under a contract of indefinite duration.” (McCamus, *supra* at 862).

The Supreme Court of Canada also relied on the absence of good faith to award punitive damages for breach of contract in *Whiten v Pilot Insurance Co*, 2008 SCC 18, [2002] 1 SCR 595 [*Whiten* (SCC)], a case that involved an insurance company which denied coverage under fire insurance policy. In the Court of Appeal judgment (*Whiten v Pilot Insurance Co*, 170 DLR (4th) 280 [*Whiten* (CA)]), Laskin JA dissented on the quantum of punitive damages that were awarded by the majority of the Ontario Court of Appeal, because, in his view the insurance company “acted maliciously and vindictively by maintaining a serious accusation of arson for two years in the face of the opinions of an adjuster and several experts it had retained that the fire was accidental” (*ibid* at para 43). The insurance company took this position in the hope that the owner of a home that had been destroyed by fire would compromise or abandon its claim (*Whiten* (SCC), *supra* at para 137, citing *Whiten* (CA), *supra* at para 43). The majority of the Supreme Court of Canada followed the dissent of Laskin J.A. and restored the original jury decision on damages. This resulted in the award of \$1 million in punitive damages for the combination of a breach of contract (the failure to pay a valid claim) and an independent wrong in the form of the breach of an implied obligation of good faith and fair dealing that required the insurer to process claims in a prompt and fair manner (*Whiten* (SCC), *supra* at paras 79,141).

It might be argued that these three cases were simply examples of implying a term of good faith based on the intention of the parties. However, the *Wallace* decision explicitly

avoided grounding the duty of good faith in a contractual term. The judgment unequivocally demonstrated that the Court imposed the duty of good faith as a matter of policy because of the power imbalance between employers and employees and because for most people “work is one of the defining features of their lives” (*Wallace, supra* at para 94 and generally at paras 91-95). The subsequent decision in *Keays*, which based the duty of good faith in the terms of the contract, was brought “Wallace-damages” within existing common law theory, although it is very doubtful that the duty truly reflected the intentions of the employer and the employee. In reality, the Court in *Keays* based liability on an implied term. In theory, this decision would allow employers to redraft contracts so as to limit good faith obligations, but the language of the court in both decisions suggested that the employers’ duty was an imperative upon which future courts would probably insist.

The judgment in *Whiten* (SCC) was much more conventionally anchored in the insurer’s implied duty of good faith and fair dealing (*Whiten* (SCC), *supra* at para 79). This provided a convenient solution to the conventional Canadian requirement that an award of punitive damages in a contract case must be based on a separate actionable wrong in addition to the breach of contract. In this case, the main breach arose from the failure of the insurer to pay a well-founded claim. The implied duty of good faith provided a convenient source of the separate actionable wrong. The fact that the Court in reality awarded punitive damages on the dubious basis of a double breach of contract provides another example of its determination to prevent the occurrence of seriously bad faith conduct in the performance of contracts.

Good Faith in England

The high watermark for good faith in the English law of contracts is found in the previously mentioned case of *Yam Seng*. International Trade Corporation (ITC) granted *Yam Seng* (YS) the exclusive rights in a number of territories to distribute certain fragrances that were sold under the unlikely brand of Manchester United. ITC claimed that it had a licence to manufacture and sell Manchester United fragrances, although it had not received a licence at the time it entered

the agreement. The relationship between the parties was initially warm, but it deteriorated because of ITC’s repeated failure to supply the goods as agreed. As a result YS also failed to meet commitments to its own customers. YS justifiably came to regard ITC’s repeated explanations of its failures and assurances of improved performance as implausible and ultimately false. As a result of ITC’s conduct, YS terminated the distributorship agreement and sued ITC for breach of contract or, in the alternative, misrepresentation. The distributorship bore some similarities to the dealership agreement in *Bhasin* (SCC) and was classified by the Court as relational in nature. It had some of the elements of a relational contract, because ITC’s obligation was to supply goods in the required quantities over the life of the agreement and because the agreement envisaged further extensions. However, the initial agreement had only a one-year term, subject to a possible 20 month extension. It did require continued communication and cooperation between the parties, particularly because YS could not specify in advance the exact quantities of goods that it might require and this matter would have to be worked out over time. However, this did not create an unforeseeable risk, as the parties could easily have inserted a term dealing with expected quantities. The distributorship has been accurately described by one commentator as “a significantly, but not pronouncedly relational contract” (Campbell, *supra* at 481). For purposes of comparison, the contract was less relational than the agreement in *Bhasin*, where the dealership had been in place for many years and where the risk of a Securities Commission investigation was entirely unforeseeable when the agreement was first made.

Leggatt J in *Yam Seng* emphasized that relational contracts are made against a background of “unstated shared understandings which inform their meaning” and that this background includes shared values and norms of behavior. The general norm underlying almost all contractual relationships is “an expectation of honesty” (*Yam Seng, supra*, at paras. 133-135) and when the court interprets a contract in circumstances that were not specifically provided for, it must give the contract “a reasonable construction which promotes the values and purposes expressed or implicit

in the contract” (*ibid* at para 139). In *Yam Seng*, the Court found that the distributorship agreement contained an implied duty that ITC would not knowingly provide false information on which Yam Seng was likely to rely” (*ibid* at para 156).

The judgment in *Yam Seng* makes a strong case for the adoption of a duty of good faith and fair dealing in a way that is very similar to *Bhasin* (SCC). However, the cases differ in two important respects. Firstly, in *Yam Seng* the Court finds that the duty of good faith exists as a matter of intention, as an implied term of the agreement between the parties, rather than as a general duty imposed by law. Secondly, the absence of good faith was not central to the finding of liability on the part of ITC. The Court concluded that ITC was in breach of contract because of late delivery and failing to make products available when promised and that Yam Seng had been induced to enter the agreement through false representations by ITC. The existence of bad faith was important to the result of the case only indirectly, as one of two grounds for finding that ITC had repudiated the agreement (*ibid* at paras 173, 230). The other justification for the finding of repudiation was that ITC had committed a straightforward breach of the exclusivity clause in the agreement, thus emphasizing that the implication of a duty of good faith was not strictly necessary for the decision (*ibid*).

Yam Seng is an important judgment, but it carries very little legal authority. Leggatt J’s enthusiasm for the good faith doctrine has not been reciprocated by higher courts. The Court of Appeal has commented on the case while scrupulously avoiding any endorsement of its adoption of a broad duty of good faith. In *Mid-Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd*, [2013] EWCA Civ 200, [2013] BLR 265, [Mid-Essex Hospital], the Court of Appeal reversed a judgment in which, among other reasons, the trial judge had found an implied duty to act in good faith in a contract to provide catering and cleaning services to a hospital. The judge found that the duty obliged the Hospital Trust not to exercise certain powers “in an arbitrary, capricious and irrational manner” (*ibid* at para 69). Not surprisingly, the Court referred to *Yam Seng*, which had been decided only about six weeks earlier and might be considered to

support the contractor’s position. However, the Court of Appeal ignored Leggatt J’s lengthy justification for the existence of a contractual duty of good faith and focused only on his statement that there is no general doctrine of “good faith” in English law (*ibid* at para 105). In a marked departure from Leggatt J’s analysis, the Court of Appeal concluded with a statement that “if the parties wish to impose such a duty they must do so expressly” (*ibid*). The selective omissions in the Court of Appeal’s reference to the *Yam Seng* judgement suggest little enthusiasm for an expansive duty of good faith. This lack of enthusiasm is reflected in other senior English decisions, most notably in the comments of Lord Ackner in *Walford v. Miles* ([1992] 2 A.C. 128, 136-138) and the rejection by the Court of Appeal of any special treatment for relational contracts (*Baird Textile Holdings plc. v. Marks and Spencer plc.* [2001] EWCA Civ.274, [2002] 1 All ER (Comm.) 737 (C.A.), 744 par.16).

The Role of Good Faith in Australia

The Supreme Court of Canada was cautious in his comments on Australian law in the *Bhasin* decision. It recognized that “There is no generally applicable duty of good faith” in Australian contract law (*Bhasin* (SCC), *supra*, at para 58) without adding that its own decision crosses a theoretical divide which Australian courts have eschewed. While the principle of good faith plays an important role in Australian contract law, it does so on the basis of the parties’ intentions and under established contract doctrines. In contrast, as we have seen, *Bhasin* (SCC) imposes a duty of good faith that is independent of intention and rises above ordinary contract doctrines. There is little support in the Australian authorities for the imposition of a general duty of good faith and honest performance. Instead, good faith is seen not as “an independent concept so much as something which is inherent in contract law itself and therefore a concept which must be taken into account when interpreting a contract [and] determining the scope of contractual rights” (John W Carter, *Contract Law in Australia*, 6th ed. (Chatswood: LexisNexis Butterworth 2013) at para 2-03). Where a requirement of good faith exists, its source is an implied term of the contract and “any attempt to imply an independent term requiring good faith is unnecessary and

a retrograde step” (*ibid* at para 2-01). The theoretical basis of Australian law is thus similar to Canadian law prior to *Wallace v. United Grain Growers* (*supra*) and certainly prior to *Bhasin* (SCC). If Australian courts are reluctant to imply independent terms requiring good faith, they would surely reject the judicial imposition of a general duty of good faith. In contrast to both the Australian and English approaches, the Supreme Court of Canada rejects the common law treatment of good faith in order to make the law “less unsettled and piecemeal, more coherent and more just” (*Bhasin* (SCC), *supra* at para 33).

Conclusion

The development of a doctrine of good faith in common law jurisdictions invariably provokes strong reactions. Observers of the of good faith movement tend to see traditionalists as treating its introduction as if it were a communicable disease. Traditionalists have been described as viewing good faith as a “contagious disease of alien origin” (Guenther Teubner, “Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences” (1998) 61 Mod L Rev 11, quoted in Andre Sinanan, *Good Faith in English Contract Law: A “Contagious Disease of Alien Origin”*, online: Social Science Research Network <<http://ssrn.com/abstract=2654752>>) or treating it as “an embarrassing social disease” (John Swan, “Whither Contracts: A Retrospective and Prospective Overview” in *Special Lectures of the Law Society of Upper Canada 1984 - Law in Transition: Contracts* (Don Mills: R. De Boo, 1984) at 148). In Canada, the decision to adopt the doctrine of good faith performance in *Bhasin* SCC has now shifted the debate from a theoretical to a practical level, which requires lawyers to deal with its implications in a practical way with less emphasis on vivid rhetoric. In examining the impact of this change, it is important to consider one of the impulses that inspired it.

The emergence of discussions of good faith in common law jurisdictions has been due in part to internationalization and an increased awareness of other legal systems. The *Bhasin* (SCC) decision was influenced by two observations. The court recognized that the Québec civil code establishes a broad duty of good faith in the civil law tradition and that there is an obligation of good faith in

the Uniform Commercial Code that has long been part of the law of Canada’s neighbour and largest trading partner (*Bhasin* (SCC), *supra* paras 82-85). In England and Wales, the need to consider good faith has been accelerated by EU legislation and directives as well as movements towards the harmonization of European law (*Yam Seng, supra* para 124). This has created a momentum for conformity with the law of major trading partners and jurisdictions that form part of a federated union and the suggestion that resistance amounts to no more than swimming against the tide (*ibid*).

However, the requirements of neighbourliness do not demand theoretical consistency. The objective must surely be the more mundane one of ensuring that courts reach broadly similar conclusions in similar cases. The recent debate, in contrast, has focused less on the results of cases than on the theoretical desirability of the doctrine of good faith. For example, the *Bhasin* (SCC) decision recognizes the existence of the doctrine of good faith in both Québec and the United States, but does not ask the more important question whether the courts in those jurisdictions reach generally the same results and whether those results are similar to those reached in the courts of common law Canada.

Most common law courts in the Commonwealth apply the existing range of contract doctrines and accord no separate role to the principle of good faith. The advantages of this approach are that it respects the traditional notion of freedom of contract and employs techniques that are well-known to common law judges and lawyers. However, the weakness of the common law is that it tends to deal with good faith issues only indirectly through devices, such as the interpretation of contracts, which do not confront good faith directly. The adoption of an express duty of good faith forces courts to examine closely the types of conduct that they wish to discourage rather than, for example, dealing with a difficult case through the implication of a term which may or may not truly reflect the parties’ intentions. In practice, the adoption of a duty of good faith is unlikely to change the results of many decided cases. The theoretical change wrought by the *Bhasin* (SCC) decision may well be confined to three classes of practical effects. Firstly, it may be more difficult for the parties

to draft a clause which excludes or limits a duty which is now recognized as one imposed by the courts. Secondly, it is possible that courts may begin to treat long-term relational contracts differently from single transaction contracts. Thirdly, the decision presents litigants with a guarded invitation to expand good faith arguments beyond the traditional relationships and categories recognized in common law. However, it is almost certain that in practice

the changes wrought by *Bhasin* (SCC) will be ones of form than substance.

The author acknowledges the valuable research assistance of Ashton Menuz, a second-year law student at the University of Alberta, in the preparation of this article and is grateful to his colleague Professor Shannon O'Byrne for her patient advice in the course of many consultations on the duty of good faith.

CALL FOR PAPERS

The Commonwealth Judicial Journal (CJJ) is the flagship publication of the Commonwealth Magistrates' and Judges' Association 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 proceeding to submit a manuscript or contribution.

Contact Details

Manuscripts sent by email, as a Word document, are particularly encouraged. These should be sent to: info@cmja.org

Alternatively, manuscripts may be sent by post to: CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX, United Kingdom.

Information for Authors

1. Manuscripts should ideally 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. The CJJ encourages authors to refer to material from one or more jurisdictions across the Commonwealth.
7. 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.
8. Please note that by submitting an article or other contribution for publication, you confirm that the piece is original and 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.
9. 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 authorize publication of the articles in other appropriate publications.

LAW REPORTS

STATE AND ANOTHER V TRANSFEREES AND ANOTHER

19 September 2014, 5 August 2015

Supreme Court of Papua New Guinea [2016] 1 LRC 497

Sakora, Gavara-Nanu and Ipang JJ

The primary judge ('the judge'), sitting in the National Court, initiated proceedings in order to inquire into possible breaches and abuses of the rights and freedoms of the asylum-seekers ('transferees') held at a detention centre. The judge construed the phrase 'own initiative' in s 57(1) of the Constitution of the Independent State of Papua New Guinea 1975 ('the Constitution') as conferring power on the National Court power to conduct an inquiry into those matters. The inquiry was commenced in accordance with r 8 (commencement of proceedings by the court) of the Human Rights Rules 2010, which fell under Ord 23 of the National Court Rules and set out the human rights jurisdiction of the National Court. The matter was registered as *HROI No 1 of 2014*, issued in Form 126 of the National Court Rules. Thereafter the judge summoned certain persons to appear before him, invoking s 57(3) of the Constitution, and issued directions without first hearing the parties. The judge also appointed a consultant ('Dr C') as an expert medical witness to inspect, examine and evaluate the provision of clinical and public health services at the detention centre. The appellants filed an application by way of notice of motion for the judge to disqualify himself on the grounds of apprehended bias because of the manner in which he had conducted the proceedings and because he made certain statements in another case which appeared to pre-empt the outcome of the current proceedings. Before the notice of motion was moved, the judge disclosed to the parties that Dr C was a personal friend of his of long standing but he refused to disqualify himself, finding there was no basis for any claim of apprehended bias against him. The appellants appealed to the Supreme Court. Two issues arose for consideration: (i) whether the judge had power under s 57(1)

of the Constitution to initiate or commence proceedings at all ('the threshold issue'); although that issue was not raised as a ground of appeal, the Supreme Court exercised its inherent discretionary power under s 155(4) of the Constitution to consider and determine the issue; and (ii) whether a claim of apprehended bias and breach of natural justice by the judge was justified.

HELD: Appeal allowed. Proceeding HROI No 1 of 2014 declared void.

(1) Section 57(1) of the Constitution did not confer power on either the National Court or the Supreme Court to initiate or commence proceedings on its own initiative or to unilaterally commence a proceeding; nor did it confer power on a court to conduct an inquiry, as occurred in the present case. Section 57 of the Constitution in its heading provided for the 'Enforcement of guaranteed rights and freedoms'. In its specific terms, sub-s (1) provided for the protection and enforcement of a right or a freedom. That was the purpose of any 'initiative' a court might in its discretion decide to take under sub-s (1). Furthermore an 'initiative' of a court under sub-s (1) related to its discretion as to an order or a declaration it might make in the particular circumstances of a case. Therefore a proper exercise of power by a court under s 57(1) would involve the making of an order or a declaration only. Such an order or a declaration had to be proper and reasonable and made according to law and the court had to exercise its discretion judicially. The approach adopted by the judge in the present case was inconsistent with the intention and spirit of s 57(1). For the same reasons, *HROI No 1 of 2014* was an abuse of the processes of the court.

Per Ipang J. In defining the phrase 'on its own initiative' in s 57(1) of the Constitution, the

word 'initiative' was defined in the dictionary as the ability to initiate, the power or opportunity to act before others did, without being prompted by others. To initiate was therefore to cause a process or action to begin. The National Court was wrong to approach the current proceedings as an inquiry. The courts determined right whilst inquiries made findings and recommendations. Furthermore, if the proceedings were an inquiry then the first usual step would be to appoint counsel assisting or an amicus curiae, so that the judge, as the decision-maker, was removed from the arena or spotlight. The judge in the present case did not appoint assisting counsel or an amicus curiae; instead he personally conducted the proceedings. On the facts he was a party, prosecutor, witness, counsel and judge.

(2) Order 23, r 8 of the National Court Rules, relating to the commencement of proceedings by the court, was inconsistent with s 57(1) of the Constitution. The 'initiative' referred to in s 57 related only to the court's discretion as to an order or declaration it might make in the particular circumstances of the case. The judges of the National Court or Supreme Court had made r 8 under s 184 of the Constitution which, however, provided that the judges 'may make rules of court, not inconsistent with a Constitutional Law'. Having found Ord 23, r 8 to be inconsistent with s 57(1) then, pursuant to ss 184(1) and 155(4) of the Constitution, r 8 and Form 126 were to be declared unconstitutional and should be struck out.

(3) Section 57(3) of the Constitution conferred power on a court to make an order or a declaration only to enforce a statutory right or duty. The court's jurisdiction under s 57(3) and a court's power to make an order or a declaration under that subsection only arose on an application being made by a party. Consequently, the court's power under sub-s (3) was wrongly invoked by the judge to issue summonses against certain individuals.

(4) The proper test for a judicial officer to apply when deciding whether to disqualify himself on the ground of apprehended bias was whether a fair-minded member of the public, having full knowledge of the relevant facts, would have a reasonable apprehension or suspicion that the judicial officer was biased in his decision. A fundamental principle that

should guide that judicial officer in making that decision was that the parties to litigation had to have full confidence in the integrity and impartiality of the court to administer justice. In a situation where, as in the present case, there was an existing relationship between a judge and a party or a witness, the judge had a duty to disclose to the parties the relationship or association. The purpose of that disclosure was so that the parties, in particular the respondents, were given an opportunity to respond and for the court to then consider such response and make an informed decision on the appropriate course to take. In the present case the judge and Dr C were close friends and their association was a long one. Thus the judge had a duty to disclose his association with Dr C to the parties at the very outset before the hearing commenced, but he did not. In the circumstances, a fair-minded member of the public having full knowledge of that association would have held a reasonable apprehension of bias against the judge such that he might not have had an impartial mind in deciding the issues before him. In addition, the fact that the judge had commenced the proceeding of his own volition would have created a reasonable suspicion in the mind of a fair-minded member of the public, having knowledge of the facts, that he had an interest in the proceeding and would not be impartial. Furthermore, the judge had issued directions, called witnesses and named the respondents to the proceeding, without giving an opportunity to those parties to be heard, which amounted to a serious breach of natural justice.

Per Sakora J. Under the disqualification principle--which underpinned the important and crucial public policy consideration that public confidence in the judicial system and in the administrative decision-making process required impartiality--decision-makers should voluntarily 'recuse' themselves, or be disqualified by formal application by a party, from hearing a case, deciding a matter or making a decision if they lacked independence or impartiality. Furthermore, where an apprehension of bias was demonstrated, the relevant decision-maker should disqualify him or herself and allow the case to be heard and determined by another judge.

HUNTE AND ANOTHER V STATE

4-5 February, 16 July 2015

Privy Council (Trinidad and Tobago) [2016] 1 LRC 116

Lord Neuberger, Lady Hale, Lord Mance, Lord Clarke, Lord Sumption, Lord Reed and Lord Toulson

In 2008 the appellants, H and K, were convicted of murder and sentenced to the mandatory death penalty. Their appeals against conviction were dismissed by the Court of Appeal and in 2012 they applied for leave to appeal to the Privy Council. H was granted leave to appeal on the ground that, after a *voir dire*, the trial judge had wrongly admitted in evidence a confession statement allegedly made by H and recorded by a police officer in the presence of a justice of the peace, after H had received advice from an attorney who was not allowed to see H in private but only in the presence of police officers. K was granted leave to appeal on the ground that the trial judge had failed to direct the jury on a possible alternative verdict of manslaughter, on the basis of joint enterprise and secondary liability. The appellants also sought leave to appeal against sentence, seeking the commutation of their death sentences on the ground that, due to the lapse of time, it would be unconstitutional for them to be carried out.

HELD: Appeals against conviction dismissed. (Lady Hale dissenting) Leave to appeal against sentence refused.

(1) In denying H private access to his attorney the police officers had acted wrongly and in serious breach of the important right, under s 5.2(c)(ii) of the Constitution of Trinidad and Tobago 1976, of a person under arrest to communicate with his chosen legal adviser without delay, reinforced by the right to necessary procedural provisions to protect that right, under s 5.2(h). However, it did not necessarily follow that the confession evidence had been wrongly admitted: that depended upon whether the evidence was admissible as a matter of law and, if so, whether fairness nevertheless required it to be excluded. The test of admissibility was whether the alleged statements were voluntary according to the Judges' Rules 1964, para (e). There was no proper basis to conclude that the trial judge had erred in holding, after hearing evidence in the *voir dire*, that the statements, if made, were

voluntary and admissible; that was her task but there had been no prejudice to H in the judge also considering whether the statements had been made, which had properly been left as a question for the jury. There were a number of seriously unsatisfactory features, in breach of the Judges' Rules, in the procedure adopted in the police station: the times at which questioning began and ended had not been recorded as required and questions had been put to H after the written statement was made, which the Judges' Rules prohibited. The failure to allow H to speak to his attorney in private was inexcusable, but he had been advised not to make any statement and knew that he had that choice. H had undoubtedly signed a confession statement after he had been spoken to in private by the justice of the peace, who had inquired whether he had been properly treated. The judge had been entitled to leave it to the jury to decide whether they were sure that the alleged oral and written statements were of H's own making and reliable. H had not been denied a fair trial and his appeal was therefore dismissed.

(2) A trial judge was required to leave an alternative verdict to the jury, where neither the prosecution nor the defence had asked the jury to consider it, only where the evidence provided an obvious basis for conviction of an alternative offence. A bare possibility that a defendant might have been guilty of a lesser offence did not require the judge in all circumstances to leave an alternative verdict to the jury. In the instant case the evidence did not support a realistic finding that this was a conspiracy to rob in which H had carried out an unplanned murder. If that had been a realistic scenario, K would still have been guilty of murder under the felony murder rule in s 2A(1) of the Criminal Law Act 1979; that would have been relevant to sentence. K's appeal was therefore dismissed.

(3) (Lady Hale dissenting) (i) The Board did not have jurisdiction to grant leave to appeal against sentence and to order commutation

of the death sentences imposed upon the appellants. Under s 109 of the Constitution of Trinidad and Tobago the Board had 'all the jurisdiction and powers possessed in relation to that case by the Court of Appeal'; the death sentences passed on the appellants were fixed by s 4 of the Offences Against the Person Act 1925 and there was no dispute that they were lawful and mandatory, so that, under s 43(c) of the Supreme Court of Judicature Act 1962, the Court of Appeal had no jurisdiction to entertain an appeal against sentence and had not done so. If the Board were to grant leave to appeal against sentence and order commutation of the sentences, it would be granting an appeal when there was no Court of Appeal decision to appeal against and making an order which the Court of Appeal would have had no jurisdiction to make.

(ii) While the Board was not by law bound by its own previous decisions, it was very reluctant to depart from its own fully reasoned previous decisions unless there were strong grounds to do so. It was not possible to provide a comprehensive list of factors which might be sufficiently powerful to make it right to depart from the strong presumption in favour of respecting precedent, but in the instant case several could be identified. Firstly, the decision of the Board in *Matthew v State* [2004] 4 LRC 777 could not be described as fully reasoned and its decision in *Ramdeen v State* [2014] 4 LRC 499, although fully reasoned, was largely founded on respect for the precedent established in *Matthew*, which it had not been asked to overrule; closer analysis of that case and of the arguments advanced in it had exposed the lack of a satisfactory foundation for it. Secondly, the issue concerned the constitutional power of the judiciary to interfere on appeal with a lawful sentence; if the Board had assumed a judicial power which it did not possess, it would damage respect for the rule of law to continue to exercise that power contrary to constitutional provisions, notwithstanding that the Board could exercise such a power on appeal from a constitutional motion, under s 14(1) and (2) of the Constitution. Thirdly, to allow *Matthew* and *Ramdeen* to stand as an exception to the principle in *Walker v R* [1993] 2 LRC 371 would lead to uncertainty as to its extent, contrary to the purpose of *stare decisis* to promote certainty, and to anomalies

wherever the line was drawn. Therefore the right course was for the Board to hold that *Matthew* and *Ramdeen* should not be followed and that leave to appeal against sentence should be refused.

Per curiam. Per Lord Toulson. (i) As a final appellate body which did not sit in banc, it was always possible for a panel of the Board not to contain anyone who was a party to a recent governing precedent or to be composed largely of members who were in previous dissenting minorities. Particularly in a difficult case in which the panel is narrowly divided, a small change in constitution could possibly produce a different outcome, a powerful reason to be very slow to depart from a fully considered previous decision. To do otherwise would not only lead to uncertainty but would risk the rule of law being seen as the rule of individual judges.

(ii) While the outcome is unattractive it is not morally unacceptable that the Constitution provides different avenues for appealing against a sentence which was wrongly passed and for obtaining relief on constitutional grounds from the execution of a sentence lawfully imposed, a constitutional division which is not unique. It is not a necessary consequence of this decision that prisoners in similar circumstances will spend longer on death row: at any time after the fifth anniversary of their convictions the appellants might have applied to the President for commutation of their sentences, failing which they could have applied to the High Court for constitutional relief. It is not clear whether the Court of Appeal hearing a criminal appeal could reconstitute itself as a panel of the High Court, as can be done in England and Wales, but in any event administrative arrangements should be possible, where appropriate, for appeals from a criminal court and from the High Court on a constitutional motion to be heard immediately after one another.

(iii) This decision will not affect the validity of the orders made by the Board in *Ramdeen* or by the Court of Appeal in subsequent cases commuting the death penalty on the authority of that case, the respondent having stated that it has no intention to seek leave to appeal out of time against such orders. Orders of the High Court and Court of Appeal, as 'superior courts of record', are valid until set aside, even if

made in excess of jurisdiction. Without such a principle the judicial power to adjudicate rights and liabilities would be seriously defective.

Per Lord Neuberger. Certainty and consistency were vitally important features of any civilised justice system and a court should never be eager to depart from one of its earlier decisions even if it was not bound by them. Nonetheless, the majority decision in *Ramdeen* was wrong: the mere fact that the Board was hearing an appeal against conviction or sentence did not give it jurisdiction to order commutation of a lawfully passed death sentence on the ground that it would be unconstitutional to carry it out. The *Ramdeen* decision was very recent; the Board was not here concerned with an argument that attitudes had changed since the decision under attack was given, an argument which might be assisted by the fact that the decision in question was of some antiquity rather than recent. The argument here was that the decision under attack was wrong when it was made and, in such a case, the fact that the decision had had little time to be absorbed or accepted was a point against adhering to it if the Board thought that it was wrong. If the decision was allowed to stand, it would mean that the Board had arrogated to itself a constitutional power which it did not properly have. In the absence of any countervailing arguments to support adhering to it, such a course would risk undermining the rule of law, potentially placing the executive and judiciary in conflict. There would be procedural difficulties and conundrums if *Ramdeen* continued to apply and, if it was not overruled, the Board would sooner or later face the unpalatable choice of applying that wrong decision in other jurisdictions with similar constitutional principles or else to apply different constitutional principles in jurisdictions with identical constitutions. Furthermore, the issue had been more fully argued in the instant case than it was in *Ramdeen*. On the other hand, it was perhaps right to add that the fact that *Ramdeen* was decided by a bare majority of three to two was not a relevant factor.

Per Lady Hale (dissenting). Where an appeal was properly before the Board for some other reason, the Board had jurisdiction to commute a death sentence on constitutional grounds even though the matter was before it on a criminal appeal rather than by way

of a constitutional motion; s 14 of the Constitution of Trinidad and Tobago clearly contemplated that a violation of constitutional rights could be remedied when it arose in the course of ordinary proceedings as well as by constitutional motion. Therefore the Board should not close its ears to the argument that it would be unconstitutional to carry out a death sentence: the Board would not then be taking jurisdiction for that purpose but exercising a jurisdiction which it undoubtedly had to prevent a very serious (in fact the most serious imaginable) violation of the appellant's constitutional rights. The instinctive revulsion to the 'death row' phenomenon, in the inhuman punishment of carrying out death sentences after delays of many years, had emerged from an enlarged Board in 1993. In *Bowe v R* [2006] 4 LRC 241 the Board held that a challenge to the constitutionality of the death penalty did not have to be taken through a separate constitutional motion under the Bahamian equivalent of s 14 of the Constitution of Trinidad and Tobago but could be taken on an appeal against sentence. This enlarged Board could have overruled *Walker* but even if correct it was a pragmatic decision, designed to stop all the death row cases being brought before the Board rather than the local authorities, and was authority only for the proposition that leave to appeal against sentence could not be given for the sole purpose of arguing that a sentence lawfully imposed had become unlawful to carry out. The majority in *Ramdeen* were right. It was morally unacceptable and, more importantly, not intended by the Constitution, to exacerbate the 'death row' phenomenon previously held by the Board to be unconstitutional.

Per curiam. Per Lady Hale. In several other appeals from Trinidad and Tobago pending before the Board, involving people suffering from mental illness or disability, the distinction between the imposition and the carrying out of the death sentence is less clear cut than in the instant case. The prospect of the Board holding that a sentence lawful when passed would probably not be lawful to carry out, but then having to dismiss the appeal in the expectation of a successful constitutional motion, is deeply unattractive: it would permit the inhuman or cruel and unusual punishment to continue because of what some would see as a pure technicality.

BOOK REVIEWS

Paths to the Bench: The Judicial Appointment Process in Manitoba, 1870-1950

Dale Brawn

UBC Press, Vancouver, 2014

Readers of the *Commonwealth Judicial Journal* might be surprised that I draw attention to a text devoted to the historical situation of Superior Court Judges in one precise jurisdiction, but I am of the firm belief that we may all profit from a study making plain the undemocratic nature of patronage, the pernicious effects of undermining judicial independence and the illiberal elements associated with judging perceived as dedicated to the maintenance of a precise social order and *élite*.

Stated otherwise, Professor Brawn's book presents a superbly-documented and well-written account of the early period of the superior judiciary starting in what was then a frontier province, and concluding with developments after the Second World War. This form of empirical, as opposed to theoretical, study outlines the many evils, the word is not too strong, that flow from judicial appointments based on political ties, social class and religious affiliations – in particular, we are made to understand fully why justice may never be achieved by a view that judges serve either the political party then in power or the financial elites supporting such a party as opposed to Themis.

I commend in particular the multi-faceted analysis of the many ways in which lawyers sought to gain the attention of the “powers that be” in order to underscore the imperative need for an objective and transparent system of judicial appointments. *Paths to the Bench The Judicial Appointment Process in Manitoba, 1870-1950* is a significant book well worth our attention and I look forward to the next title, examining the system of appointments to today's date.

Gilles Renaud

Ontario Court of Justice

Next CMJA Conference

"The Judiciary as Guarantors of the Rule of Law?"



CMJA
CONFERENCE
18-22
September
2016
Georgetown
GUYANA



The Kaieteur Falls ©Guyana2011

GUYANA - THE LAND OF MANY WATERS

www.cmja.biz

Registration Still Open!

18-22 September 2016

Register now to avoid disappointment at:
www.cmja.biz