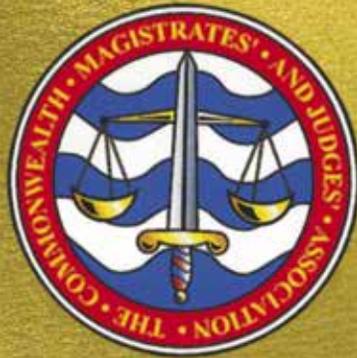


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EDITORIAL

Before getting to the substantive content of this issue's editorial, we wish first to make formal mention of the fact that, effective January 2019, Judge Thomas S. Woods of the Provincial Court of British Columbia, Canada, took over the reins from Dr. Aldo Zammit Borda as editor-in-chief of the *Commonwealth Judicial Journal*. You can learn more about Judge Woods and his background by reading the short profile, entitled "Introducing Our New Editor-in-Chief," further on in these pages. Words of appreciation for the valuable contribution of Dr. Zammit Borda during his term as editor-in-chief are found at the end of this editorial.

On, then, to business.

To say that change is difficult but unavoidable is merely to repeat a commonplace. We all know it and yet many of us find ourselves resisting it. Change is "disruptive"—a word that enjoys new prominence in modern parlance. Today, considered and thoughtful disruption is increasingly seen as being not only a good thing but essential if genuine progress is to be made on many fronts. But change—and perforce *disruptive* change—brings, at least temporarily, a sense of discomfort, a sense of the loss of the conceptual and institutional landmarks that for so long made the world intelligible and predictable. (And, yes, *comfortable*.) Change, thus, inevitably meets with resistance, some of it appropriate. It therefore behooves the architects of progressive (and sometimes disruptive) change to anticipate that resistance and intelligently prepare the way for the reforms that they believe are called for.

We see this phenomenon writ large in the efforts unfolding around the Commonwealth to make better use of technology in order to improve the quality of service provided by justice systems to the citizens and other entities they serve. But like the "paperless office" that was so confidently touted two decades or more ago, the "paperless courtroom" and the "paperless justice system" have generally been shown to be more promise than reality. Zealous proponents of technology are sometimes given to overselling their wares, only to find that they are later unable to meet the expectations they have engendered. Still, as technological

knowledge and know-how evolve, progress in adopting it *does* gradually occur. That process of growth and evolution in justice systems is heavily dependent, however, upon buy-in at every level—from judges and magistrates, through court administration and court staff, to other stakeholders (like the bar, law enforcement officials, prison administration, &c.) and, most importantly, members of the public. Buy-in is dependent, in turn, on proper consultation with those affected—not just *pro forma* consultation but dialogue that is real and meaningful. Technological innovations intended to improve access to justice and the administration of justice that bear the imprint of those most affected have the greatest prospect of being successful. Given the wide range of computer literacy reflected amongst the members of the public whose lives intersect daily with adult and youth criminal courts, family courts and courts handling civil disputes throughout the Commonwealth, we must be careful that the incorporation of technological innovations not become *de facto* access-to-justice impediments.

It is interesting to note that some of the strongest leadership in this important area is emanating from developing nations. The Chief Justice of Rwanda, the Hon. Sam Rugege, recounts in his article in this issue of the *Commonwealth Judicial Journal* the remarkable progress that has been made in his country in incorporating electronic methods for processing the cases that come before the Rwandan judiciary. It is an extraordinary story of determined adaptation that Chief Justice Rugege tells, the more so when one considers that it has unfolded against the historical background of the horrific genocide that occurred so recently in Rwanda. While still a work-in-progress, what the Rwandans have already achieved in displacing paper with electronic court file handling rather puts comparable efforts in some of the more developed nations to shame.

And Rwanda is but one of a number of beacons in this regard to be noted within the Commonwealth. Commenting upon the remarkable work that is now being done to upgrade the information technology employed in the court system of Papua New Guinea,

Lord Burnett of Maldon LCJ observed recently that the UK is, in fact, lagging seriously behind that country and others in its uptake of such technology. In an article reported online in *Legal Cheek*, the Lord Chief Justice is reported to have told an audience at the Royal Courts of Justice in March of this year that:

It is sobering to think that despite being one of the most advanced economies in the world, with as mature a legal system as exists anywhere, that we are only now moving towards widespread electronic working and filing in our civil courts.

It is plain that when it comes to integrating technological reforms into systems of justice, collaboration and mutual facilitation between and among Commonwealth nations has been and should continue to be a two-way street, with the smaller and less developed nations often pointing the way forward for the larger ones. Undoubtedly, the sharing of information and general cross-pollination that now occurs at CMJA conferences and, indeed, in the pages of this journal, has been in some measure an engine of progressive change relating to court system technology. Long may that sharing and cross-pollination continue. (Incidentally, the CMJA has been contributing to the United Nations Office on Drugs and Crime (“UNODC”) Guidelines on the Use of Social Media by Judges that are due to be published later in 2019.)

And speaking of sharing and cross-pollinating, an excellent opportunity to do just that on myriad topics will arise at the CMJA 2019 conference to be held, conveniently, at Port Moresby, Papua New Guinea from September 8-12, 2019. That conference has “Parliamentary Democracy and the Role of the Judiciary” as its theme but, as past experience attests, impromptu discussions in the corridors will undoubtedly range widely across many subject areas, including technological ones. The draft program—which is easily accessible online at www.cmja.biz shows that much fascinating content will be on offer again this year. Don’t forget to register.

Readers will likely be familiar with other progressive CMJA initiatives that have been active since the last issue of the *Commonwealth Judicial Journal* was published. As you will be aware from reading the last *CMJA Newsletter*,

the Association has continued to work actively in the provision of training courses for judges and magistrates, with a training course for magistrates in the Gambia organised jointly with the English and Welsh judicial college, and a fourth training course on Judicial Case Management and Ethics which was held in London in February. The next training course runs from 13-18 July 2019. The CMJA is also contributing to the Commonwealth Secretariat’s work in the development of Commonwealth Anti-Corruption Benchmarks. Similarly, the association is collaborating with the International Association of Judges and the International Bar Association on a proposal for a panel session at the second meeting of the UNODC Global Judicial Integrity Network to take place at Doha, Qatar in November 2019.

A few words now about the substantive content in this issue.

His Hon. Chief Judge Dr. John Lowndes, former CMJA President, and Her Excellency Paula-Mae Weekes, President of Trinidad and Tobago, have each written convincingly and compellingly on the importance of judicial independence, the responsibilities that come with judicial independence and some of the steps that have been, and can in future be, taken to preserve and strengthen judicial independence.

Mention has already been made of the Hon. Chief Justice Sam Rugege’s interesting and informative piece on the evolution of court technologies in Rwanda.

Dr. H.D.F. Silva has shared with our readers in this issue a fascinating and affectionate portrait of the Rt. Hon. L.M.D. de Silva Q.C.—the first member of the Judicial Committee of the Privy Council from Sri Lanka (or Ceylon, as it was then known).

Justice Emmanuel Ekundayo Roberts of the Supreme Court of Sierra Leone makes a compelling case, in his article in this issue, for enhanced training for judges and magistrates in basic economics, in part so that those judicial officers are better prepared to confront certain realities regarding the cost of litigation—to the party participants as well as to justice systems and the societies that fund those systems.

The June 2019 issue is rounded out with LRC

case summaries of recent, and important, decisions given by courts in a number of Commonwealth countries and a book review by CMJA Secretary General Dr. Karen Brewer providing her impressions of a scholarly analysis and treatment of that sometimes-fraught topic, judicial humour.

Lastly, we wish to close this editorial with fitting tributes to two of the *Commonwealth Judicial Journal's* own.

The first is Dr. Peter Slinn, the chairperson of our editorial board. While (thank heavens!) he continues on in that role, Peter retired from the Executive Committee of the Commonwealth Lawyers Association (“CLA”) at the Commonwealth Law Conference (“CLC”) this April in Zambia. He served in that capacity for many years and his extraordinary career and contributions were acknowledged at the CLC in an homage that was delivered by CMJA Secretary General, Dr. Karen Brewer. Peter’s accomplishments and achievements are legion, but to mention just a few:

- He taught international, constitutional and natural resources law for over 40 years at the School of Oriental and African Studies (“SOAS”) at the University of London where he became the head of the Law Faculty;
- In retirement he took over as the director of the M.A. in International Studies at SOAS’s Centre for International and Diplomatic Studies;
- He continues to teach as a Professor of Law at the University of Notre Dame in London;
- He was instrumental in establishing the Law Reports of the Commonwealth, published by LexisNexis, in 1985 and served as the series’ co-editor until 2016;
- He served as co-editor of the *Journal of African Law*;
- He is a founder member of the Commonwealth Human Rights Initiative; the Commonwealth Legal Forum; and the Latimer House Working Group.
- He is currently UK Vice-President of the Commonwealth Legal Education Association;

- He drafted the Commonwealth (Latimer House) Guidelines on Parliamentary Supremacy and Judicial Independence at its first colloquium in 1998. The 10 principles that were distilled from those guidelines were endorsed by the Commonwealth Heads of Government in 2003 and are now part of the Commonwealth Fundamental Values that have been incorporated into the Commonwealth Charter;
- He has played a major role in the running of the Commonwealth Moot Competition since its inception more than 25 years ago; and
- He was appointed Officer de l’Ordre des Palmes Academiques for service to Anglo-French cooperation in the field of the international law.

We take this opportunity to congratulate and thank Peter for his enormous contribution to the promotion of the rule of law throughout the Commonwealth as exemplified by the points noted above. We thank him for his continuing and valuable involvement as the Chairperson of the Editorial Board of this journal.

The second of our own who we wish to acknowledge and celebrate here is Dr. Aldo Zammit Borda, the former editor of the *Commonwealth Judicial Journal*. Aldo retired as Editor with the publication of the December 2018 issue.

Aldo is a former Maltese diplomat who, as an academic and legal scholar, specialises in European Union law and public international law. He is a senior lecturer at Anglia Ruskin University in the UK and serves as well as the director of the Professional Doctorate in Law Programme at that institution.

Earlier in his career, Aldo served as first secretary in the Ministry of Foreign Affairs of Malta during the country’s accession to the European Union. He then joined the Commonwealth Secretariat as legal editor of the *Commonwealth Law Bulletin*, following which he ultimately became the editor-in-chief of the *Commonwealth Judicial Journal*.

Aldo’s research interests include the sources of, and approaches to, international law;

international criminal law and adjudication; and comparative law. His resignation as editor-in-chief of the *Commonwealth Judicial Journal* was necessitated by the fact that he is currently pursuing those research interests (and is at work on a book that reflects them) while on sabbatical leave from his teaching

and research responsibilities at Anglia Ruskin University.

The CMJA is indebted to Dr. Zammit Borda for his years of dedicated service to the CMJA, the *Commonwealth Judicial Journal* and the journal's readers.

CALL FOR SUBMISSIONS

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/submitted 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 also 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.

INTRODUCING OUR NEW EDITOR-IN-CHIEF

Effective January 1, 2019, Judge Thomas S. Woods of the Provincial Court of British Columbia, Canada, assumed the role of editor-in-chief of the *Commonwealth Judicial Journal*, succeeding outgoing editor-in-chief Dr. Aldo Zammit Borda in that position. Judge Woods has been a member of the editorial board of the journal since 2012.

Judge Woods' appointment to the Provincial Court of British Columbia in October 2007 came after a 20-year career as a commercial barrister and, before that, a 10-year career in psychology during which he published several chapters and more than 25 research and review articles in journals originating in Canada, the USA, the UK and Europe.

Judge Woods sits in Port Coquitlam, a suburb of Vancouver, and hears cases in the court's adult criminal, youth criminal, family, child protection and civil divisions. He has, to date, given 154 published decisions. Judge Woods' retirement from the Provincial Court will occur in September 2019, almost 12 years after his appointment. He will, however, continue in his new role with the *Commonwealth Judicial Journal* following his retirement from the bench.

Judge Woods' practical and academic interests in the law cover a wide spectrum. He has authored (and co-authored) numerous articles and book chapters on such subjects as expert opinion evidence, defamation, electronic evidence, principles of appellate review, causation in negligence, ADR, ethical and professional responsibility issues, pure economic loss, solicitors' brief privilege, security for costs, developments in the law of products liability, &c. He has co-edited and contributed chapters to multiple editions of three textbooks published by the B.C. Continuing Legal Education Society, namely, *Expert Evidence in British Columbia Civil Proceedings*, the *British Columbia Civil Trial Handbook* and the *Provincial Court Small Claims Handbook*. Some of his legal writing has been cited and quoted in court decisions, including judgments of the Supreme Court of Canada.



From 2003 to the time of his appointment to the Provincial Court in 2007, Judge Woods contributed a regular column on defamation law for publication in *Canadian Corporate Counsel*. Beginning in 2006 and continuing on to the present, he has periodically contributed articles on the Canadian and Commonwealth law that governs expert evidence to *The Expert and Dispute Resolver* (a publication of the UK Academy of Experts). Commencing in 1990 and concluding in 2007, he authored columns, editorials and other such matter in his capacity as assistant editor (1990-1996), and then editor-in-chief, (1996-2007) of the *Advocate*—a journal whose 11,000+ subscribers include all members of the legal profession in British Columbia as well as law school and courthouse libraries across Canada and abroad.

Judge Woods has made numerous presentations on legal topics to various groups across Canada and internationally, including invited presentations on expert evidence at the 20th Commonwealth Law Conference in Melbourne, Australia in 2017 and at two conferences convened by the Academy of Experts in London in 2003 and 2006.

BECOMING STRONGER AND MOVING FORWARD TOGETHER: THE ROLE OF JUDICIAL ASSOCIATIONS IN THE MODERN ERA

His Honour Chief Judge Dr. John Lowndes, Chief Judge of the Local Court of the Northern Territory, Australia, and the immediate past president of the CMJA. He expresses his thanks to Cecelia Ngu, an Aurora intern assigned to the Local Court of the Northern Territory, for her valuable research assistance. This article is based upon a paper presented at the CMJA Triennial Conference, Brisbane Australia, September 2018. Footnotes have been removed to comply with house style.

Abstract: *Judicial independence is fundamental to the rule of law. Paradoxically, the judiciary is the weakest of the three branches of government in tripartite systems and thus, alone, insufficiently equipped to protect its independence, judicial institutions and the rule of law. By collaborating through the formation of effective judicial associations, both domestic and international, judiciaries can strengthen their ability to protect their independence and thereby better fulfil their collective constitutional role as a cornerstone of democracy.*

Keywords: Judicial independence – judicial independence, the protection of – judicial associations – rule of law.

Introduction

Any democratic society that respects the principle of judicial independence and values the rule of law needs judicial associations to protect the independence of the judiciary as the third branch of government and to preserve the rule of law as the other cornerstone of democracy.

Almost three decades ago Justice McGarvie outlined a number of “foundations of judicial independence” (see Justice R.E. McGarvie, “The Foundations of Judicial Independence in a Modern Democracy” *Journal of Judicial Administration* (1991) 1, pp. 3-45). He did not include judicial associations as one of those foundations, but he certainly came close to including them when he observed (at p. 22):

In Australia, it is proper and expected that leaders within the legislative arm and the executive arm of government are alert and active to ensure that their arm is adequately sustained and protected. It is for judges to

act in the same way in respect of their arm of government.

Judicial associations are the perfect means by which the judiciary can ensure that the judicial branch of government is adequately sustained and protected. Judicial associations are truly a foundation of judicial independence.

The judiciary has traditionally been regarded as the weakest (Alexander Hamilton, *The Federalist Papers*, No. 78) and most vulnerable branch of government—and yet it is expected to be the guardian and guarantor of judicial independence and the rule of law. However, the independence it seeks to sustain and protect (in the interests of preserving the rule of law) is always at risk due to the very weakness and vulnerability of the judiciary within the structure of government. Judicial associations serve the function of addressing the power imbalance between the judiciary and the other two more powerful arms of government with a view to making the judiciary an equal branch of government. They achieve this by bringing the judiciary together and augmenting the power and influence of the judiciary as the third branch of government—a simple and pure case of “becoming stronger together”.

As the active and public voice of the judicial branch of government, judicial associations play a vital role in strengthening and defending the independence of the judiciary and preserving the rule of law in a modern democracy.

Judicial Associations as Legitimate Entities

Judicial associations are an internationally recognised phenomenon that have a legitimate existence in modern society.

Principle 9 of the *United Nations Basic Principles on the Independence of the Judiciary* states:

Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their independence.

Similar recognition of judicial associations as legitimate entities is to be found in Article 8 of the *Beijing Statement of Principles on the Independence of the Judiciary in the Law-Asia Region*, Article 22 of the *Syracuse Principles on the Independence of the Judiciary* and Article 2.09 of the *Montreal Declaration*.

Perhaps, the fullest recognition of the legitimacy of judicial associations is to be found in the very recent *Brisbane Declaration on the Independence and Integrity of Judicial Officers of the Lower Courts* (endorsed and issued by the General Assembly of the CMJA at the 18th Triennial Conference on 13 September 2018), which also provides a blueprint for the objects or purposes for which judicial associations may be formed (see below).

The Need for Judicial Associations

The judicial branch of government is traditionally regarded as “the least powerful (although it may be influential) in that it may act only when resorted to by parties who choose to invoke its jurisdiction and because it is dependent upon the other branches of government to enforce its decisions” (Justice R.D. Nicholson “Judicial Independence and Accountability: Can They Co-Exist? (1993) 67 ALJ 404, p. 410). Alexander Hamilton concluded that “the judiciary is beyond comparison the weakest of the three departments of power” because:

The judiciary ...has no influence over either the sword or of the wealth of society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.... (The Federalist Papers No 78, p. 504).

The judicial branch is also the least powerful of the three branches of government because of its “over-dependence upon administrative and financial resources from the executive arm of government” (J. Lowndes, “The Australian Magistracy: From Justices of the Peace to Judges and Beyond, Part II” (2000) 74 ALJ 592 at 601).

Furthermore, Parliament has a right to reorganise the court system in “the interests of the improvement of the judicial system”: “A Brief History of the Early Days of the Judicial Conference of Australia”, Secretariat of the Judicial Conference of Australia, p. 17 (“Brief History”). However, the possibility that “the real reason for a particular reorganisation is to rid government of a court which itself is regarded, or some of whose members are regarded, as inconvenient” (Brief History, p. 17) lays bare the vulnerability of the judicial branch of government.

The circumstances that make the judiciary the least powerful branch of government also make it the most vulnerable branch.

Given the judiciary’s lack of power and vulnerability within the structure of government there are very few protective mechanisms to protect its independence.

The primary protective mechanisms are the Latimer House Principles and the doctrine of the separation of powers. Although these Principles encourage mutual respect between the three branches of government in relation to the fulfilment of “their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner” (Principle 11)(b)— as well as acknowledging that “each Commonwealth country’s Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law” (Principle 1) and that “an independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice” (Principle 1V)—they afford minimal protection for the judicial branch of government as they have not been formally adopted by governments across the Commonwealth, except for the Australian Capital Territory of Australia.

That only leaves the doctrine of the separation of powers. However, because this doctrine is not always constitutionally entrenched or legislated, and only operates by way of the common law or convention, it remains “an incomplete and fragile mechanism for ensuring judicial independence” (John Lowndes “Judicial Independence and Judicial Accountability at the Coalface of the Australian Judiciary”, a paper delivered at the Northern Territory Bar Association in Dili, East Timor July 2016, p. 24). As noted by Diana Woodhouse (“United Kingdom, The Constitutional Reform Act 2005 – Defending Judicial Independence the English Way” (2007) 5 IJCL 153 at 158), where the doctrine of the separation of powers is based on “understandings, convention and guidance,” its efficacy depends on “a commonality of purpose and shared values across various political, institutional and judicial cultures”. However, “developments in government—such as the emphasis on public management and efficiency, changes in the role and focus of the judiciary making it more outward looking, and increased public expectations coupled with a decline in public trust—mean that the relationships that have promoted a sharing of values are changing” and “commonality of purpose can no longer be assumed” (Woodhouse at 158).

Notwithstanding the fundamental importance of the Latimer House Principles and the doctrine of the separation of powers as institutional safeguards of judicial independence they are fragile mechanisms that are liable to shatter in an instant—even in a modern and stable democracy.

Traditional thinking maintains that the judiciary and the public should look to the Attorney-General (in Australia) or to the Lord Chancellor (the equivalent office in the UK) to defend the courts and the judiciary from threats to judicial independence and unjustified and irresponsible criticism (see The Hon. L. King “The Attorney General, Politics and the Judiciary” (2000) 72 ALJ 444 at 453; Sir Anthony Mason “No Place in a Modern Democracy for a Supine Judiciary” 1997, 35(11) Law Society Journal 51; Woodhouse at 154). However, over the past three decades the role of the Attorney General and the Lord Chancellor as a defender of the judiciary has progressively diminished, and become

minimised such that the judicial branch of government can no longer look to neither an Attorney-General nor a Lord Chancellor to protect the independence of the judiciary. In this latter regard, see King at 453; former Australian Attorney-General Daryl Williams, “Judicial Independence” (1998) 36(3) Law Society Journal 50-51 and “Who Speaks for the Courts,” in “Courts in a Representative Democracy”—A Collection of Papers from a National Conference presented by the AIJA, the Law Council of Australia and the Constitutional Centenary Foundation, November 1994, 182 at 192; Justice Robert Beech Jones “The Dogs Bark but the Caravan Rolls On: Extra-Judicial Responses to Criticism,” an address presented to the South Australian Magistrates Conference May 2017, p. 15; Brief History at 6-8; Woodhouse at 154-156).

In 1994, prior to becoming the Australian Attorney-General, Mr. Daryl Williams expressed the view that “the judiciary should accept the position that it could no longer expect the Attorney-General to defend its reputation” (Williams, “Who Speaks for the Courts” at 192). This view of the role of an Attorney General “appears to represent the approach adopted by most [subsequent] Federal and State Attorneys-General” (Beech Jones at 15) and continues up to the present day.

The experience in the United Kingdom has been similar. As pointed out by Woodhouse (at 154), over the past two decades there have been concerns that Lords Chancellor have not always fulfilled the role of “protector of judges and their independence” effectively. Specifically, the support of Lords Chancellor “for, and implementation of, policies of putting into effect the government’s commitment to efficiency and value for money have led to accusations that, rather than protecting judges and the administration of justice from interference, they have been a party to it” (Woodhouse at 159). As is further pointed out by the author below, doubts have arisen about the willingness of Lords Chancellor to protect the independence of the judiciary from either government policies that encroach on the administration of justice or from political criticism.

It would seem that the *Constitutional Reform*

Act 2005 did little to enhance the role of the Lord Chancellor as the defender of the judiciary and its independence. According to Woodhouse, by “fundamentally changing the responsibilities of the Lord Chancellor” the reforms enacted by the *Constitutional Reform Act* have “cast doubt on the suitability of the office [of Lord Chancellor]” to fulfil the task of defending the judiciary (at 160). Woodhouse has concluded (at 163) that the *Constitutional Reform Act* appears to “afford less protection than has been portrayed by the government; the judges may find that they themselves will have to take some responsibility for the defence of their independence”. The recent case of *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 supports that conclusion.

In *Miller* the High Court held that it was for the UK Parliament, not the government, to decide whether to trigger Article 50 of the Treaty on European Union and to instigate the process of the UK leaving the Union. To say that the court’s decision was not well received is an understatement. The three judges constituting the court were extensively criticised in the media, with one outlet (the *Daily Mail*) labelling them “enemies of the people”.

The Lord Chancellor’s slow and weak response to the vitriolic attack on the three UK judges who delivered the *Brexit* decision was a three-line statement to the effect that “the independence of the judiciary is the foundation upon which our rule of law is built and our judiciary is rightly respected the world over for its independence and impartiality”. Such a response did little to instil confidence in the ability of the Office of the Lord Chancellor to fulfil its statutory duty to protect the independence of the British judiciary.

It is abundantly clear that in Australia and the United Kingdom—democratic countries which are generally regarded as bastions of the rule of law and judicial independence—the judiciary cannot confidently rely upon either the Attorney General or the Lord Chancellor to protect the judiciary and its independence, at least to the requisite level.

The reluctance of Attorneys-General and Lords Chancellor in Australia and the UK in

recent times to defend the judiciary—when it is clear that they have a duty as first law officers to protect the independence of the judiciary and to preserve the rule of law—is a significant factor contributing to the relative weakness and vulnerability of the judicial branch of government within the tripartite structure of government. It is a factor that points to the need for judicial associations.

The historical reasons for the emergence of organisations such as the CMJA, the Judicial Conference of Australia (“JCA”) and the Association of Australian Magistrates (“AAM”) bespeak the need for judicial associations. All three associations were born out of a perception that the independence of the judiciary was not guaranteed because of:

- a lack of independence per se;
- the fragility of the principle of judicial independence; or
- the absence of strong institutional safeguards of judicial independence.

The CMJA, originally the Commonwealth Magistrates Association (“CMA”), was formed in 1970. In 1990, the CMA was renamed the CMJA to take account of the fact that in some Commonwealth jurisdictions magistrates had become judges.

The impetus for the creation of the CMA came from Sir Thomas Skyrme who had in mind for a long time the formation of a Commonwealth judicial organisation (Skyrme, “CMJA: Serving Judicial Officers in the Commonwealth for 30 Years”, p. 1). Sir Thomas considered that “those who were in greatest need of [such] an organisation were the Magistrates” for the following reasons (at 3-4):

- magistrates around the Commonwealth exercising extensive powers were not legally qualified and were in need of professional training;
- “their scrutiny and independence left much to be desired”; and
- “in some places the conditions under which they had to operate were appalling”.

The JCA was formed in 1993. Although its establishment coincided with the debate about

the proper role of the Attorney-General, the JCA was not established because the Attorney-General at the time had “expressed the view that he saw his role as no longer being a defender of the judiciary” (Brief History, at 6). Rather, the impetus for the creation of the JCA was a fundamental concern to protect the important yet fragile principle of judicial independence (Brief History at 1, citing Justice David Angel “The Early Days of the Judicial Conference” *Judicial Conference News*, No 1, p. 2). However, as was pointed out by Justice Beech Jones (at 16), “to an extent by reason of the history and practice the JCA fills the role that the Attorneys-General used to perform but no longer do”; and is therefore a factor justifying the existence of the JCA.

In his seminal paper “The Foundations of Judicial Independence in a Modern Democracy” JJA (1991) 1, pp. 3-45, Justice McGarvie helped to sow the seeds for the birth of JCA by raising “concerns that there were great challenges to judicial independence from the rising power of cabinet and the public service and from social changes”. He also noted that “some of the safeguards of judicial independence in fact lacked real strength and that the institutional framework should be repaired and extended so that it gave effective protection to judicial independence” (Brief History, at 2).

In a later foundational paper, “The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence” JJA (1992) 1 at 236 at 243, Justice McGarvie argued that the judicial branch of government needed to organise and assert itself “in the manner necessary for the preservation of judicial independence in the modern democratic world”; and to display “a commitment to doing what is necessary to meet the challenges to judicial independence” (see Brief History, at 2-3). To that end, His Honour proposed (at 259) the creation of a judicial association—an Australian Judicial Conference, sharing some of the features of the Canadian Judges Conference (now Canadian Superior Court Judges Association): see Brief History, at 3.

However, it is important not to overlook the fact that the need to meet these imperatives and challenges was not the only rationale behind the establishment of the JCA. It was

anticipated that the JCA would also have “an educational role, directed towards the wider community and the legislative and executive branches [of government]” (Brief History, at 8). This encapsulated Sir Anthony Mason’s view that “judges could reinforce public confidence in the administration of justice by explaining publicly their work and the issues they faced” (Brief History, at 7 citing Sir Anthony Mason “The State of the Judicature” (1994) 20 Monash University Law Review 1 at 11).

The Australian Stipendiary Magistrates Association (“ASMA”) was formed in June 1978 and renamed the Association of Australian Magistrates (“AAM”) in about 1994. The purpose of ASMA was to enable magistrates of the various States and Territories of Australia to speak with a national voice, and to address matters of importance to the Australian magistracy; and, where appropriate, to institute national projects relevant to the magistracy and its development.

Judicial associations endow the traditionally weakest branch of government with the ability to adequately sustain and protect its independence. As judiciaries in a modern democratic society generally have a hierarchical structure, there may be a lack of institutional unity—the judges may not be bound together institutionally as the judicial branch of government. Justice John Priestley has commented on the lack of institutional unity in the New Zealand judiciary (Justice Priestley, “Chipping Away at the Judicial Arm: The Harkness Henry Lecture” (2009) Waikato Law Review, vol. 17, 1 at 12). Judicial associations have the potential to create the institutional unity that is necessary to maintain a strong and independent judiciary. As an old proverb says, “unity is strength”. We become stronger if we stay united.

The CMJA, JCA and AAM are prime examples of associations that bind judicial officers together institutionally as the judicial branch of government. The CMJA brings together judicial officers at all levels of the judiciary across the Commonwealth. The JCA is a national judicial organisation whose membership comprises both magistrates and judges from all tiers of the Australian judiciary. By having a Governing Council that represents

superior and intermediate courts as well as the lower courts, the JCA helps to integrate the Australian judiciary in a way that contributes to the institutional unity of the judicial branch of government. The composition of AAM's Executive and its membership contributes to institutional unity at the level of the Australian magistracy.

However, there are further reasons why a modern democratic society needs judicial associations as a foundation of judicial independence.

Although there are others like Chief Justices and heads of jurisdiction—as well as the legal profession—that the judiciary can look to for the protection of its independence, the assistance provided by these protectors may be limited, depending on the circumstances.

As was pointed out by the Hon. David Malcolm AC KCSJ (“The Role of the Chief Justice” vol. 12, 2008 Southern Cross University Law Review 149 at 153, citing Chief Justice Doyle “The Role of the Chief Justice”, paper presented at the Supreme and Federal Court Judges’ Conference, Hobart, January 2001, p. 3):

The Chief Justice must be ready to speak for the judiciary of the nation, or of a State or Territory, on issues such as those that affect judicial independence and attacks on the judiciary.

As former Chief Justice Gleeson of the High Court of Australia acknowledged, “from time to time it will be necessary for Chief Justices to respond to criticism of judgments or judges when response is necessary and the Attorney General does not respond” (Justice Margaret McMurdo, “Should Judges Speak Out or Shut Up”, an address based in part on a paper delivered at the 5th JCA Colloquium, April 2000, p. 6 citing I. Henderson, “Gleeson Vows to Defend Judges” The Australian, 25 June 2001). This is reflected in clause 5.6.2 of the *AJIA Guide to Judicial Conduct*.

However, the role played by Chief Justices or heads of jurisdiction as protectors of the independence of the judiciary may be limited. Issues may arise that are not confined to a particular jurisdiction within a country but

extend to the judiciary as whole. Issues of this type may require an institutional response through a national judicial association. Cases may arise where the head of jurisdiction is the subject of unwarranted criticism. In such cases it may be more appropriate for a judicial association to respond to the attack. Furthermore, there may be cases where as a result of consultation between the head of jurisdiction and the judicial association it is mutually agreed that in the circumstances of the case it would be more appropriate for the judicial association to make the response.

As was observed by the Hon. David Malcolm AC KCSJ, “independence of the judiciary and the legal profession is recognised internationally as a core element of any civilised society”, and “the independence of the judiciary and the independence of the legal profession is for the protection of the people, and is the backbone of a free and democratic society” (“Independence of the Legal Profession and Judiciary”, Church Service, May 2005, pp. 3 and 4). As enunciated in the Latimer House Guidelines “an independent, organised legal profession is an essential component in the protection of the rule of law” (Guideline V111).

Thus, the judiciary and the legal profession have been enduring allies and the protector of each other's independence and the rule of law. However, as pointed out by Justice Margaret McMurdo “the legal profession cannot be relied upon to routinely explain and defend the work of the judiciary and the courts; its hands are quite full enough promoting and defending its own position” (Justice Margaret McMurdo “Should Judges Speak Out”, a paper presented at the JCA Colloquium, Uluru, April 2001, p. 5).

The judiciary needs the support of the legal profession; but as the primary guardian and guarantor of judicial independence and the rule of law, the judicial branch of government is duty bound to organise and assert itself in a manner that protects its independence. The best way for the judiciary to organise and assert itself is by forming judicial associations and for members of the judiciary to join and support such associations.

The Role of Judicial Associations

It is obvious from the preceding discussion that the primary role of judicial associations is to strengthen and defend the independence of the judiciary and to preserve the rule of law.

By way of example, the primary objects of the JCA are:

In the public interest:

To ensure the maintenance of a strong and independent judiciary as the third arm of government in Australia and

1. *To defend the judiciary and judicial officers against unwarranted attacks and to respond to such attacks*
2. *A main object of AAM is to also “ensure the maintenance of a strong and independent judiciary as the third arm of government in Australia”.*

Likewise, a primary aim of the CMJA is to “advance the administration of law and the rule of law by promoting the independence of the judiciary within several countries of the Commonwealth”. Furthermore, the recent *Brisbane Declaration on the Independence and Integrity of Judicial Officers of the Lower Courts* states, amongst other things:

Consistent with their fundamental rights, all members of the judiciary shall be free to form and join associations or other organisations to:

- a. *ensure the maintenance of a strong and independent judiciary within a democratic society that adheres to the rule of law;*
- b. *promote and encourage continuing legal, judicial and cross cultural study and learning by members of the judiciary;*
- c. *promote and encourage the exchange of legal (or judicial) educational practical or professional information on best practice between members of the judiciary and other persons or bodies including wherever possible*

by attendance at relevant conferences within or without the jurisdiction for which appropriate funding should be made available for attendances by judicial officers from the lower courts;

- d. *promote a better understanding and appreciation of the proper role of the judiciary in the administration of justice and the importance of a strong and independent judiciary in protecting the fundamental human rights and entrenching good governance and to do likewise within the Executive and Legislative branches of government;*
- e. *seek improvements in the administration of justice and the accessibility of the judicial system;*
- f. *undertake supporting research that will further the achievement of these aims.*

As the principal object of judicial associations is to promote, preserve or protect “judicial independence” it is essential to define “judicial independence” in order to determine what types of issues should properly concern a judicial association. This point was made by the Supreme and Federal Court Judges’ Conference (“SFCJC”) Steering Committee chaired by Justice Sheppard in 1992 in relation to the possible formation of the Australian Judicial Conference (Brief History, at 5).

The principle of judicial independence “focuses on the creation of an environment in which the judiciary can perform its judicial function as the third branch of government without being subject to any form of duress, pressure or influence from any persons or other institutions, in particular the two other branches of government” (John Lowndes, “Judicial Independence and Judicial Accountability at the Coalface of the Australian Judiciary”, citing E. Campbell and H.P. Lee, “The Australian Judiciary”, p. 50; J. Debeljak “Judicial Independence: A Collection of Materials for the Judicial Conference of Australia, JCA Colloquium, Uluru, April 2001, p. 2).

The principle of judicial independence has a broad compass (J. Lowndes “Judicial

Independence and Judicial Accountability at the Coalface of the Australian Judiciary”, p. 3):

...the principle of judicial independence connotes more than just the notion of impartiality; it requires that there exist an environment which ensures that the judiciary performs its “central, distinctive function [which is] independent and impartial adjudication (Sir Anthony Mason “The Appointment and Removal of Judges” in H. Cunningham (ed.) Fragile Bastion: Judicial Independence in the Nineties and Beyond (1997) 1, 4), and is perceived to perform that important function (Campbell and Lee, p. 49). It primarily “denotes the underlying relationship between the judiciary and the two other branches of government which serves to ensure that the court will function and be perceived to function impartially (MacKiegan v Hickman [1989] 2 SCR 796 per McLachlin J at 826).

As was stated by Sir Anthony Mason, a further distinctive feature of judicial independence is that it is “a privilege of, and protection for, the people” (A. Mason, “The Independence of the Bench, the Independence of the Bar and the Bar’s Role in the Judicial System” (1993) 10 Australian Bar Review 1 at 3).

The promotion or protection of the independence of the judiciary is clearly an appropriate and pre-eminent object or aim for a judicial association to pursue. However, in pursuing that aim, associations need to keep in mind the broad nature of judicial independence and its status as a right of every citizen in a modern democracy. These two aspects define the types of issues that should concern a judicial association. Judicial independence issues must always be pursued in the public interest.

It must always be borne in mind that judicial associations are not—and should never be—“a judges’ trade union, advancing the financial interests of judicial officers” (Brief History, at 8) and other personal interests. This is also made clear in the “CMJA Procedures for Dealing with Judicial Independence Issues”. If judicial associations were to be perceived to be mere judges’ trade unions, that would impugn their credibility (Brief History, p15).

Judicial associations exist for the purpose of maintaining a strong and independent judiciary that adheres to the rule of law; and, in pursuing that fundamental object, judicial associations need to “act in the overall interest of ensuring that the independence of the judiciary as an institution continues to be of worth and value to the public” (John Lowndes “Judicial Accountability as an Evolving and Fluid Concept (2018), 24(1) CJJ 15). As pointed out by former Chief Justice of the High Court of Australia, Robert French, “these objectives transcend any notion of a mere judges’ trade union” (“Seeing Visions and Dreaming Dreams” JCA Colloquium, Canberra, Oct 2016, p. 2).

It is legitimate for any judicial association concerned with the protection or promotion of judicial independence to respond on behalf of the judiciary whenever the independence of the judiciary or the rule of law is threatened.

The “Policies and Procedures in Regard to the JCA’s Role of Defending the Judiciary” identify the various ways in which the independence of the judiciary and the rule of law may be threatened and which may warrant a response from the JCA:

- The executive or legislative branches of government may propose an action that affects a court or the judiciary generally and the proposed action has the potential to “undermine a strong and independent judiciary”;
- An attack may be launched against an individual judicial officer, or a particular court or the judiciary generally in such a manner as to threaten or compromise the independence of the judiciary or the rule of law. By way of example, “a judicial officer [may] be vilified or denigrated”, “a judicial officer [may] be threatened with violence”, “a call [may] be made for a judicial officer to be ‘sacked’ or removed from a particular geographical area or from hearing particular types of matters”, “the role of the judiciary or a judicial officer [may] be inaccurately or improperly described eg to implement the will of the people as expressed in Parliament, or even to respond to a campaign conducted by a newspaper or other medium, leading to

the potential that the public's perception will be misled”;

- “There [may] be calls for inappropriate reform eg that the judiciary be elected, or the judiciary generally [may] be denigrated because its members are an unelected elite”: see for example the response of the media following the Brexit decision.

When an individual judicial officer or a court or the judiciary is attacked in any of the above ways it may be appropriate for a judicial association to respond to the attack (as is the policy of the JCA) by way of a “front-line defence” of the judicial officer, court or the judiciary. The JCA has regularly responded to such attacks: see the JCA website under “Media Statements” at <www.jca.asn.au>.

As has been pointed out by Justice Beech Jones (at 12), the particular circumstances of the case may warrant a response not to “vindicate the reputation or even feelings of the individual judge by correcting the misapprehension”, but because “some criticisms, considered individually or cumulatively, have the capacity to seriously undermine public confidence in the particular court, courts generally and ultimately the rule of law”. Whilst the “right of citizens to comment and criticise judicial decisions” is well recognised (Beech Jones at 19), a response may well be called for when the criticism exceeds the permissible limits of freedom of speech by undermining the authority or independence of the judiciary. This is supported by Article 5 of *The Commonwealth Principles on Freedom of Expression and the Role of the Media in Strengthening Democratic Processes and Good Governance* which was launched before the CHOGM in April 2018:

The rule of law, including the independence of the judiciary, is essential in order to uphold the right to freedom of expression, other human rights and the democratic process. The judiciary should promote open justice and facilitate media access to the courts for the reporting of proceedings. The media have a responsibility not to undermine the authority or independence of the judiciary and to communicate judicial decisions to the public.

Justice Beech Jones (at 20) says this about the

purpose and content of the JCA's responses to unwarranted attacks:

... [they] have been prepared on the basis that its ultimate aim is to promote the respect for the judiciary and the rule of law... overall it has sought to make its response conform with a number of common themes that meet its principal objective such as the need to explain the judicial process, the importance of judicial independence and the rule of law, the accountability of judges through the process of giving reasons and the system of appeal. The responses have also referred to the inability of individual judges to respond to personalised attacks as a reason why such attacks should not be made.

As is clear from the CMJA's front-line defence of the independence of the judiciary, it may also be appropriate for a judicial association to respond to disciplinary proceedings to suspend or remove a judicial officer for alleged misconduct or the arrest and detention or impeachment of judicial officers in circumstances that indicate that the process may be unconstitutional, unlawful, unfair or otherwise improper such as to erode the independence of the judiciary. Furthermore, it may be appropriate for a judicial association to respond to a failure by governmental agencies to comply with court orders. A failure to fulfil court orders strikes at the heart of an independent judiciary which depends upon the executive to enforce its decisions. The CMJA has responded to such potential challenges to judicial independence: see the CMJA website under “Recent CMJA Activities” at <www.cmja.org>.

However, the role of judicial associations is not confined to a “front-line” defence of judicial independence and the rule of law.

Judicial associations can perform a legitimate role in commenting on, or making submissions concerning, proposed legislative and executive action in the interests of pre-emptively protecting judicial independence, the rule of law and the administration of justice in a democratic society.

The CMJA has established a set of guidelines for dealing with requests from member governments, through their Ministries of Justice

or equivalent, the Commonwealth Secretariat and Member Associations/Chief Justices (as well as individual judicial officers) to respond to consultations on constitutional or legislative reforms: see “The CMJA Procedures for Dealing with Judicial Independence Issues”.

When there is a request for assistance in relation to constitutional or legislative reforms, a process is followed. This includes an assessment as to whether or not the proposed reforms “relate to the CMJA and whether or not the CMJA has responded to similar requests in the past on the same or similar issues”. The process also includes consultation with the Executive Committee of the CMJA to ascertain whether there is any objection to the CMJA responding to the request and “whether or not any response should be made as a member of the Latimer House Working Group rather than the CMJA”. If the request has been received from a government source, the local member of Council or Regional Vice President and local Member Association are also consulted as “to whether or not there are objections to a response from the CMJA”. An inquiry is also undertaken to establish whether or not “any responses have already been made by the Member Association or legal or judicial services within the country and check what, if any, responses are being made by other international organisations/partner organisations”.

After it is decided that a response should be given, a draft response is circulated to the Executive Committee for its input, and where possible to the Member Association or Chief Justice for their approval. Once approved the response is sent to “source of request with a copy to the Member Association /Chief Justice and Regional Vice President/Council Member for the country concerned as well as members of the Executive Committee”. Thereafter, progress on the constitutional or legislative reforms is monitored.

The JCA has also developed a set of guidelines concerning the circumstances in which it would be appropriate for it to make comment or submissions concerning proposed legislative changes: see “Public Pronouncements about Proposed Legislation: Guidelines”. These guidelines are designed to “inform the Governing Council or the Executive of the JCA

in speaking on behalf of the judiciary”.

As is noted in the guidelines:

Inevitably, within such a large body as the JCA, there will be some disparity of opinion upon issues which are the subject of, or related to, a political controversy. This is a further reason to be careful to avoid, if it is possible to do so whilst pursuing the objects of the JCA, participation in a discussion on matters of government policy. But it is a consideration which should not compromise the proper pursuit of the JCA's objects. It is by limiting its public statements on proposed legislation to where they are reasonably required in the pursuit of those objects, that the Council or Executive will be able to speak authoritatively for the JCA and the Australian judiciary.

The guidelines acknowledge the necessity “to recognise that even where it is appropriate for the JCA to speak, ultimately it is for the Parliament to decide upon the content of legislation, and to that end to resolve issues of policy”.

With those matters in mind, the guidelines suggest that “in the main, the public statements of the JCA [in relation to proposed legislation] will be confined/directed to: (a) matters affecting the independence of the judiciary; (b) matters affecting the operation of courts; (c) the maintenance, promotion and improvement of the judicial system; and (d) matters likely to affect some aspect of the administration of justice”. These guidelines are broadly in line with the “Guidelines for Communications and Relationships Between the Judicial Branch of Government and the Legislative Branches Adopted by the Council of Chief Justices of Australia and New Zealand on 23 April 2014” and the UK Judicial Executive Board’s “Guidance to the Judiciary on Engagement with the Executive”.

The JCA guidelines recognise that “the range of matters which may affect some aspect of the administration of justice may, on some views, be extensive”. Accordingly, caution is to be exercised when “considering making a public statement on matters which affect the administration of justice”. As a general rule, the JCA will make “public statements on

matters of that kind only if they bear directly on the central functions of the judiciary”.

The guidelines proceed to set out a number of considerations that are meant to guide the JCA in making such public statements:

- the fact that it is Parliament which ultimately has the responsibility of resolving issues of policy affecting the content of legislation;
- the subject matter of the proposed legislation, and the extent to which it involves political controversy;
- the desirability of the judiciary avoiding entering into political controversies, but accepting that on occasions it will be inevitable;
- the desirability of judicial officers sharing their experience so as to inform public debate and to improve the quality of legislation;
- whether the making of the public statement has been invited/solicited and, if so, the source of the request, and the uses which may be made of the public statement ;
- the potential impact of the public statement on reasonable perceptions of judicial independence and impartiality, and to the desirability of avoiding a perception that judicial officers might not consider the law in question fairly and dispassionately;
- the desirability of avoiding so far as practicable a circumstance in which a reasonable apprehension of bias may arise in relation to the JCA's members who will have to consider the law in question;
- in respect of a law which has effect on or in a certain jurisdiction, the views concerning the law expressed by the members of the judiciary in that jurisdiction, particularly views expressed of a head of jurisdiction, and attempt, so far as practicable, to avoid inconsistency with those views;
- the desirability of avoiding the expression of public and conflicting views by judicial officers; and
- the extent to which the members of the

JCA may themselves hold conflicting views concerning the merit or otherwise of the law in question.

However, in making such public statements, any judicial association—as much as the judiciary itself—must operate within the framework of the Latimer House Principles and its theoretical underpinning, the doctrine of the separation of powers. Both require the three branches of government to mutually respect each other's function in a democratic society. In making such public pronouncements a judicial association must be careful not to breach the doctrine of the separation of powers nor in any way appear to undermine the principle of parliamentary sovereignty.

In addition to pre-emptively defending the independence of the judiciary in the manner discussed, it is legitimate for judicial associations to promote, foster and develop “within the executive and legislative arms of government, and within the general community, an understanding and appreciation that a strong and independent judiciary is indispensable to the rule of law and to the continuation of a democratic society” and to bring about “a better understanding and appreciation of the benefits of the rule of law and of the role of the judiciary in the administration of justice” (see CMJA Brisbane Declaration on the Independence and Integrity of Judicial Officers of the Lower Courts; JCA Constitution; and AAM Constitution). This is an important educational role which is designed to strengthen the independence of the judiciary as the third branch of government.

As Justice Margaret McMurdo has pointed out (“Should Judges Speak Out” at 5):

Most of us now accept that it is for the judiciary to foster public confidence in the courts by ensuring the public understand the role of judges to administer justice according to law. This is necessary to maintain public confidence, understanding and support for the courts.

Later, Her Honour acknowledges (at 10) the desirability of “institutional communication to explain the workings of judges and the courts”. Indeed, such institutional communication is an absolute necessity as the judiciary is under an

ethical obligation to engage in civic education (S. Bookman, “Judges and Community Engagement: An Institutional Program” (2016) 26 JJA 3 at 5). There is no better vehicle for institutional communication of this type than judicial associations.

As pointed out by Lowndes, the judiciary has indeed a “societal obligation to engage the community in the manner suggested by Bookman because as an important social institution the judiciary needs to impart information to the public concerning its role, functions and activities in order to sustain its legitimacy—which is derived from the community it serves—and to maintain public confidence in it as a branch of government” (J. Lowndes, “Judicial Accountability as an Evolving and Fluid Concept” at 22, citing Bookman at 6). Judicial associations provide a means by which the judiciary as an institution can meet this fundamental obligation.

Finally, but not least, a judicial association must be concerned with providing “training and continuing professional development for the judiciary”—which is “essential to ensuring high ethical standards and competent judges” (Horizon Institute, “Judges Associations”, p. 3; Principle 9, *United Nations Basic Principles on the Independence of the Judiciary*). Unethical and incompetent judicial officers are the arch enemies of judicial independence and impartiality. Continuing judicial education strengthens the independence of the judiciary and the rule of law.

The Functioning of Judicial Associations

To be effective, a judicial association needs to be a well-organised, well-oiled and finely tuned machine.

It is essential that a judicial association have in place appropriate policies and procedures for responding to threats to the independence of the judiciary and the rule of law, so as to ensure a principled and consistent approach to the defence of judicial officers, a particular court or the judiciary generally against unjustified attacks. To that end, both the JCA and the CMJA have developed such policies and procedures.

In conducting a “front-line defence” of the

judiciary, judicial associations need to possess the following characteristics:

- the ability to become aware of threats or risks to the independence of the judiciary and/or rule of law—otherwise a judicial association cannot begin to fulfil its role as defender of the judiciary;
- a process which enables an assessment to be made as to whether it is appropriate to respond to the threat or risk and procedures for determining the response (if any) to be made; and
- the ability to make a swift and effective response

These characteristics are shared by the CMJA and the JCA.

As referred to in the “CMJA Procedures for Dealing with Judicial Independence Issues,” threats or risks are brought to the attention of CMJA through a number of sources: member associations, Commonwealth Chief Justices, individual judicial officers, notifications from other Commonwealth organisations or a partner organisation such as the CLA or CLEA and through media reports identified by the CMJA Secretary General. As mentioned in the “Policies and Procedures in Regard to the JCA’s Role of Defending the Judiciary,” attacks are brought to the attention of the JCA through the Secretariat who regularly monitors media reports or through a member of the Governing Council or Executive Committee of the JCA or a JCA member.

Both the CMJA and the JCA have a structured approach to responding to threats or risks to judicial independence which is characterised by a well-developed set of procedures.

The CMJA’s approach is comprehensive, no doubt due to the fact that the CMJA is an international organisation with a diverse and dispersed membership consisting of both individual members and member associations.

A distinctive feature of the process is that the CMJA only responds to issues of judicial independence at the request of a member association /Chief Justice or an individual judicial officer.

Upon receiving a request of the first kind, the CMJA assesses the nature and urgency of the threat and conducts an inquiry to establish “the geo-political status of the country concerned (including any past example of threats against the judiciary or the administration of justice)” and whether “any disciplinary measures have been taken in accordance with constitutional or legislative requirements” as well as the reactions of other national bodies and other organisations involved in the area of the rule of law, good governance, and human rights and any information received by other international organisations or the Commonwealth Secretariat on the issue and how these organisations might be responding to the issue. The following process is then followed:

- a. The CMJA Secretary General engages in the consultative process that is undertaken in relation to requests for assistance in relation to constitutional or legislative reforms as well as making the relevant inquiries: see above.
- b. The Secretary General, in consultation with Executive Committee, takes one of the following three approaches depending on the urgency and seriousness of the issue: (i) contacts “the Commonwealth Secretary General and/or members of the Ministerial Action Group, expressing CMJA’s concerns and urging them to resolve the issue according to Commonwealth fundamental values”; (ii) contacts other international organisations working in the area of judicial independence such as IBAHRI, ICJ or CLA who “might more easily produce a press statement or further investigate the matter”; (iii) provides the member association or Chief Justice with all the information they may need in support of their defence of judicial independence and the rule of law. The Secretary General would only approach the Minister responsible for the judiciary in exceptional circumstances.
- c. At all times, the Secretary General, assesses “the risk of any approach on the members of the judiciary within the country concerned”.
- d. The Secretary General then drafts a

response citing relevant international documents (including the Latimer House Principles) which is circulated to the Executive Committee and the member association/Chief Justice for final input prior to being sent to the relevant recipients referred to in paragraph (b) above.

- e. The Secretary General then continues to monitor the situation within the country concerned, keeping the Executive Committee, Council and membership informed of any developments, as well as informing the Commonwealth Secretariat relevant divisions of “any developments that might affect the way they deal with the issue”.

Any response sent in accordance with paragraph (d) above is posted to the CMJA website.

If the request emanates from an individual judicial officer and the issue pertains to his/her personal position the Secretary General recommends that the judicial officer “take up the issue with the national association and/or the International Commission of Jurists Centre for the Independence of Judges and Lawyers who might be able to assist”. However, if the request relates to the rule of law, the independence of the judiciary or the administration of justice the process referred to in paragraph (a) above is followed. The Secretary General may consult with the President and the Executive Vice President as well as the relevant members of the Council as to whether or not the matter might be considered as affecting the independence of the judiciary, rule of law, or the administration of justice. If so, the Secretary General assesses the nature and urgency of the threat and conducts the other inquiries that are undertaken when a request for assistance is received from a member association or the Chief Justice, and proceeds in accordance with the process outlined in paragraphs (b) and (c) above.

The CMJA also has similar processes for responding to threats to judicial independence communicated to the association from other partner organisations such as ComSec or the CLA or other organisations such as IBAHRI and the ICJ. The CMJA also has a similar process for responding to threats to

judicial independence which are brought to the attention of the association through the Secretary General's monitoring of press and media reports.

The JCA's process for responding to attacks against the judiciary is not as detailed owing to the fact that the JCA is a national, rather than an international, association and does not have to operate within a framework like the Commonwealth of Nations. The JCA's process for responding to attacks against the judiciary which is set out in its "Policies and Procedures" may be summarised as follows:

- any response is "made by, or in the name of, the President";
- if the President is unavailable or it is inappropriate for the President to respond, the Vice President, Treasurer or a member of the Executive Committee in order of availability responds;
- the process of responding is co-ordinated through the Secretariat;
- the President makes "every effort to contact the judicial officer/s concerned and the relevant head of jurisdiction, and seek their views as to whether a response should be made and in what terms";
- if those persons cannot be contacted, usually no response is made;
- if either person requests that the JCA not respond, usually no response is made;
- "given that a response is only potentially effective if it is made very swiftly, the President is not obliged to seek the views or approval of the Executive Committee, but in some circumstances the President may decide to do so".

The form of response made by the JCA is governed by the nature of the attack or criticism and may consist of:

- a media release sent to media outlets, "presidents and media persons at the Law Council of Australia, bar associations and law societies";
- a letter to "the editor of the relevant newspaper";
- "an opinion piece article" sent to "the

relevant newspaper or journal";

- a letter to "the editor of the relevant media outlet expressing concern and seeking a retraction or correction";
- a letter to "the person/s who made the attack seeking a retraction or correction"
- "a complaint to the Australian Press Council";
- if the attack is "sustained and personalised", a letter to the Attorney-General requesting him/her to "place in the public domain the reasons for the judicial officer's decision and confirm that he /she acted in accordance with law";
- if the attack is made in Parliament, a letter to "the Attorney-General of the relevant jurisdiction, seeking his/her support in defending the judicial officer".

The President of the JCA decides the form that the response is to take, involving, if necessary, "the Secretariat in the logistics of making the response".

The JCA policies and procedures recognise the imperative for a swift response—otherwise the effectiveness of the response "is essentially dissipated". Accordingly, once the President becomes aware of the attack, he/she contacts "the judicial officer/s concerned" and "the relevant head of jurisdiction". The President also advises the Secretariat (if he is not already aware of the attack) that "a response is to be made and to be prepared to assist". The President then prepares the appropriate response and arranges for the response to be distributed or forwarded, usually by the Secretariat.

As a general rule, all members of the JCA are advised of the response, including its contents, either by email or by inclusion in the weekly *JCA News & Media*, and the response is posted on the JCA's website.

Moving Forward Together

Judicial associations enable the judiciary to "become stronger together" and to assert itself as an equal branch of government. But what about the future? How does the judiciary move forward as a separate, but equal branch of government?

Judicial associations are one of the foundations of judicial independence. They can give the judicial branch of government an institutional unity that it otherwise lacks—even in the most integrated court systems around the Commonwealth.

The structure and membership of judicial associations is critical to, and dictates, the degree of institutional unity engendered by a judicial association. The greater the institutional unity (or judicial solidarity) that a judicial association creates, the more likely it is to be effective. The reason for that is simple and straightforward. A judicial association whose membership only comprises members from one tier of the judiciary is bound to be less effective than an association whose membership extends to other or all tiers of the judiciary. The most effective judicial associations are those which represent all tiers of the judiciary such as the CMJA and the JCA.

Such associations are more conducive to creating the institutional unity that is needed to enable the judiciary to stand firmer against executive and legislative action that challenges the independence of the judiciary and the rule of law (as suggested by Dr. Brewer, the Secretary General of CMJA). Again, as suggested by Dr. Brewer, associations like the CMJA and the JCA avoid the “divide and rule” situations—pitting the higher levels of the judiciary against the lower levels—that some Commonwealth nations have faced. Is this not a matter of “united we stand, divided we fall”?

Looking to the future, judiciaries around the Commonwealth are encouraged to the extent they have not already done so to form judicial associations. Ideally, the membership of those associations should include both magistrates and judges (from all tiers of the judiciary) so as to ensure a sufficient level of institutional unity to enable them to operate effectively within their jurisdictions. In that regard, nascent judicial associations have some excellent models to look to—such as the CMJA and the JCA.

The CMJA is a network of not only individual judicial officers, but also of member associations. As part of becoming stronger and moving forward together the CMJA needs to have strong member associations in all the regions of the Commonwealth: the Caribbean,

East, Central and Southern Africa, Indian Ocean, Atlantic & Mediterranean, Pacific and West Africa. The strengthening of the network will assist the CMJA in strengthening and defending the independence of the judiciary around the Commonwealth.

The opportunity that the CMJA affords for “networking” brings with it other benefits such as “opportunities to promote professional development through for example judicial study exchanges and conferences” and “guidance on the establishment and role of judges’ associations” (Horizon Institute, “Judges Associations”, p. 5).

Finally, but not least, such networking enables judicial associations around the Commonwealth to learn from each other as to the most effective ways to defend and strengthen the independence of the judiciary and preserve the rule of law in an ever-changing world that presents new challenges.

As observed by Woodhouse, “a key characteristic of the concept [of judicial independence] is its fluidity, which enables it to adapt to some degree to political, social and practical requirements”; and given “the elusive nature of judicial independence, it is also difficult to determine what developments might put it under pressure or undermine public confidence in the judiciary” (at 164)

The judicial branch of government must become stronger together—and move forward together—to meet the inevitable challenges ahead. As advocated by the Canadian Judges Conference (now the Canadian Superior Court Judges Association), the judiciary must be “constantly vigilant and committed to assuring the preservation of a strong and independent judiciary” (Brief History, at 3). That role is best served by well organised judicial associations in all Commonwealth countries that are truly representative of the judiciary as a whole and able to speak and act on behalf of the judiciary as an institution when it comes under attack. That is not to overlook the indispensable role played by the CMJA in bringing together judicial associations around the Commonwealth as a key strategy in preserving a strong and independent judiciary that adheres to the rule of law from one end of the Commonwealth to the other.

USE OF COURT TECHNOLOGIES IN RWANDA: PROGRESS AND CHALLENGES

The Hon. Sam Rugege, Chief Justice of Rwanda. This article is based upon a paper delivered at the CMJA Triennial Conference, Brisbane, Australia, September 2018. Footnotes have been removed to comply with house style.

Abstract: *In the years following the Rwandan Genocide, much work has been done to revive and rebuild the country's social fabric, economy, infrastructure and institutions—including its judicial institutions. By stages, Rwanda has increasingly improved access to timely and affordable justice by introducing electronic methods for processing the cases that come before its judiciary. The benefits and advantages of having done so are already clearly apparent but there is still work to do to modernise the civil and criminal justice system in Rwanda.*

Keywords: Technological reform – digitisation – improving efficiencies in court document management – overcoming distance and other barriers to access to justice electronically

Introduction

As is now common knowledge, Rwanda was devastated during the Genocide against the Tutsi in 1994 with massive loss of life and the destruction of the country's social fabric, its economy and its infrastructure. Public institutions ceased to function, and the post-genocide government and society had to begin reconstruction virtually from scratch. However, even before the Genocide, courts were not known for their efficiency nor did they command the respect of the population, largely because they were not well-funded, they were dominated by the executive and they were staffed by persons a majority of whom were not legally trained. Moreover, the system was riddled with corruption. There was a heavy back-log of cases going back as far as 20 years. Court processes were purely manual with the only machines being dated type-writers.

Since the end of the Genocide, there have been many programmes of reconstruction and development involving all institutions. Specifically in the judiciary, the main priority has been the reinstatement of the rule of

law. But a significant focus has been placed upon the training of lawyers, judges and magistrates; the construction of new courts and equipping them; and the introduction of court technologies wherever possible. Today, all courts have access to the Internet and communicate via email. Proceedings are digitized and some courts have digital means for recording proceeding. Electronic case management has been implemented in all courts.

A Brief History of Digitisation in Rwanda

Until the judicial reforms that began in 2004, there only a handful of computers were at the disposal of the judiciary and those were only available in the higher courts. Recording of proceedings was done by hand, all documents were kept in folders. Storage was poor with the risk of damage or loss of files, whether intended or unintended. Finding what was needed for a particular case was very difficult since it meant physically searching through huge volumes of files. Equally, determining how many cases were pending, for planning purposes, was slow and tedious requiring physical verification through piles of folders.

In 2006, with the assistance of some Canadians, a document management system called “Registre de Dossier Judiciaire” (“RDJ”) was initiated to ease access to case document information. With this system, cases were filed physically at the court and all case processing (such as case number allocation) was done manually. The court registrars would access RDJ to input the case information which could later be easily employed to locate files electronically. However, RDJ did not replace physical case documents; rather, it was used concurrently to facilitate searches for case information. This did not help in terms of reducing the time or the cost a litigant spent in filing the case; neither was it very helpful to the court staff charged with processing

cases. Further, the system did not allow for attachment of documents such as pleadings or evidence, nor could it be accessed online by interested parties.

By 2008 almost all courts had computers for use by judges, registrars and other staff. In 2011 an electronic filing system (“EFS”) was introduced whereby the litigant did not have to come physically to court to file a case. Pleadings could be scanned and entered into the system electronically. However, the documents would then have to be printed at the court registry and compiled to make them ready for the hearing.

Although EFS had the advantage of saving time and cost for the litigant by enabling web-based filing (and thereby also improving court efficiency), there were still shortcomings. Case management after filing could not be done in the system and the litigant could not track developments in the case. Thus, the Electronic Document and Records Management System (“EDRMS”) was introduced in 2012 by an Indian company to augment the EFS. EDRMS was conceived as a document management system, basically employing off-the-shelf software that was intended to be adapted to work in that application. Apparently, it had been used in different public institutions in some countries but had never been tried in courts. It did not include case filing which means that litigants would file cases through EFS, and court registrars would manually input information into EDRMS. As well, it was not a web-based system and each court worked in an isolated manner. The attempt to convert it into a case management system took a long time and much tinkering. It never did work properly. The adaptation continued until the contract of the providers expired but then it had to be abandoned. The lesson learnt with EDRMS was that before purchasing an application for your institution you need to conduct a thorough study that demonstrates that it will meet your particular needs. There must also be very close collaboration between court staff and developers at every stage.

Integrated Electronic Case Management System

The current Integrated Electronic Case Management System (“IECMS”) was

introduced in 2016. It was developed by Synergy International Systems Inc.—an American company with its development office in Armenia—after a thorough study by a consulting firm. It was an initiative of the entire Justice Sector based on a needs assessment conducted by the Sector. The Sector comprises the institutions involved in the criminal justice chain, namely, the Rwanda Investigation Bureau (“RIB”), the National Public Prosecutions Authority (“NPPA”), the judiciary, and the Rwanda Correctional Services (“RCS”). The system has a fully integrated process in criminal matters, beginning with the investigation phase where RIB officers capture suspect details, arrest statements, seizure and the like and then send the case to the prosecution. At this level, the prosecutor has access to the whole investigation case file, to general information on the accused and to other case information that is automatically filled into the prosecution case. The prosecutor only adds prosecution-related information like any suspect’s statement made before the prosecutor, indictment, etc. which is then transmitted to the court via the system. The court, the defendant and their lawyers have access to both the investigation and the prosecution case. Once court proceedings are completed and a judgment is rendered, it is forwarded automatically to RCS for execution with all the supporting documents in the criminal process chain. Moreover, the system keeps track of the criminal record of the individual from detention through all appeals with the corresponding decisions from all the institutions.

On the civil litigation side, individuals, entities with legal personality as well as the civil litigation department of the Ministry of Justice have access to IECMS. The litigant files a case for consideration in any court in the country. The defendant is automatically informed of the case against it and provides responses through the same system. After an admissibility compliance check by the registrar, an automatic case number is generated. At each stage in the case process, each actor builds on the previous actor’s work and completes only his/her relevant requirements until the file reaches case disposal.

The system was aimed at improving service delivery by reducing delays and costs with

benefits both to litigants and the justice system. As has been noted, unlike previous applications, IECMS was developed in close collaboration with stakeholders and thus is able to capture most of their requirements from the outset. It is periodically upgraded based on the feedback and needs of users.

The main advantages of IECMS

The IECMS system can be accessed from anywhere on computer, tablet or mobile phone. Thus, activities like filing a case or an appeal, issuing a summons, receiving notifications and reminders of any deadlines regarding case processes (via e-mail, sms and system notifications) can be done electronically. Litigants can also follow up on their cases regarding current status and what follows next. Pleadings and other documents can be filed online and new evidence can be added after the initial filing. Court fees can be paid using mobile money services on telephone. A litigant can also check whether his or her case has been appealed or not for execution purposes (This was one of the more frequent reasons that litigants came to court. In 2014, 18.51% of all visits to courts were made by litigants returning to check whether their cases had been appealed; in 2017 that had dropped to 8.36%. As copies of judgments can be obtained online, trips to court to obtain those have also been reduced considerably. These services are available 24 hours a day, seven days a week. Litigants and lawyers do not have to leave work to file documents or check on progress of their cases as they can do so from their offices or home, saving them time and money.

IECMS makes work easier for registrars and court clerks in preparing files for the court hearings. Integration means that court staff can obtain data from other Justice Sector institutions automatically. If there are delays in performing certain functions, the system sends a notification and laxity can easily be identified. Operation of IECMS has been summarised thus: The case workflow automates the processing of cases from one agency to the next, so that there is a seamless integration of activities and communication. The system automatically sends in-system, email, and SMS notifications to users and users can create, assign, and track tasks. Information

is captured and passed on digitally, and data exchange is no longer fragmented. A detailed audit trail provides a record of all edits and status updates.

Besides enhancing efficiency, the contact between litigants or their lawyers and the court has been much reduced. This minimizes opportunities for corruption. It is also almost impossible for files to vanish. In addition, the system also helps track unnecessary adjournments and other delays, and assists in compiling reports on the performance of a particular court or individual judge, thus revealing where there might be a bottleneck or suspicious conduct symptomatic of corruption. It also enables the preparation of global performance statistics report for the entire judiciary on a quarterly basis.

For judges, the system has advantages. It assists them in the management of the cases allocated to them and in making available most of the information necessary for preparing orders and judgments in one place. After judgment has been delivered, judgments can be uploaded into the system making them available to the parties free of charge.

Level of achievement in implementing the system

Implementation has been fairly successful although it has not yet reached 100%. Electronic filing is now fully functioning in all courts in Rwanda and most other digital court services are widely used, reducing considerably the number of court users physically coming to court. Almost all the functions of the registry are performed within the system, including chatting with litigants, assisting them on how to properly prepare and submit their claims, pleadings, evidence etc. Case files are also exchanged between courts in the system. It is now easy for the head of the court to track the performance of individual registrars and court clerks to determine how well they perform their duties.

Challenges in implementation

Implementation of the IECMS system has not been without challenges. One was overcoming resistance to change and innovation among judges. Even the leadership within the judiciary

was initially resistant to the change that brought integrated electronic management. There was a fear that the data of the courts would be vulnerable to being accessed by institutions in other branches of government and that judicial independence would be put at risk. The judiciary had to be reassured time and again by judiciary technicians that the data was safe and only persons with the requisite permissions could enter the system and that those persons could only access what was relevant to them through the use of passwords, supported by an automated tracking system. There was also the need to change the mind-set, especially of the older more senior judges, to embrace electronic case management in the cases assigned to them. Although there was adequate training in the use of the system, it took months for such judges to overcome their fear of technology such that they could be able to perform functions within the system when their turn came.

The quarterly meetings of heads of courts and their chief registrars with the Chief Justice were used as an opportunity for the judiciary's IT staff to review the use of IECMS, explain any processes calling for more explanation and update those present on new functionalities as they were added to the system. Judges and registrars could raise issues they had encountered and learn from their peers as to how they had resolved them. The judiciary has also created an IECMS users' email forum whereby judges and registrars can pose questions or state problems they may be having in using the system and get feedback and assistance from their colleagues. This has eased the pressure on the few IT officers who are then freed to deal with bigger problems.

The problem of change of mind-set also predictably applied to legal practitioners who had to represent their clients in filing claims, pleadings and other documents through the IECMS system. There was considerable resistance at the beginning but with sensitization and training by the Judiciary's IT officers as well as the courts' refusal to accept physical documents, practitioners eventually came around and they are now in fact happy with the system. They realize that it saves them time and money and makes them better organized and systematic in their preparation for court proceedings.

One attorney told the story of why he was happy with the system. He lost a case in 2010 in the Magistrate's Court in the up-country town of Nyamagabe because he had forgotten a crucial document in Kigali (a four-hour drive away). On the other hand, in 2017 while his co-counsel was in Lesotho, he was able to file a case in a Rwandan court through IECMS using scanned documents emailed to him from Rwanda. Another lawyer testified about how he had physically gone to file an appeal case in 2005 in Kigali and there was a long line of litigants at court. The working hours ended while he was still waiting in line and since it was Friday, they were told to return the Monday. He was unable to file his appeal because Friday was the deadline for filing the appeal. Today, he is happy that he can file his appeal in the night, while attending social events or over the weekend at his own convenience.

Another challenge has been the inadequacy of necessary IT infrastructure to support the judiciary and other partner institutions. Initially the Internet infrastructure did not reach all courts and other institutions. For example, the police did not at first have enough computers in their outlying stations. For this reason, IECMS was initially (in January 2016) deployed in 24 courts, mostly in and around the capital city. However, connections have progressively been extended such that since July 2017 all courts in the country have been using the system. Currently, 58 out of 63 courts are connected by high speed internet (52 on fiber-optic cables, six on 4G LTE) while five are connected to 3G broadband Internet. Equipment has also been progressively provided to the institutions that were not initially well equipped.

There was also the challenge of getting ordinary litigants to file cases and submit documents online, especially given that only about 30% of Rwandan society have access to the Internet. In order to get the litigant community to engage with online filing and other online services, there was a campaign by judiciary officials to sensitize the public on the benefits of electronic case management. This was done mostly through regular talk shows on local radio stations as most Rwandans have access to and regularly listen to the radio. In particular, the judiciary has a weekly slot on a radio station where it regularly discusses

current topics related to the work of the judiciary, including technology.

There was, however, also the need to educate the public in the use of the IECMS system. Given the very limited human resource capacity in the IT department, the sector came up with the innovative strategy of training young people, mostly students and recent graduates with skills or interest in law or IT, in the use of the system to serve as IECMS facilitators. They were then deployed across the country to offer their services to members of the public who wished to file their cases. For a small fee, facilitators assist potential litigants to create user accounts and file cases online. Operators in cyber cafés, telecentres and smart villages were also trained to provide the service. This strategy has worked very well.

Litigants who are too poor to afford services at cyber cafés, are able to access the services from employees of the Maisons d'Access en Justice (“MAJ”)—that is, Access to Justice Centres—located at the offices of every district and which will soon be available at sector centres, closer to the citizens. These centres enable the very poor to file and follow-up on cases free of charge. In addition, user manuals and tutorial videos on YouTube have been distributed in both English and Kinyarwanda.

An ongoing challenge is that the system, although developed in collaboration with local stakeholders, to some extent remains dependent on the external experts. Although most modules are complete and have been used as soon as completed, a few modules are still under development. The local technical staff have been trained as administrators of the system and trainers of users. However, they are not trained software developers and all needs for upgrades still have to be referred to the Armenia-based developers. This is expensive and not sustainable in the long term, as most added functionalities have to be paid for. Therefore, a plan is being worked on to train local software developers to a level where they do not only effectively maintain the system but are also able to develop and effect upgrades whenever necessary.

What is planned for the future?

Although the system is already doing a lot in

terms of easing the work of the courts and other justice institutions as well as assisting litigants by reducing the cost and time involved in litigation, it is believed the system is capable of more. Some of the planned functionalities include (a) execution of civil cases through the system as it is currently done for criminal case execution; (b) online auctioning; and (c) the adoption of e-signature protocols together with integration with Rwanda’s public service e-payment provider system, “Irembo”, to permit online payment of relevant fees with electronic bank cards. Moreover, future integration is envisioned with other information systems and institutions to permit easy access to shared information directly through the IECMS. Such institutions include the National Identification Agency (for easy identification of suspects), Rwanda Natural Resources Authority (to be able to view the land registration data in land disputes) and the Rwanda Law Reform Commission.

Virtual Courts

For a while now people have predicted an impending end of courts as we know them with the increasing use of alternative dispute resolution and ICT. A few courts around the world are experimenting with virtual courts with litigants appearing before judges from within their homes or offices via Skype, video- or tele-conferencing or other such technologies. A tech company advertisement captures some of the attractions of virtual courtrooms: “Police staff no longer have to spend half a day giving their witness statements, there are few changes to the clerk of court’s diary, no delays in transporting the suspect, victims and perpetrators no longer in the same space, foreign players don’t need to be flown in for international cases, and interpreters can do their work remotely”. As Chief Justice Wayne Martin of the Supreme Court of Western Australia observed after participating in a distributed court mock trial in Brisbane:

Anything that reduces the need for travel and makes it easy to participate in court processes has got to be an improvement in access to justice. There are also security opportunities. You can ensure people can participate safely from a secure place, whether they are a vulnerable witness, or an accused where there are legitimate security concerns...

It is arguable that any court should benefit from virtual courts. In Rwanda, cases have been postponed or delayed several hours waiting for detainees or prisoners to arrive at court for their court hearings due to a shortage of vehicles or because the vehicles break down. The point about security is also valid. Many courts do not have sufficient security to protect judges, other court staff, accused persons, witnesses or victims. There was a recent incident at the High Court in Rwanda where a terrorism suspect was allowed to go to the bathroom but once inside removed his prison uniform, changed into civilian clothes, walked out past the guard and hurried to the perimeter wall and was only caught after jumping over the wall.

On the other hand, sceptics have raised possible drawbacks of virtual courts. There is the argument that where an accused is not physically before the court, the judge is unable to determine whether the accused is telling the truth or not. However, there is no assurance that judges will be better able to make those determinations, based on demeanour, with defendants and witnesses physically present in any event.

There is also the concern, perhaps more plausible, that in a virtual courtroom setting, a party may not be in the same room as his/her lawyer and may not be able to consult when the need arises.

What is evident is that more and more courts are using video conferencing technology to hear witnesses and victims from designated locations in far flung parts of the country or in other countries. Rwanda has not advanced far in the direction of virtual courts. There are limited video conferencing facilities at the Supreme Court in the capital city and there is one or more such facility in each of the

five provinces. The facilities are used to hear witnesses and victims but have not been used to hear a defendant in a criminal case or a party in a civil case. Foreign jurisdictions, mostly in Europe, investigating or hearing cases of persons suspected of crimes committed during the Genocide against the Tutsi have used the video-conferencing facilities to interview witnesses in Rwanda.

Discussions have been held with stakeholders on the possibility of installing video-conferencing equipment in prisons and police detention centres so that courts can hear cases remotely. There are no serious objections to the idea. On the contrary, many agree that it would eliminate the cost of transporting prisoners or detainees on remand to court and that it would better ensure everyone's security. The sticking point seems to be one of affordability. At this stage, it would be too expensive to install and maintain video-conferencing equipment in all prisons and courts around the country, given the many other priorities the country has.

Conclusion

Rwanda has come a long way since 1994 in rebuilding its institutions, including its judiciary. Thanks largely to the country's prioritizing the use of ICT in all public activities and programs, the judiciary has been able to introduce some modest court technologies that have enhanced access to justice, efficiency and transparency in the administration of justice. However, there is still a long way to go by modern standards. Nevertheless, the appetite for digitizing justice processes is limited only by the cost. High quality audio-visual equipment and technology do not come cheap and high-level training is an additional cost. However, step-by-step Rwanda hopes to advance towards virtual courts in the most effective and cost-efficient ways, without compromising justice.

THE RT. HON. L.M.D. DE SILVA, Q.C. AND HIS PRIVY COUNCIL EXPERIENCE

Dr. H.J.F. (Joe) Silva, attorney-at-law, Sri Lanka, academic and former principal of Sri Lanka Law College. Dr. Silva wishes to thank Prof. Peter Slinn and Dr. Reeza Hameed for their valuable comments and suggestions in preparing this article.

Abstract: This paper discusses Mr. L.M.D. de Silva, QC, who is said to be the only Sri Lankan to have served on the Judicial Committee of the Privy Council on a “permanent” basis. His entry to the highest judicial body in the Commonwealth is significant, owing to the political patronage and maneuvers that were adopted to put him in that position. The narrative also reveals the steadfast attitude of the senior civil servants who meticulously applied the relevant rules in connection with his claim that his salary be paid out of UK treasury because of the “unusual circumstances” surrounding his appointment. From the documents now available at the National Archives at Kew Gardens, the author reveals hitherto unknown facts relating to his tenure at the JCPC, the political undercurrents that propped him up and how the emerging political trends in Sri Lanka changed his prospects. Despite not being paid a proper salary, Mr. de Silva contributed his knowledge and forensic skills in enriching the jurisprudence of the apex Commonwealth Court.

Keywords: Ceylon; Sri Lanka; Commonwealth; Dominions; Judicial Committee of the Privy Council; Lord Chancellor

Introduction

Lucian Macull Damian de Silva (“Mr. de Silva”) has sometimes been referred to as being a “permanent” member of the Judicial Committee of the Privy Council (the “JCPC”). In this regard, see Lord Wilberforce’s statement at the end of this article. In light of what follows below, however, it is perhaps more appropriate to describe Mr. de Silva as the only Ceylonese (or, in modern parlance, Sri Lankan) citizen ever to have served continuously for a period of years on the JCPC. (Throughout this article, the country now known as Sri Lanka shall generally be referred to as “Ceylon” insofar the events it addresses mostly predated 1972 when the country’s name changed.)

Mr. de Silva’s tale is one of a many-faceted career in the civil service, judiciary and the private sector. It is also a narrative of political patronage, intrigue, fame and disenchantment.

He was born on the 25th April 1893. He had his primary education at Trinity College, Kandy, Ceylon, and his university education at St. John’s College, Cambridge, England, where he obtained a Master of Arts degree. He was later called to the Bar and was a member of Gray’s Inn. Sacrificing a large practice as a barrister in England, in 1924 he returned to Ceylon to assume duties as a Commissioner of Request—a position on a lower rung of the judicial ladder in Ceylon. He may have done so because he had high expectations based on promises made to him by influential persons in the country. Not surprisingly, a year later he was appointed as the acting Deputy Solicitor General and was confirmed in that post a few months later still. The following year he was appointed acting Attorney-General. He took silk in 1932.

It is reported that Mr. de Silva functioned as an acting puisne judge of the Supreme Court in 1933, when Sir James Macdonell was Chief Justice. He resigned from government service in 1934 in order to return to England to practise before the JCPC.

Despite his return to England, Mr. de Silva did maintain his close connections with the political elite in Ceylon. It was common knowledge that he was a close confidante of Mr. D.S. Senanayake (who later became the first prime minister of independent Ceylon). It is reported that Mr. de Silva was the one who conveyed to Lord Soulbury, the Governor General of Ceylon, the wish of Mr. D.S. Senanayake to nominate his son Dudley as his successor. This resulted in Sir John Kotelawala, the most senior figure in the ruling United National Party, losing his bid to be the leader. Consequently, ill feelings between Sir John Kotelawala and Mr. de Silva surfaced in events that followed.

During this period, Mr. de Silva served on various important commissions set up to deal with subjects such as mortgages, pledges and joint stock companies; delimitation of electorates; and anti-corruption initiatives. (As a result of the report he prepared on the latter subject, three members of the State Council had to resign in 1943.) He also represented Ceylon at many international conferences.

The Associated Newspapers of Ceylon Limited (also known as Lake House) was then the leading publishing house in the country, closely associated with Mr. D.S. Senanayake and his party. When its founder and chairman Mr. R. Wijewardene passed away in June 1950, Mr. de Silva was appointed as the caretaker chairman of the group until such time that Mr. D.R. Wijewardene's son was in a position to take over the chairmanship. These events indicate the close links and the confidence that the ruling political elite had in Mr. de Silva.

Ceylonese Efforts to Gain Representation on the JCPC

Ceylon became a British colony as a result of the seizure of the maritime provinces from the Dutch in 1796, and the conquest of the Kandyan kingdom in the central hills in 1815. Since then, Ceylon (now Sri Lanka) had a very long association with the JCPC, the final appellate tribunal for British dependencies. That association continued until 1971.

The first reported case from the country to come before the JCPC was heard in 1860 (*Elsy Linsay v Oriental Bank*). That occurred after the entire country was brought under one legal system by the *Charter of Justice of 1833* and the subsequent changes in the structure of the judiciary. Since resort was taken to the JCPC more frequently as the years went by, it is said that by 1950, Sri Lanka was considered to be the “Council’s best customer”.

Winds of change started sweeping through the British Empire after the Second World War. The Labour Party came to power in the UK and it granted independence to its dominions. Thus India, Pakistan, and Ceylon came into existence. Some former dominions that became independent abolished the right of appeal to the JCPC (Canada in 1949, South Africa in 1950 and India in 1952). The abolition of

the right of appeal to the JCPC was arguably based mainly on political grounds.

Troubled by these changing circumstances, the British establishment focused on ways and means of retaining the link between the JCPC and Britain’s former dominions. It was at a crucial point in 1951, when a proposal was made by Mr. D.S. Senanayake, Prime Minister of Ceylon, to appoint a Ceylonese as a permanent member of the JCPC. What was sought was similar to the arrangement India had had for two of its judges on the JCPC (whose salaries were paid out of the consolidated fund amounting to sterling pounds 2000 each, annually). The Indian arrangement ceased of course when India abolished the right to appeal to the JCPC in 1950. The Ceylonese proposal was supported by Lord Jowitt, the Lord Chancellor under the Labour government. The UK government however changed in 1951 with a return to power of the Conservatives under Sir Winston Churchill. Before leaving office Lord Jowitt wrote to his successor stating that English lawyers were unfamiliar with Roman Dutch law and that an appointment from Ceylon would strengthen the JCPC.

Roman Dutch Law was the common law in Ceylon, South Africa and other former Dutch colonies. Expertise in that area came mainly from South African judges and lawyers. However, due to South Africa abolishing the right of appeal to the JCPC in 1950, recourse to that expertise was thereafter lost to the tribunal. Hence, the proposal for a Ceylonese appointee to the JCPC had gained favour with the Lord Chancellor Jowitt. He considered that if Ceylon could not pay the whole salary of the Ceylonese representative, a part payment could be paid from the UK exchequer. Lord Simmonds—who succeeded Lord Jowitt—generally concurred with his predecessor’s views.

Mr. de Silva’s Challenging Pathway to Appointment to the JCPC

It was against this background that Lord Soulbury, the Governor General of Ceylon, wrote in January 1952 to Lord Ismay, Secretary of State for Commonwealth Relations, to say that the Prime Minister of Ceylon had in mind to recommend a suitable person for

appointment to the JCPC. The candidate was said to have “very considerable private means and therefore was inclined to accept a moderate salary provided by the Ceylon Government”. The Governor General ended his letter by stating that “I must add I know him very well and I am sure that the Prime Minister could not recommend a better man.” This was a time when the British government was cash strapped and bureaucrats were struggling to deal with requests for increases in judges’ salaries. The idea that the British government might not have to pay the salary of a Ceylonese appointee was attractive to them.

The person the Prime Minister of Ceylon had in mind, of course, was Mr. de Silva, perhaps as a gesture of reciprocation the loyal services rendered in past by his friend and confidante.

There was however a major impediment to the appointment of Mr. de Silva to the JCPC. The *Judicial Committee Amendment Act 1895* stipulated that only judges of superior courts from territories included in the statute’s Schedule could be appointed. Those territories were limited to South Africa and Australia. It was pointed out by the Commonwealth Relations Office that Mr. de Silva was not a judge at the time (although he had, for a brief period, acted as a puisne judge in 1933). Moreover, Ceylon was also not included among the territories listed in the Schedule.

A plan was then adopted to make an Order-in-Council under the 1895 statute adding Ceylon to the list in the Schedule. This was done by the Judicial Committee (Ceylon) Order No. 18 of July 1952, which stated that “The Supreme Court of Ceylon is hereby named as one of the Superior Courts in Her Majesty’s dominions for the purposes of the *Judicial Committee Amendment Act, 1895*”. Mr. de Silva was thereupon appointed to the Supreme Court of Ceylon.

Mr. de Silva was not, however, appointed immediately to the JCPC because Lord Simmonds drew the attention of Lord Salisbury, Secretary of State for Commonwealth Relations, to the similarities between the case at hand and the “Collier Explosion” scandal which had made a stir in 1872. Sir Robert Collier, Attorney General, was appointed a judge of the Court of Common Pleas in order that he

could be immediately appointed as a member of JCPC. The government, as a consequence of that maneuver, came in for heavy criticism for disregarding the purpose and the spirit of the relevant statute. Given that history, it was determined that Mr. de Silva could not, therefore, be appointed immediately. He had to bide his time till some considerable time elapsed after the Amendment.

On 11 January 1953—about six months after Ceylon was added to the Schedule to the 1895 statute—Mr. de Silva resigned from his position as a judge in Ceylon and proceeded to England. He was sworn in as a Privy Councillor on 11th February 1953 and first sat as a judicial member of the JCPC on 9th March 1953, before which four appeals from Ceylon had been scheduled.

Mr. de Silva’s travails did not end there. There was great uncertainty with regard to the payment of his salary. He requested payment by the UK government, as had been done for Indian judges on the JCPC. He made that request despite having told Prime Minister Senanayake that he was prepared to serve on the JCPC and draw the salary of a Supreme Court judge in Ceylon.

After he assumed office Mr. de Silva first served on panels that heard appeals from Ceylon only. He had plenty of spare time as the appeals from Ceylon were few. He therefore offered to sit voluntarily on panels hearing appeals from other dominions—a prospect to which the Prime Minister of Ceylon took no objection, even though the government of Ceylon was paying his salary. There was however resistance from UK bureaucrats to this offer, perhaps because they thought that this was a move on Mr. de Silva’s part to strengthen his case for payment by the UK. However, a compromise was eventually reached, allowing Mr. de Silva to sit on JCPC panels hearing appeals from Africa and the East. Meanwhile, the Inland Revenue Department in the UK insisted that he should pay tax on remittances he received from Ceylon.

Having failed to resolve these money issues, Mr. de Silva contacted Sir George Coldstream, the Permanent Secretary, seeking an appointment with the Lord Chancellor on the question of tax and whether the UK Government might

be asked to bear a portion of his salary and also whether the Lord Chancellor would be prepared to propose legislation to make him a member of the JCPC on a permanent basis. After studying the relevant file, the Permanent Secretary consulted the JCPC, Treasury and the British High Commissioner to Ceylon on those issues.

Sir George Coldstream's memorandum to the Lord Chancellor regarding Mr. de Silva contained a summary of the facts stated above and the following conclusion:

I share the view of Lord Simmonds and Sir Albert Napier that we are very fortunate in having his services on the JCPC without having to pay for them out of UK funds. We are at most under a moral obligation to make some contribution. But I have also told him that in my judgment it would be most unwise at the present time.

The Treasury took the position that Ceylon had agreed to pay Mr. de Silva's salary for hearing appeals from Ceylon and other jurisdictions. Thus, it did not see any need for an alteration. If Mr. de Silva was to be paid out of UK funds, legislation would be necessary, and any such legislation would be justified only as a part of a general Dominion plan for strengthening the JCPC.

The British High Commissioner in Ceylon, Sir Cecil Syers, made the following observations:

Mr. de Silva feared he may be excluded from his work with JCPC by Sir John Kotelawala and he was right in saying so as Mr. de Silva was more closely associated with both Mr. Dudley Senanayake and Mr. J.R. Jayewardene than with Sir John Kotelawala. He may have played a role behind the scenes when Sir John Kotelawala lost the premiership at the first round to Mr. Dudley Senanayake. Moreover, he himself has said that Kotelawala had brusquely turned down his suggestion that he should be given a knighthood.

He may well fear that if Sir John Kotelawala is prepared to leave things as they stand, he will be persuaded otherwise by the new Chief Justice, who is a powerful figure in the island, and is an intriguer, may cast his eyes

on Mr. Silva's appointment for a nominee of his own.

He may cherish the hope that, if somehow or other he gets on "UK books", he will then get the knighthood which he undoubtedly covets.

He is undoubtedly of Western-minded and prefers West to his own country. He has an English wife and a house in Sussex. Even before he became a Privy Councillor, he was more out of Ceylon than in it during my time and he has affiliations with France.

The High Commissioner concluded:

The above is, I admit, conjecture based upon very little ascertainable grounds; but I suspect that I may not be very far from wrong. However that be, it seems to me the difficulty in the way of doing what he asks is formidable:

- a. *It would need an Act of Parliament with all that legislation entails. Admittedly, the Act could be in general terms, but I should have thought this is a difficult proposition in order to meet the case,*
- b. *In view of the past history of the appointment and of the fact the Act would apply to the appointee of the Ceylon Government, I do not see how legislation could be passed without the concurrence of the Ceylon Prime Minister. If I am right in my analysis of Sir John Kotelawala's possible attitude to Mr. de Silva this concurrence might not be forthcoming. Yet we could hardly go without it. On the other hand, the concurrence might be forthcoming in order to transfer the cost of the judge from Ceylon to U.K. funds but with the arrière pensée, as soon as the legislation was enacted, the Ceylon Government would ask to withdraw Mr. de Silva and nominate somebody else. This may sound far-fetched, but it would not be out of line with the way in which the Ceylon Government and their new Chief Justice could act.*

For these reasons despite my desire to help a man who deserves well of us and is a good

man, I myself feel we should not get into deep water if we were to meet him.

However, to be fair to Sir John Kotelawala, on 21st March 1956, he did nevertheless send a letter in the following terms to the UK government.

Please refer to Lord Salisbury's letter of April 1952, and correspondence dealing with the matter of the appointment of a Ceylonese conversant with the law of Ceylon to the Judicial Committee of the Privy Council. As you are aware, the Right Honourable L M D de Silva was appointed about three years ago. In Lord Salisbury's letter of the 15th April, 1952, to Lord Soulbury dealing with the question of a contribution by the United Kingdom towards Mr. de Silva's salary, he said that, if such a contribution is a necessary condition of the appointment, the matter will have to stand over and considered at some more convenient opportunity.

The time has now perhaps come for a further consideration of the question by you. The present holder of the appointment was willing to serve on the salary of a Puisne Judge of the Supreme Court of Ceylon, which is the salary he now draws. It was hoped at some time it would be possible to increase that salary by obtaining a contribution from the United Kingdom. It would be greatly appreciated if it could now be done. In this connection, I would draw your attention to the fact that Mr. de Silva sits to hear cases from territories other than Ceylon.

Before he received a response, the government in Ceylon changed at the general election. Mr. S.W.R.D. Bandaranaike came to power as the Prime Minister on 12 April 1956.

The response came on 9th June 1956 from the Secretary of State, addressed to Prime Minister Bandaranaike. The operative paragraph in it read as follows:

I am afraid however that a contribution from the U.K. funds to his salary would at the present time present great difficulty. There is no provision for the payment of salaries to the members of Judicial

Committee of the Privy Council as such, as the only members who receive emoluments are those whom are paid in some other capacity, e.g. the Lords of Appeal in Ordinary. Special legislation would therefore be necessary if we were to pay the salary of Rt. Hon. L.M.D. de Silva. In the present circumstances it is very doubtful whether Parliament would be prepared to pass legislation, which naturally could not apply to him personally, but would have to relate to any other members of the Judicial Committee of the Privy Council who might be in similar position, apart from finding parliamentary time for such legislation. But we have made exception from UK tax. I do not see any prospect in the immediate future.

The question of tax on Mr. de Silva's salary from Ceylon was resolved under double-taxation arrangements between the two countries. The outstanding issue was Mr. de Silva's salary and, in particular, the initiative to have it paid out of UK funds. As was acknowledged in the letter to the Prime Minister of Ceylon, special legislation was needed for such payment and that legislation could not be enacted solely to produce a result for Mr. de Silva. Further, the other members of JCPC only received an allowance for "expenses" in respect of each sitting in addition to their emoluments, which was no different from Mr. de Silva's circumstances. He would have definitely known the legal impediments to his being paid out of UK funds.

Mr. de Silva had also undertaken to serve on the JCPC on the local salary of a Supreme Court judge. He was well settled in the UK with substantial assets. Why did he then ignore his initial undertaking given to the Prime Minister of Ceylon and continue seeking to be paid by the UK? The assessment of Sir George Coldstream appears to be plausible; namely, that he was concerned with his tenure of service. The political climate in Ceylon was not favourable to him, with the nationalist movement led by Mr. S.W.R.D. Bandaranaike gaining popularity in the country. As someone who was closely associated with local politics, Mr. de Silva would have seen the direction in which the wind was blowing. Further, he might have feared that Ceylon would follow India in abolishing the right of appeal to the

JCPC. The question of knighthood would have been in his mind as well but that would have been an incidental matter only. What would have been paramount to him would have been the question of tenure of service.

Mr. de Silva's aspirations, to his great regret, were never realised, despite the backing he received from the Lord Chancellor's Office. The "technical arguments" from the Treasury ultimately carried the day. Robert Stevens summed it up very succinctly in his book, *The Independence of the Judiciary: The View from the Lord Chancellor's Office* (Oxford: Clarendon Press, 1997), as follows:

Coldstream thought him a cautious and patient judge, and with a good mind... up to the standards of the Judicial Committee... his understanding of the Oriental mind might be available for other appeals as well. The Lord Chancellor's Office thought he should be, but the Treasury could find nothing unfair in the situation. Eventually, he was paid £5 a day for "expenses". [at 145-146]

Despite his disappointment, Mr. de Silva continued to serve on the JCPC till his death in November 1962. At the time he was a member of the panel hearing an appeal from East Africa on a type of Trust called Waqfs under the Muslim law (*Rizki v Sharifa*). However, he died before judgement in that case could be delivered. Appeals to the JCPC from Ceylon continued however until the right was finally abolished by the *Court of Appeal Act* of 1971. The following year Ceylon formally was re-named Sri Lanka.

Mr. de Silva's Contribution to the Law

Mr. de Silva was a great resource to his fellow members of JCPC on intricate legal issues, especially those connected with the entanglement of Roman Dutch and English law. In addition to appeals from Ceylon he had also sat on panels hearing cases from Kenya, Nigeria, East Africa, Malaya, Singapore and Fiji.

At the hearing of the last two JCPC appeals from Sri Lanka on 11th January 1972, Lord Wilberforce paid a glowing tribute to the contribution made by Sri Lankan judges to JCPC jurisprudence, especially by Mr. de Silva. The tribute is quoted by H. Marshall in (1973) "Ceylon and the Judicial Committee of the Privy Council." *International and Comparative Law Quarterly*, 22(1), 155-157 and reads as follows:

It is worth re-stating the fact that the Judicial Committee is not and has never been a purely British court. It has included judges from all parts of the Commonwealth. Four ex-Chief Justices from Ceylon have sat as members of the Committee, commencing with Sir Alexander Johnston, who was a member from 1833. In 1953, Mr. L.M. de Silva was appointed a permanent member and I can personally testify not only to his learning and ability but to the unfailing kindness with which he helped counsel over some of the difficulties of Roman Dutch law.

A Closing Comment

Mr. de Silva's story presents an interesting account of life's vicissitudes, driven by ambition, patronage and political undercurrents.

STRENGTHENING AND DEFENDING JUDICIAL INDEPENDENCE

Her Excellency Paula-Mae Weekes, President of Trinidad and Tobago (and former Justice of the Court of Appeal of Trinidad and Tobago). This article is based on a panel presentation delivered at the CMJA Triennial Conference, Brisbane, Australia, September 2018.

Abstract: *Judicial independence is both a sword and a shield that must be used wisely. It is inseparable, both in theory and in practice, from judicial accountability and judicial ethics. The principle of judicial independence exists not for the benefit of the judiciary but for the benefit of the people served by the judiciary. The institution of the judiciary must constantly take steps to strengthen itself from within through ongoing judicial education, including ongoing education on the doctrine of judicial independence itself. To the fullest extent possible, the judiciary must aim to be transparent and accountable to the public. By fostering public confidence in the judiciary at every level—beginning with appointment processes and continuing through to defensible complaint processing mechanisms—the principle of judicial independence is fortified.*

Keywords: Judicial independence – judicial accountability – judicial education – timeliness of judicial decisions – coherence and consistency in judicial decision-making – transparency – the importance of self-regulation – fostering public “buy in” for the principle of judicial independence.

Let me first confess that I get very anxious whenever I hear the words “judicial independence” used in a phrase or sentence in which the terms “judicial ethics” and/or “judicial accountability” do not also feature. This is because people, both within and without judicial office, sometimes mistake judicial idiosyncrasy, judicial caprice, judicial intractability or judicial arrogance for judicial independence. When the error is made by one of our brother or sister judges (or magistrates—I use the terms interchangeably), it is a prescription for chaos and inimical to the rule of law. Judicial independence is not meant to be, and cannot operate successfully as, a stand-alone concept; it is inherently and unassailably plural, its “riding partners” being accountability and ethics.

As an active participant in the judicial arena for over 35 years from the vantage points of the bar and the bench, I can call to mind occasions when judicial independence was used as a cloak or screen to hide our imperfections: inexcusable delays in delivery of judgments, inexplicable disparities in sentencing and questionable use of resources. I am sure I am not alone in making this observation.

Whenever we invoke the revered and sacrosanct principle of judicial independence—which is the bedrock of our vocation—we must ensure that it is in its truest and purest form, used in the right circumstances, at the right time and for the right reasons. To do otherwise would be to do a grave disservice to the principle, our institutions, and the public (particularly litigants). We all know the end to the fable of the boy who cried wolf.

Before embarking on any discussion about defending and strengthening judicial independence, let us agree on the true meaning and purport of the doctrine. It is not a right conferred on judges and magistrates merely by virtue of office, but rather a privilege afforded to ensure that they can be true to their oaths of office without fear of being visited with adverse consequences. In our respective oaths we pledge “to uphold the Constitution and the law, and to conscientiously, impartially and to the best of our knowledge, judgment and ability discharge the functions of our office and do right to all manner of people after the laws and usages of our jurisdiction without fear or favour, affection or ill-will”.

That is a tall order and one which can be difficult to achieve without robust and effective safeguards which ensure that we are left alone, without pressure, influence or orders to perform our core functions without being distracted by ancillary matters. This inviolable principle is not for our own benefit but for the benefit of those who entrust their lives, rights and property to us. Litigants and interested

observers must be confident, especially when issue is joined with the state, that nothing but the evidence and the law, interpreted and applied by competent authority, factors into the decisions arrived at by the court.

In a shameless bit of plagiarism, I adopt the definition of judicial independence found on the UK Courts and Tribunals Judiciary website and quote:

It is vitally important in a democracy that individual judges and the judiciary as a whole are impartial and independent of all external pressures and of each other so that those who appear before them and the wider public can have confidence that their cases will be decided fairly and in accordance with the law. When carrying out their judicial function they must be free of any improper influence. Such influence could come from any number of sources. It could arise from improper pressure by the executive or the legislature, by individual litigants, particular pressure groups, the media, self-interest or other judges, in particular more senior judges.

Now that we are all on the same page, there can be no difficulty in agreeing that our judicial independence has to be vigilantly guarded, strengthened and defended.

For the purpose of this discussion I make a practical distinction between strengthening and defending.

To my mind one strengthens from within by building up the core of an organism. That exercise requires pointed introspection aimed at identifying any weaknesses and the ways and means available to close the gaps.

Judicial education can be a frontline strategy for strengthening judicial independence. From the outset new judges must be familiarised with the doctrine. This cannot be a one-off lesson; it will need to be reinforced by repetition to embed it in their consciousness. Experienced judges will also benefit by reiteration. The sharing of experiences from other jurisdictions can be helpful in building an appreciation of the nuances and intricate workings of the concept.

Additionally, continuing judicial education which ensures that judicial officers are up to date with current laws, procedures and practices is a necessary component of judicial independence. Sound knowledge of the law can render a judicial officer less likely to be improperly influenced, even unwittingly, by disingenuous practitioners and well-meaning colleagues. A forum that allows interaction between junior and senior judges so that the former can have the benefit of the latter's experience without being pressured to accept advice or positions is invaluable.

Judicial independence can come under threat when the judiciary is seen as not being accountable to the legal profession, litigants and the public. Scrupulous judicial accountability goes hand in hand with judicial independence. The concepts are not inimical but rather complementary. Transparency engenders confidence.

A major complaint across many jurisdictions is that judges take far too long to hear cases, render judgment or provide written reasons. The delay can give rise to accusations of laziness, incompetence and, worse yet, conspiracy theories that unknown and unseen forces are influencing outcomes. The development and adoption of realistic performance standards can ensure prompt trials and the provision of clear, coherent and timely judgements. Judges must be held accountable for unreasonable delay.

Another facet of accountability is the provision of regular reports and statistics which give some insight into the operations of a judiciary. We strengthen our judicial independence by our willingness to be open about the workings of our institutions. Such openness can be further enhanced by an active media interface, perhaps social media, catering for prompt responses to queries and requests for information. Those of us with freedom of information legislation should ensure that it is used by the public only as the solution of last resort.

One final but critical issue in accountability is the need for a judiciary to be self-regulating, providing a mechanism for receiving, investigating and addressing complaints against our number. As complaints are inevitable, we must undertake to deal with the grievances

ourselves. Any external source of regulation or censure would fly in the face of the principle of judicial independence.

Institutional strengthening through a code of judicial ethics is yet another means of fortifying judicial independence. It is necessary to develop, monitor and enforce a code of conduct to which all judicial officers subscribe, whether or not its rules reflect their personal ethos, so that both judges and the public understand what is expected of us, particularly in the many and diverse gray areas of judicial practice.

The wealth of our shared experience is reflected in the Bangalore Principles to which the majority of us subscribe. No doubt some tweaking to accommodate jurisdictional peculiarities is permissible but the well-known values of independence, impartiality, propriety, equality, competence and diligence have stood the test of time.

No discussion on strengthening judicial independence can be complete without considering the issue of judicial neutrality. While we are all hyper-vigilant for improper external influences we sometimes fail to notice internal influences that could be just as dangerous to our judicial independence. We would be well advised to maintain a watchfulness over our known biases and to run a periodic diagnostic for any unconscious bias that may have crept in undetected.

Though conceptual, judicial independence does involve practical considerations. As far as possible, judges need to be properly provisioned to carry out their functions. Attention must be paid to their physical accommodation. They must be given the human and other resources to get the job done and their remuneration must be adequate. These comforts allow them the ease and peace of mind to function without being susceptible to subtle influences that could take advantage of discontent.

The core function of judges ought to have the first call on the resources available to a judiciary. It happens from time to time that limited resources are diverted to ancillary and sometimes vanity projects while judicial officers struggle to get necessary aids for their work.

Defending judicial independence speaks to an external focus, proactive and vigilant, scanning the landscape in order to anticipate, identify and neutralise impending or incipient threats, though not indulging in paranoia. Defending judicial independence also requires that we take steps to surround both our institutions and individual judges with support mechanisms that can repel any attack on our independence.

We best defend judicial independence by convincing the public of its value; they must be as hellbent on supporting and protecting it as are we. An aggressive and sustained program of education run by judiciaries about the meaning and import of judicial independence and aimed at driving home the message that the people (in particular litigants) are its true beneficiaries, can encourage public buy-in and make members of the public powerful partners in vigilance against and rejection of attempts to improperly influence judicial decisions.

As early as at secondary school level, using age-appropriate pedagogy, children should be introduced to the concept of judicial independence and made to understand its practical value to the society. In Trinidad and Tobago, we have from time to time engaged in outreach initiatives affording students between the ages 14 to 18 opportunities to engage in a Q & A sessions with judges. This exercise provided the perfect opportunity to begin the public education process, but unfortunately it has not been sustained. Civil society groups can be the medium through which the message is communicated to adults.

Another result of this exercise will be to demystify and humanise the judiciary, allowing judges to be seen as being possessed of particular specialized skills and duties rather than as remote, entitled functionaries divorced from every-day realities. But we cannot do that without being willing to account for our actions and decisions and without subjecting ourselves to public scrutiny: that is, we cannot do that without sincere, outward displays of humility that holders of high office do not display often enough.

Public confidence in the judicial system also buttresses judicial independence. Transparency builds confidence, and this has to begin with

the processes for the appointment of judges. The integrity of the body making the selection is critical; the entire process must be free of political influence. The hand picking of members of a judiciary to serve oblique ends is inimical to the very concept of judicial independence as he who pays the piper will call the tune.

The next step would be to ensure a widely-published and rigorous screening process which ensures that appointees of the highest calibre are chosen strictly on merit. When citizens are convinced that the most worthy candidates for the judiciary have been appointed, they are more inclined to support and defend judicial independence.

One of the more ticklish aspects of defending judicial independence is financial autonomy. This must not be mistaken for non-accountability. Autonomy would allow judiciaries, once their budgetary allocations have been determined by the executive, to allocate resources as they see fit, subject of course to all public accounting guidelines, and not to have to go “cap in hand” for separate items of expenditure. Too close oversight allows the executive to exert subtle influence

over a judiciary. Where such autonomy does not now exist, judiciaries, bearing in mind the historic antipathy of the executive to this course, must be prepared to engage the powers-that-be in a cogent and systematic discussion aimed at convincing them of the universal benefit. An economy thrives when it can attract the kind of local and international investment that can only be secured by an effective and efficient judiciary that is free from improper influence.

I suspect that at a gathering such as a CMJA conference I am preaching to the choir when I conclude that judicial independence is pivotal to our function and must be zealously strengthened and defended. However, I hasten to remind all that when sentences are inexplicably disparate, when citizens are not accorded their fundamental rights, when the custody of a child is granted to an unfit parent, no one is comforted by the thought that the magistrate or judge arrived at an indefensible decision while standing firmly on the platform of judicial independence.

Judicial independence is both a sword and a shield. Let us use it wisely.

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A CASE FOR BESPOKE JUDICIAL TRAINING IN ECONOMICS AND LITIGATION COST ASSESSMENT

The Hon. Justice Emmanuel Ekundayo Roberts, Justice of the Supreme Court of Sierra Leone.
This article is based upon a paper delivered at the CMJA Triennial Conference, Brisbane, Australia, September 2018. Footnotes have been removed to comply with house style.

Abstract: *The cases over which judges preside involve a myriad of economic considerations. The litigation process itself also has its own economic implications, not only for the litigants but for judicial institutions. It is argued here that the introduction of some bespoke judicial training in economics and litigation cost assessment would be a worthy reform in that such training would better equip judges to (a) perform their daily work in deciding cases where economic factors are in issue and (b) perform their case management functions with a view to maximizing efficiencies and preventing either parties or justice system players from being excessively burdened by excessive and unjustifiable litigation expenses.*

Keywords: Cost of litigation (to the parties) – cost of litigation (to the justice system) – judicial education – judicial continuing education – basic economics – prevention of avoidable litigation expense

Introduction

This article was informed and influenced by the history and judicial context of my country. Sierra Leone is a small nation in West Africa, a proud member of the Commonwealth with a population of approximately seven million. It is still recovering from one of the most brutal conflicts in Africa which lasted from 1991 to 2002. The war devastated almost all institutions of the nation. The Lomé Peace Agreement of 7th July 1999 recorded a negotiated end to the conflict and it made provision for the establishment of a Truth and Reconciliation Commission (“TRC”) as a means of providing for some accountability for atrocities committed during the conflict as well as a healing and reconciliation process for our people.

The TRC, established in 2002, concluded its work and presented its final report on 5th October 2004. In that Report it made scathing and disparaging findings about the Sierra

Leone judiciary as whole, highlighting lack of access to justice as one of the root causes of the civil war.

In its several recommendations the TRC noted that “delay in the delivery of both criminal and civil justice threaten to cripple the administration of justice in Sierra Leone”. The commission also recommended the simplification of court rules and procedure in order to improve access to justice.

Today in Sierra Leone there are 35 judges in the superior courts and 34 magistrates in the lower courts. When juxtaposed against the country’s population—just slightly less than eight million people—it is not difficult to see why we often struggle with backlog of cases in the courts.

Judicial Reform and the JLTI

After the publication of the Final Report of the TRC and its recommendations, there followed massive and widespread reforms of many state and other institutions. The judiciary embarked on a series of reform measures in a bid to improve access to justice. One such measure was the establishment of the Judicial and Legal Training Institute (the “JLTI”) in December, 2010. This was in recognition of the urgent and immediate need to provide well-structured and carefully designed judicial training for all judicial and other staff and officers within the justice sector.

In a presentation entitled “Judicial Education to Support Judicial Reform” made at the 13th Commonwealth Law Conference in 2003, now-retired Canadian Judge Sandra E. Oxner (the founding chair of the Commonwealth Judicial Education Institute) made these compendious remarks about judicial education:

What is Judicial Education? A definition of judicial education includes collegial meetings (international, national, regional

and local) and all professional information received by the judge, be it print, audio, video or electronic... As well, mentoring, organized feedback such as performance evaluation, self-study material and distance learning are important judicial education mechanisms.

The objective of judicial education may be succinctly summarized as the fostering of impartiality, competency, efficiency and effectiveness within the judicial system.

No doubt judicial education plays a pivotal role in judicial reform. It enhances competence and efficiency and consequently aids in the restoration of public trust and confidence in justice systems in nations such as that in Sierra Leone as they recover from the ravages of their troubled histories.

Judicial education primarily involves training in core and basic courses and programs touching on substantive and procedural law as well as administrative and case management subject matter. However, there is the growing argument that judicial education should also include bespoke training in relevant academic and practical thought and analysis that would enhance the speed and quality of the service delivered by judges. Indeed, Judge Oxner encourages teaching judges a "...new intellectual approach as in the judicial exercise of discretion, domestic application of human rights norms or in developing schools of jurisprudential thinking related to reform".

Perhaps it is in this regard that I will emphasize the benefits of judges' having an appreciation of issues like the transaction cost of litigation and its impact on the parties as well the judiciary as an institution. This may well require some basic knowledge of microeconomics and cost analysis, but the appreciation of the various aspects of the cost of litigation and their impact would no doubt help the judiciary in becoming more effective as well as aid in the judicial reform process.

Cost of Litigation as an Access to Justice Issue

Improving access to justice was a key and imperative recommendation in the TRC Report. Access to justice is an ever-relevant

component of judicial reform in Sierra Leone as in many other Commonwealth countries. It is concerned with concrete measures to better meet the legal and justice needs of the people. From the judiciary point of view, access to justice involves an assessment of the cost parties must incur when approaching the court, the costs associated with trial, the speed of the process and how simple and fair the process is. It also includes the availability of affordable legal advice/representation, the availability of courts in all areas including remote communities etc.

In his paper entitled "What is Access to Justice?" Professor Trevor C.W. Farrow stated that "...[s]pecific opinions and ideas about what could be done to promote a more accessible justice system (particularly from a procedural perspective) often included cost, simplicity, and speed..."

Indeed, access to justice is much broader and means much more. It must be considered not only from the judiciary's viewpoint but also from the views of the people (parties, litigants, victims, communities etc.) who come in contact with the law.

Judges' Appreciation of the Cost of Litigation

The training of judges to appreciate the impact of the cost of litigation as an access to justice issue is particularly relevant, not only to the work of the individual judge, but also to judicial reform programs in our respective nations.

Again, in his paper quoted above, Prof. Farrow made a very salient observation when he stated that "...one issue that is only starting to be taken seriously by the justice community is the question of cost: in particular, what it costs to provide accessible justice, and more importantly, what it will cost if we do not provide accessible justice." He went on to state:

...having unresolved family, racial, employment, discrimination, housing or other legal problems will tend to lead, as we know, to further legal and other social and health-related problems. When we take into account these clustering and cumulative

negative effects of not resolving legal problems, the cost to society—individually and collectively—is significant. And of course, cost in this context includes not only economic costs, but also health and other related social costs.

I could not agree with him more. It would in this regard be helpful to remind judges (through training) about what I would call the *judicial cost of trial*, in other words what it costs the judiciary itself (in terms of its time, salaries of personnel, equipment etc.) to try a case. Many courts in the United States have adopted the CourTools Trial Courts Performance Measures methodology, which, among other things, calculates the average cost (to the court) per case. As K. Miller and A. Petrin have noted in their paper, “Modeling the Costs and Benefits of Civil Court Case Resolution”:

The CourTools methodology calculates the average cost per case by aggregating total court expenditures over a period of time, including salaries and benefits for judicial officers and court staff, supplies, equipment, and services, rent, maintenance and insurance costs. These total court expenditures are split among the various civil case categories according to the court’s time allocation of personnel across the different types of cases. These total costs then are divided by the number of case dispositions over the time period to obtain the average cost per case for that civil category.

Surely in this day and age when many judiciaries are experiencing low if not decreasing budgetary allocations, it would be most helpful for us to calculate the judicial cost of providing justice, and in particular, the judicial cost of trying a case (be it civil or criminal). I believe many Commonwealth countries may have mechanisms/tools for estimating or measuring the judicial cost of trial and it would be useful to share such tools (through training and collegial exchange) with their colleagues in other jurisdictions. This would enhance efficiency and judicial accountability; it would as well remind us to be very conscious and responsible in the use of judicial time and resources in the performance of our duties.

I also note that in their reform initiatives, many Commonwealth countries have introduced into their civil procedure rules a formal acknowledgement of what is called the “overriding objective”. This was a reform initiative recommended by Lord Woolf (I shall say a bit more on the Woolf Reforms later). Implementing the overriding objective requires that in applying or interpreting as well as exercising discretion under civil rules of procedure, the courts are obliged to deal with a case justly and at proportionate cost. In other words, when judges interpret these rules and exercise discretion, they must bear in mind the speed, expense and proportionate cost of every stage of the proceedings. It also requires a judge to give each case an appropriate share of the court’s resources, bearing in mind the requirements of other cases.

This is surely a reform initiative that contemplates cost analysis and its implications are worthy of consideration by those jurisdictions that do not have such an order in their civil procedure rules. This can be facilitated by judicial training and exchange programs.

Such an overriding objective is acknowledged in the civil procedure rules of countries like Ghana (2004), Nigeria (2009), Kenya (2012) and Belize (2005), to name only a few. More recently, the overriding objective provisions in the civil procedure rules in England have been amended by adding provisions regarding enforcement of compliance with rules, practice directions and orders.

Another illustration of the importance and impact of the transaction cost of civil litigation is explained in H.E. Jackson and W.K. Viscusi, *Analytical Methods for Lawyers* (Foundation Press, 2010). There, the authors suggest that by bringing a suit or instituting a civil action the plaintiff will be taking a costly initial step, adding that “bringing a suit involves costs including the plaintiff’s time and energy, legal services and possibly filing fees.” They further state that “the plaintiff will sue when the cost of suit is less than the expected benefit from suit”. This is a most practical illustration of an economic analysis in relation to one of the most fundamental issues in civil litigation: that is, the decision to commence the action. Generally (all things being equal), the plaintiff

is less likely to sue and perhaps more willing to settle if his estimated cost of the suit (including cost that may be awarded against him) is higher and the likelihood of winning is lower (as the case may be). Indeed, transaction costs of litigation may be considered not only in relation to whether or not to commence the action, but also whether or not to settle after commencing the action and even during trial. Being able to conduct this kind of analysis would surely assist the judge in his assessment and award of costs and damages as well as in his role in urging or encouraging settlement by the parties.

Cost of Litigation and Pre-action Protocols in the UK

Pre-action protocols were introduced in England and Wales as part of the Woolf Reforms. In March 1994, Lord Woolf was appointed by the Lord Chancellor to review the rules of procedure of the civil courts in England and Wales with a view to, among other things, improve access to justice and reduce the cost of civil litigation. This review resulted in wide ranging reforms of civil procedure and practice in England and Wales. As part of the Woolf Reform, certain guidelines called pre-action protocols were introduced in certain civil cases, which encouraged the parties to enter into discussions and negotiations and/or seek alternative dispute resolution. As has been noted in C. Plant (ed.), *Blackstone's Guide to the Civil Procedure Rules* (London: Blackstone Press, Ltd., 1999), the view was that “disputes should where possible be resolved without litigation, but that if litigation was unavoidable, pre-action protocols would make both parties well informed at the outset of the litigation”. This would enable the parties to a dispute “to embark on meaningful negotiation as soon as the possibility of litigation is identified and ensures that as early as possible, they have the relevant information to define their claims and make realistic offers to settle”.

Lord Woolf's report however stressed that the objectives of the reforms (which included pre-action protocols) “can only be achieved if the court itself takes more account of pre-litigation activity”.

Failure to comply with a pre-action protocol would not bar a party from commencing

litigation but such party may end up being liable to additional costs proportionate or approximate to the cost that may have been avoided had the protocol been complied with and ADR attempted. Indeed, if in the opinion of the court non-compliance with a pre-action protocol “has led to the commencement of proceeding which might otherwise not have needed to be commenced, or has led to costs being incurred in the proceedings that might otherwise not have been incurred,” the court may order, *inter alia*, the failing party to pay the cost of the litigation proceedings, or part of those costs, of the other party: see S.M. Gerlis and R. Blackford, *The Civil Practitioner's Handbook*, 16th ed. (London: Sweet & Maxwell, 2001). There is therefore a clear incentive to abide by the pre-action protocols and try ADR, and conversely there is a cost disincentive not to do so. This is a mechanism that is designed perhaps with clear and obvious cost benefit analysis in mind. The plaintiff would have to consider the cost he may have to bear if he commences an action without complying with the protocol. The thinking is that with the cost analysis in mind a plaintiff in certain civil actions would be more inclined to try ADR before commencing an litigation. This would lead to more cases being settled out of court, thereby decongesting the courts and reducing the caseload of judges. It should also increase the satisfaction of the parties—especially if the dispute is settled in the ADR forum—and should also free the court to deal with other cases quicker and with greater efficiency.

Initially there were pre-action protocols for only two types of civil cases, namely personal injury claims and clinical disputes. Over time there have been protocols developed for other civil cases such as defamation, engineering and construction disputes.

Even where a protocol does not exist for the particular type of civil action in question the court will nevertheless expect the parties to act reasonably in exchanging information and documents relevant to the claim and in attempting to avoid instituting litigation by trying ADR.

Another example of a mechanism informed by cost analysis considerations was the encouraged use of cost budgets in certain civil

Training in Basic Economics for Judges

matters in the UK. There was concern in the UK about the huge and spiraling cost of civil litigation. Some suggestions were that lawyers were unnecessarily increasing their legal costs and the cost of the trial without justification or prior warning to their clients. In 2013, on the recommendations of Lord Justice Rupert Jackson, the *Civil Procedure Rules* in England included a requirement that in certain civil matters, both parties will have to provide budgets in respect of the estimated cost of the various steps in the action and seek agreement on each other's budget. If they fail to agree then the court will examine and approve the budgets and file them. At the end of the trial when assessing costs the court would have to give regard to the approved budget and will not depart from it without "good reason".

The desired benefits of this mechanism were firstly to put a cap on the amount that can be recovered from the other side at the end of the trial, thus ensuring that costs incurred or awarded are not only reasonable but proportionate to the nature and quantum of the claim in the action. A second benefit is that the mechanism will afford the lawyers and especially the parties an opportunity to know, well in advance, what cost they may incur in respect of prosecuting their cases and conversely what costs they may have to pay (which they can see by examining their opponent's budget) if they lose. Again, the likely cost of litigation will be much more predictable from the outset and this will assist the parties in litigation planning.

Incorporating such measures may also cause litigants to seriously consider ADR and settle their matters in order to avoid being liable for costs which can more reliably be foreseen. Again, this represents a conscious and pragmatic application of cost analysis in the making of rules of procedure as well as in the decision-making of judges in certain civil actions.

The principles and considerations that informed the introduction of pre-action protocols and cost budgeting in England and Wales would no doubt be worthy of consideration in the judicial reform initiatives of some of our respective jurisdictions.

Notwithstanding some criticisms, I share the view that some judicial training in basic economics and cost analysis is relevant and useful in all kinds of civil cases, including but not limited to simple contract cases, landlord and tenant disputes, employment and wrongful termination cases, and the assessment of damages and economic loss in tort cases. Even though we rely on experts to help us reach our conclusions, we sometimes end up being more confused than we were before they came in to assist us.

This may largely be attributable to our relative lack of knowledge in this area as we often do not know what useful questions to ask. Neither can we always recognize flaws in the methods used in securing data, or flaws in the conclusions drawn from that data. We often rely on opposing experts to reveal economic truths and hope that by doing so we will mask our own ignorance and have the path to the decision we eventually reach illuminated for us by experts. This is most unsatisfactory to our work in dispensing justice and certainly most unfair to the parties before us.

In countries like the United States, huge antitrust cases have become increasingly complex, with huge amounts or claims at stake. These cases often require experts on either side to assist the court with highly technical issues. In an online article by Michael Baye and Joshua D. Wright entitled "Is Antitrust Too Complicated for Judges? The Impact of Economic Complexity and Judicial Training on Appeals" the authors concluded that the benefit of providing economic training to judges who handle antitrust matters is obvious (at least to economists). Their study examined data on antitrust cases from federal district courts and Administrative courts from 1996 to 2006. It revealed, among other things, that in antitrust cases, those judges who have attended economic training were less likely to have their decisions appealed or reversed.

It is not difficult for me to accept these conclusions and I believe that even in simple civil or commercial cases a judge who has received basic training in economics and economic analysis would be more competent, confident, efficient and better able to appreciate

the economic and cost implications of issues like adjournments, delays, injunctions and other interim orders, etc.

In short, it would be most useful for judges and magistrates to appreciate that what we do at every given time in the course of our work could have huge cost and economic implications for the parties and their means or resources.

Significantly, also it would be most useful to appreciate that certain orders, adjournments etc. granted by us do have economic and other implications on the resources of the judiciary as a service-providing institution. In his lecture titled “Economics for Judges” (available online), Ross Gittins stated as follows:

Micro (economics) is the study of individual consumers, workers and firms using markets to produce and consume goods and services. At the heart of microeconomics is what is called ‘the neo – classical model’ in which price is set by the interaction – and intersection – of demand on the one side and supply on the other. So conventional microeconomics is preoccupied with price; it strips away other considerations so it can get to what economists regard as the heart of the matter, price... It is the ‘price mechanism’ that economists see as bringing supply and demand – hence markets – into equilibrium, or balance.

Demand, supply, cost of production, consumer and producer surplus etc. are often relevant factors that a judge may have to appreciate and consider when assessing damages claimed or loss incurred in an action before him or her.

In her online article titled “Judicial Review of Economic Analysis”, Patricia M. Wald has stated:

... [M]ost federal appellate judges are generalists, not intensely schooled in economic theory and mindful of the limits to their institutional competence. Judicial review of economic analyses is an increasingly important task of the courts, however, particularly courts like United States Court of Appeals for the District of Columbia Circuit that hears appeals from the rules and rulings of regulatory agencies.

Agencies use economic analyses for administrative decision making in a variety of ways. They may be required by statute to make decisions that are ‘economically feasible’ or to consider ‘reasonableness of cost’... Notwithstanding the differences among these situations, they all require judges to understand the often-arcane economic issues involved in an agency’s decision.

The above passage supports the view that judges at appellate or review (and even trial) levels need, now and again, to appreciate and apply economic principles in deciding matters that come before them. This appreciation can be made possible by the clear training courses in economics, presented clearly by qualified experts and accompanied by practical everyday examples.

Conclusion

My discussions above are intended to encourage an increase in judicial training in some specialized but nonetheless practical areas such as cost and economic analysis as they relate to our work of judging as well as judicial reform. However, I am not necessarily suggesting that such training be in advanced and complex economic analysis. I am more concerned with simple, basic, bespoke and relevant programs associated with each country’s unique and specific circumstances. In my country for example, our courts do not have many hugely complex antitrust-like cases as you would find in the United States. I would therefore expect and recommend non-complex training on costs and basic economics that will nevertheless be helpful in deciding the kinds of cases and issues that come up for determination in our courts. Surely such training would remind us of the impact of costs and other economic implications of our work and our decisions. Here I am referring to the impact on the parties, the judiciary (time and resources) as an institution and the community.

Heightening judges’ sensitivity to and appreciation for economic issues through bespoke training should make them more efficient, fair, reasonable, sensitive and responsible in carrying out their judicial functions.

CHEN-YOUNG and others v Eagle Merchant Bank Jamaica Ltd and others (Attorney General for Jamaica, interested party)

18, 19 December 2017, 26 April 2018

Court of Appeal of Jamaica [2018] JMCA APP 7, [2018] 5 LRC 341

Morrison P, Phillips and Brooks JJA

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In 2006, a judge of the Supreme Court delivered a judgment in favour of the respondent companies. The applicants, Dr Chen-Young and two companies with which he was associated, appealed. Three judges of the Court of Appeal heard the case in 2013 and reserved judgment. Subsequently, all three judges retired, having reached the mandatory retirement age, without having handed down their reserved decision. There was no evidence of any of them having remained in office beyond the mandatory retirement age or that the Governor-General had given permission to any of them to continue in office pursuant to s 106(2) of the Constitution of Jamaica 1962. In 2017, a panel of the Court of Appeal delivered the decision of the retired judges ('the impugned judgment') allowing the appeal. The applicants applied to the Court of Appeal seeking a declaration that the impugned judgment was a nullity and requesting that the 2013 hearing be set aside, and the appeal heard anew. The applicants contended that once a judge of the Court of Appeal demitted office, that judge was incapable of performing any function that he could have performed prior to vacating office; consequently, the judges who heard the appeal had been rendered incapable of delivering judgment in the instant case. The applicants also requested that the costs of the vacated hearing and of the instant motion be paid by the Attorney General. They submitted that the state was liable to the parties for the default of the court because the court was part of the state and, since the court had not complied with the standard for the delivery of a judgment within a reasonable time, the state should pay the costs incurred by the applicants as a result of the default. The claim for costs was therefore hinged to the issue of redress for the breach of a constitutional right to a fair hearing within a reasonable time. The applicants relied on provisions of the Civil Procedure Rules 2002 ('CPR'), *inter*

alia, r 64.9, which allowed the court to order a person who was not a party to the claim to pay the costs of a party. The Attorney General, as the interested party, submitted that it was only in exceptional and specific circumstances that orders for costs were made against persons who were not parties to a case and the instant case did not fall within those specifications. The Attorney General also contended that the Court of Appeal was not able to determine whether there had been a breach of the applicants' right to a fair hearing within a reasonable time as, pursuant to s 19 of the Constitution, the appropriate forum for such a determination was the Supreme Court. Dr Chen-Young also asked for a freezing order issued against him by the judge in 2006 to be discharged and that the respondents continue to make monthly payments towards his living expenses out of a fund created from the sale of assets owned by the second applicant ('Ajax') in accordance with the judge's order of 2006. By the time of the instant application, the fund was exhausted and payments to Dr Chen-Young had ceased. The issues for the court were: (i) the jurisdiction of the court to consider and decide on the application; (ii) the jurisdiction of the court to consider and decide whether there had been any breach of the constitutional rights of the applicants; (iii) the status of a judge who had retired and his ability to render a judgment thereafter; (iv) if the application for a rehearing was granted, liability for costs of the application and costs thrown away in respect of the first hearing; (v) the continuation or discharge of the freezing order; and (vi) the continuation or resumption of payment of living expenses. In determining the jurisdiction issue, the court considered, *inter alia*, s 10 of the Judicature (Appellate Jurisdiction) Act ('J(A)A'). In determining the status of the impugned judgment, the court considered, *inter alia*, s 106(3) of the Constitution.

HELD: 2013 hearing and impugned judgment declared a nullity and new hearing of appeal ordered; application in respect of freezing order and payment of living expenses refused; no order as to costs.

(1) Previous authority explained that the appellate court, although not having an inherent jurisdiction in the strict sense, had an inherent power to control its processes. That power could not conflict with any statutory or constitutional provision; however, there was no statutory or constitutional provision or any provision in the Court of Appeal Rules which prevented the hearing of the instant application. Indeed, s 10 of the J(AJ)A gave the court the authority to exercise its powers for all purposes of and incidental to the hearing and determination of any appeal. Accordingly, the court did have the authority to hear the present application and rule upon it (see paras. 13, 83-85, 154, 167, 169 and 170). *Taylor v Lawrence* [2002] 2 All ER 353 considered.

(2) The Constitution provided for redress in the event of a breach by the state of any of the rights set out in the Constitution. Section 19 stated that applications for redress for breaches of rights had to be made, in the first instance, to the Supreme Court. It was true that constitutional issues had, on occasion, been first raised in cases at the appellate level. It was similarly true that claims for redress for breaches of constitutional rights were, for the most part, raised at the level of the trial court, being the Supreme Court. That court was better suited for the issues that were usually raised in those cases because evidence was usually required; particularly evidence from the party said to have breached the relevant constitutional right. The circumstances of the instant case, from the evidence of Dr Chen-Young as to the extent of the delay in the delivery of the judgment in the appeal, would require some evidence in response, which sought to explain the delay. It was understandable that no such evidence had been adduced in the court in response as the explanation would, perhaps, reside with the present or former members of the court. Based on that observation, the court should decline jurisdiction to deal with the issue of assessing whether there had been a breach of the applicants' constitutional rights and whether redress should be provided. The provisions of s

19 should be followed. The applicants were at liberty to pursue that matter with the Supreme Court if they were so minded (see paras. 13, 83-85, 154 and 177-180).

(3) The de facto principle was wholly inapplicable to the instant case because the posts which the judges, having retired, had occupied were filled by other judges. It was not a case where the judge remained in office despite having attained the age of retirement and so had the 'colour' of authority. Nor was it a case where the judge was re-appointed to office in order to allow him to deliver the delayed judgment. Similarly, the provisions of s 106(3) could not be prayed in aid in the case. Firstly, the subsection arguably required the person to be 'a Judge of the Court of Appeal'. None of the judges who heard the appeal, could, after their retirements, have been so described. Secondly, the subsection only allowed for the validity of actions of such a judge if the only element applicable was that the judge 'has attained the age at which he is required ... to vacate his office'. It could not be said in the instant case that the only factor applicable was that the judges had attained the mandatory retirement age. In addition to that factor was the element that each of them had demitted office and each of their respective posts had been filled by other persons. The demitting of office meant that the judge was unable, thereafter, to perform the functions of a judge. In the instant case, the judges, having attained the age of 70 years without having previously delivered a judgment therein, without having received permission from the Governor-General to remain in office pursuant to s 106(2), without having remained in office despite attaining the age of retirement, without having been re-appointed to the office of judge in order to deliver a judgment and whose posts were filled subsequent to their retirement, had, despite their good intentions and dedication to duty, no authority to render a judgment in the case. Their authority was spent. Since the judges were without authority to render a judgment, the impugned judgment that was purportedly handed down for them was a nullity. Consequently, the appeal would be reheard by a different panel of the court (see paras. 13, 83-85, 154, 190-193, 196-198 and 230). *Sookoo v A-G of Trinidad and Tobago* [1986] LRC (Const) 629 and *Sookar v A-G of Trinidad and Tobago* (Claim No CV

2010-04777) (4 November 2014, unreported) considered.

(4) The award of costs was a matter within the complete discretion of the court. The general rule that the court should order the unsuccessful party to pay the costs of the successful party did not apply in the instant case. There was neither a successful nor an unsuccessful party because the hearing of the appeal had been rendered a nullity by the retirement of the judges who heard it. There was likewise, neither a successful nor an unsuccessful party in the instant application. The respondents had not contested the costs aspect of the application, and so would not ordinarily be liable for the costs thereof. The interested party, although she had contested the application for an order for costs, would not ordinarily be liable to costs, as she had been joined as an interested party. It was true that the motivation for the joinder of the interested party was largely to render her liable for the costs, but that liability would have been resultant on an order for redress for a claimed breach of the applicants' constitutional rights. That claim had not been resolved in the instant application and therefore the interested party would not be an unsuccessful party to the application. In an application of CPR 64.9, the court might make an order for costs against a person who was not a party to the proceedings. The decided cases made it plain, however, that such orders were only made in exceptional circumstances. No exceptional circumstances existed in the instant case which would make it just to award costs against the interested party. That applied both to the costs of the hearing that had been thrown away and to the costs of the present application. That stance was not meant to foreclose the possibility, if the applicants pursued a constitutional claim in the court below, of that court granting costs as some form of consequential relief for any loss suffered by the applicants, or indeed by the respondents. Accordingly, there would be no order as to the costs of the instant application and each party would bear its own costs thrown away by virtue of the previous hearing having been declared a nullity (see paras. 13, 83-85, 154, 204-207, 210 and 234). *Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira*

[1986] 2 All ER 409 and *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2005] 3 LRC 719 applied.

(5) The history of the litigation and the various reinforcements of the need for the maintenance of the freezing order justified it being retained in place. Some of those orders spoke to the freezing order being retained in order to protect the status of the parties pending appeal. Based on the reasoning that there ought to be a new hearing of the appeal, the justification of the order could only be undermined by a change in circumstances. Although it had been submitted that the sale of the Ajax's assets was a sufficient basis for finding that the circumstances had sufficiently changed, there were two factors which still needed to be taken into account. Firstly, not all the assets had been sold. Ajax still owned certain assets. In addition, the order for sale had only addressed properties owned by Ajax; there had been no order for sale of assets owned by the other applicants. The second factor was that Dr Chen-Young had not informed the court of any other assets acquired or disposed of by him since the freezing order had been granted. Further, he had been actively involved in having properties transferred out of the name of his family company at different times either shortly before or immediately after the 2006 judgment. Those actions supported the need to retain control of the disposal of any relevant assets. The rationale for the institution of the freezing order, namely the protection of the Jamaican taxpayer, had not been undermined. Accordingly, the order would remain in place (see paras. 13, 83-85, 154, 216-221 and 231).

(6) The application for the continuation of the payment of monthly sums to Dr Chen-Young would be refused. The fund created from the sale of Ajax's assets, having been exhausted, there was no fund for the continuation of the payments ordered in 2006 to be made from that fund. Undoubtedly, that situation had resulted, in part, from the length of time for which the litigation had dragged on. The situation was not the respondents' fault. They should not be called upon to fund the applicants' case going forward.

SHOLLEI V JUDICIAL SERVICE COMMISSION AND ANOTHER

3 July 2018

Kenya Supreme Court [2018] eKLR, [2018] 5 LRC 533

Maraga CJ and P, Mwilu DCJ and V-P, Ibrahim, Ojwant and Njoki Ndungu SCJJ

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The first respondent, the Judicial Service Commission ('the JSC'), was a public agency established under the Constitution of Kenya 2010 ('the Constitution'). At any given time, two members of the Supreme Court were JSC commissioners, and among the Supreme Court judges were former JSC commissioners. In the instant case, the petitioner, S, complained that the JSC had violated her fundamental rights and freedoms in removing her from office without a basis in law. The Employment and Labour Relations Court upheld her claim. The Court of Appeal reversed that decision and S appealed to the Supreme Court seeking to have the Court of Appeal's decision set aside. One member of the seven-judge bench of the Supreme Court recused himself from hearing the appeal, having been a member of the JSC when S's case was before it. The JSC applied for, inter alia, an order that four further Supreme Court judges, who were members of the JSC or had proceedings pending against it, should recuse themselves from hearing S's appeal on the basis that those judges were conflicted and the JSC would not be accorded a fair hearing as set out in art 50(1) of the Constitution. If the order was granted, only two judges would be available for service contrary to the terms of art 163(2) of the Constitution, which prescribed a quorum of five judges. Consequently, the petitioner's appeal would be technically declined and the Court of Appeal's judgment would stand as the final edict of the judiciary. S contended that recusal of a judge of the ultimate appellate court ought not to be

invoked so as to impede access to justice, in the terms of art 50(1) of the Constitution.

HELD: Application dismissed.

The Supreme Court had a special constitutional mandate which could not be delegated to any other forum. The court was firmly guided by certain precious values, which provided the context within which it took ultimate responsibility for matters of dispute settlement, in accordance with the law. The instant case did not call for the recusal of any judge of the Supreme Court. Committed to their oaths of office, those judges would pronounce unbiased and own up to their constitutional mandate of dispensing justice in matters falling within their jurisdiction. The concept of fundamental rights was a subject of constitutional safeguard and a core pillar upon which the Supreme Court's mandate was founded. The rights in question were inherently and expressly attributed to citizens, as the legatees of good governance and democratic process. On that account, all rational and tenable perception of the question of access to the judicial dispute-resolution process had to be balanced to ensure the entitlement of the citizen to justice, fair trial, and constitutional safeguard. The cause of the individual who came knocking on the doors of the judiciary was the very first consideration in determining whether or not a hearing fell due. It followed that the application would be dismissed (see paras. 16-21, 33-34 and 67).

Judges, Judging and Humour

Jessica Milner Davis and Sharyn Roach Anleu (eds.)
Palgrave Macmillan, 2018, 312 pp.

This book examines the different uses of humour within the court system. Whilst humour can be used, as Michael Kirby indicates in the Foreword, as a “healing balm to the often-fraught circumstances of the cases before them [*i.e.*: the judges],” as the authors point out, caution must be exercised in any use of humour by judicial officers. This publication is an academic study of the use of humour in different contexts throughout the justice system but, more particularly, it discusses the use of humour and wit by judges and about judges.

The book firstly examines humour through an academic examination of it in social contexts. The various contributors then turn to the different uses of humour within the justice system in a number of countries. Christie Davis—who authored the chapter about Britain—points out that jokes about lawyers abound but jokes about judges are much fewer as judges are seen to be more “aloof” or dignified (though, of course, anecdotes about court cases or incidents in courts both in history and in modern times are sometimes humorous in nature). In some instances, judges have used humour to put down “long-winded counsel”. Mark Galanter outlines how humour is used in the USA. Whilst judges may use humour in court, in many circumstances the institution frowns on the practice as it negatively affects the solemnity of the role of a judicial officer. Here again there are more jokes about lawyers than about the judges who hear the cases. This does not mean that humour has not been used in theatre—especially in the European Context—to depict the failings of judges and court cases. Jessica Milner Davis delves into the historical portrayal of humour from the Greek comedies to medieval times where satirical court cases are played out in theatrical performances and corrupt judges are ridiculed. An example of the latter is found in Shakespeare’s *Henry IV*, Part 2. Even in modern times, court room scenes have been portrayed comically—*viz.*, *Monty Python’s Flying Circus*. We see this replicated in other jurisdictions such as Australia.

Humour is important for social interaction and has been used in courts. However, it must not bring the dignity of the judiciary into question and should not “evinced bias or discrimination, nor undermine perceptions of judicial impartiality “. Ethical guidelines do restrict the use of humour in some circumstances to avoid embarrassing witnesses or parties. In the chapter on judicial humour and inter-professional relationships, Sharyn Roach Anleu and Kathy Mack examine the research undertaken by the National Court Observation Study of Magistrates Courts in Australia between 2002-2015. Those authors found that humour was used sparingly to, for example, manage time, lighten the mood in court or diffuse difficult situations.

Stina Bergman Blix and Asa Wettergren look at humour in the courts from a Swedish perspective and a non-common law jurisdiction. Whilst the research undertaken by both was academic in nature, they found that a “judge presiding over a trial... has the power to decide when humour is appropriate and whether to laugh or not... [T]he other professional actors approve of judges who have the ability to create a ‘good atmosphere’”.

In her chapter, Leslie J. Moran points out that humour is used by judges, but not necessarily when they are fulfilling their judicial functions. Judicial humour abounds, for example, at swearing in ceremonies she explains.

Joao Paulo Capelotti studied the freedom to use humour in speech and the limitations of freedom of expression versus use of humour. What constitutes humour for one person may not be perceived as such by another. Dr. Capelotti outlines some interesting decisions by courts in the US and Brazil in his chapter where humour has been deemed to be offensive, abusive, intrusive or racist rather than funny. He also examines the use of humour by the media as a means of criticizing the decisions of judges and stresses the importance of balancing freedom of expression against that of the dignity of individuals.

The theme of judges regulating humour is also the subject a chapter. Laura Little points out that human dignity does not take precedence over freedom of speech which is protected by the First Amendment to the US Constitution. That said, any “joke” that is seen as a threat against an individual can be considered a crime or be actionable in court.

The authors who have contributed chapters to this edited volume have not only provided interesting views from their various jurisdictions; they have also supplied many references—including references to some interesting cases where humour has appeared, or been used, or been the subject of much debate in court.

Dr. Karen Brewer
Secretary General, CMJA

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- 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 www.cmja.org/joinus.html or contact the CMJA Secretariat on +44 (0)2079761007 or via email: info@cmja.org

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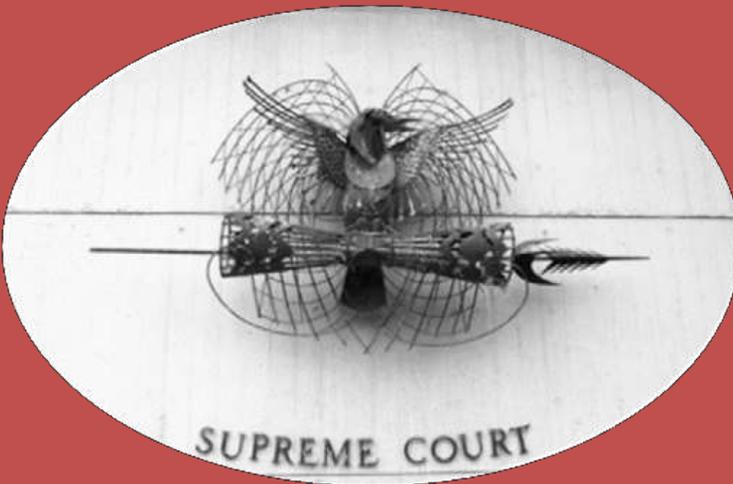


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