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## EDITORIAL

### BEFORE WE SAY ANYTHING ELSE...

Since the last issue of the *Commonwealth Judicial Journal* was published in June of this year, the Commonwealth and its realms have lost their sovereign and the Commonwealth its Head. More accurately, the *world* lost a beloved figure who, with few dissenters, was universally revered and respected as a beacon of integrity and an exemplar of stability in an ever-changing and sometimes bewildering world. (Yes, the monarchy as an institution without doubt has its questioners but its last incumbent had almost none.)

Closer to home, the Commonwealth Magistrates' and Judges' Association lost its esteemed Patron.

It is difficult to speak of the late Elizabeth II and her calm and steadfast dignity without having recourse to language that smacks of cliché. Yet, the admiring epithets that have circulated so widely after her death are no less apt for that. The Queen's steady hand as head of state *was* an unflinching one: this despite the fact that her reign began in times of post-war prosperity and then quickly moved forward (or backward) into the cold war period. Her Majesty's reign carried her on into the 1960s and 1970s when, in the West, widespread optimism and small-l liberal values experienced a renaissance. It continued as the world witnessed a sharp contraction of those values following the postmodern era while, simultaneously, it began finally to face the existential crisis that is climate change. Optimism is now indisputably in decline, cynicism is in the ascendancy and trust in governments and other civic and constitutional institutions has been shaken. All of this, too, the Queen witnessed, attentively and empathetically, but with her characteristic determination to see things through.

Despite seismic changes in society at large (and, indeed, within her own family), there were very few missteps in late sovereign's discharge of her weighty responsibilities over her 70 years and 214 days of service to the United Kingdom, the Commonwealth and the world. History will, we think, judge Queen Elizabeth's reign kindly. For now, we acknowledge our gratitude for her legacy and example, and we mourn her passing.

### THE CONSTITUTIONAL CRISIS IN KIRIBATI

*Maintenance of the rule of law requires an independent judiciary. The central meaning of this concept rests on the separation of powers.*  
— *per* Hastings CJ, *Republic v Lambourne* [2021] KHC 8 at 53

Any institution that places the preservation and strengthening of the Rule of Law at the centre of its mandate—as its *raison d'être*, if you will—must be deeply concerned with developments in the Commonwealth state of Kiribati. The preservation and strengthening of the Rule of Law across the Commonwealth is quintessentially the CMJA's core concern, and so the CMJA looks with dismay upon the steadily worsening constitutional crisis that is unfolding in Kiribati.

Once known as the Gilbert Islands, a British colony, Kiribati gained its independence as a sovereign and democratic state on 12 July 1979 and simultaneously became the 41<sup>st</sup> member of the Commonwealth. It has a written Constitution that, in its current iteration as in the original, reflects the separation of powers as a constitutional norm. More particularly, Kiribati's Constitution contains provisions that, both implicitly and explicitly, evince a commitment to the principle of judicial independence. Article 10(1) for example—which falls under the subheading 'Provisions to secure the protection of law' within the Part entitled 'Protection of Fundamental Rights and Freedoms of the Individual'—guarantees the constitutional right of an accused person in Kiribati to a fair trial by an 'independent and impartial court established by law'.

Would that it were so easy. These stirring words in the Kiribati Constitution take the island state only so far. As Tolson LJ (as he then was) once famously said, 'The rule of law is a fine concept but fine words butter no parsnips'.

The Rule of Law in any true, tripartite democracy depends upon mutual respect and acknowledgement of the separate and fundamental roles played by the legislative, executive and judicial branches of government. This necessitates respectful deference, on the part of the executive and legislative branches,

to the role of the judiciary as the arbiter when questions come before courts for adjudication where possible executive overreach, actions taken in excess of jurisdiction or other forms of alleged unlawful action on the part of the other two branches of government are placed in issue.

The Kiribati government's shoddy treatment of Judge David Lambourne and his judicial brethren has raised all of these generally unquestioned constitutional norms up into the public consciousness in a dramatic way. The government's conduct in this regard has drawn almost universal condemnation from critical thinkers, statesmen and from bodies and organisations mandated to promote the Rule of Law across the world. In a joint statement issued on 3 November 2022 on the most recent developments in the Lambourne matter, the CMJA, the Commonwealth Lawyers Association (the 'CLA') and the Commonwealth Legal Education Association (the 'CLEA') have stated, in part:

*Kiribati has committed to the shared fundamental values and principles of the Commonwealth. At the core of these values is a shared belief in, and adherence to, democratic principles including an independent and impartial judiciary. We acknowledge that issues will arise which create challenges, and we respect the independence of Commonwealth members to make decisions, but these should be in accordance with the shared values and international standards.*

So what exactly happened to set this constitutional crisis in motion in Kiribati?

Judge David Lambourne is an Australian citizen who has lived and worked in the island state for almost 30 years, serving *inter alia* as a People's Lawyer (a legal aid position) and the country's solicitor-general. In 2018 he received a judicial appointment to the Kiribati High Court for an indefinite term.

It also happens that he is married to the current Leader of the Opposition in Kiribati. Judge Lambourne has stated publicly that he believes that the hostile initiatives that have been taken against him by the Kiribati government giving rise to the current constitutional crisis represent

a 'determined attempt by the government to try and force my wife out of politics'.

In February 2020, during the early days of the global COVID-19 pandemic, Judge Lambourne was in Australia attending a conference. While he was there, Kiribati closed its borders to incoming travelers on safety grounds, and when he made attempts to return home on repatriation flights, he was consistently refused a place. His income was also cut off and border officials declined to issue him a work permit. Citing recently enacted legislation purportedly affecting all superior court judges in Kiribati, government officials explained to Judge Lambourne that he could only return to the country if he signed a contract that retrospectively limited the duration of his judicial appointment to a fixed term of three years, leaving him with only weeks remaining to the end of that appointment. He refused at first, but eventually signed under duress and under protest.

These actions of the Kiribati government, including the passing of retrospective legislation purporting to impose fixed term appointments on him and all members of the judiciary, were challenged by Judge Lambourne and in a ruling by Chief Justice William Hastings given November 2021, those actions were declared unconstitutional. Specifically, Hastings CJ declared:

- (a) Judge Lambourne continued to 'hold office as a judge of the High Court of Kiribati for an indefinite period' (subject to conditions not relevant here);
- (b) legislation purporting to retrospectively vary and limit judicial terms of office was 'inconsistent with the Constitution and void to the extent of the inconsistency'; and
- (c) '[t]he exercise of statutory discretions by public officials must recognise the constitutional nature of a judge and be in accordance with the Constitution'.

In response to the Chief Justice's ruling, Kiribati's attorney-general, Tetiro Semilota, reiterated her intention to keep Justice Lambourne out of his judicial post.

In May of 2022, the Kiribati government took steps to suspend his judicial appointment, premising its actions on allegations of misconduct against him that are conspicuously free of any specificity. (Those allegations cite, simply and generically, his ‘inability to perform functions of his office and his misbehaviour’.)

Again, Judge Lambourne filed a court challenge, this time attacking his *suspension* by the Kiribati government as being unconstitutional. The matter was put on Chief Justice Hastings’ list for hearing in June 2022. That hearing could not proceed because, before it could commence, the Chief Justice’s appointment, too, was suspended.

Judge Lambourne returned to Kiribati in August 2022 on a visitor’s visa to rejoin his wife and family. This led to an attempt by the government to deport him—a plan that was expressly disallowed at an emergency hearing of the Kiribati Court of Appeal. The deportation effort continued despite the order given by the Court of Appeal and culminated in a confrontation between immigration officials and the pilot of the commercial aircraft chosen to remove him. The pilot refused to board Judge Lambourne on his flight against his will. A second emergency hearing of the Kiribati Court of Appeal followed the next day, Judge Lambourne was granted bail after having been placed briefly in administrative detention and a week later a three-member panel of the Court of Appeal upheld Chief Justice Hastings’ previous ruling declaring all of the Kiribati government’s actions against Judge Lambourne unconstitutional.

Subsequently in September 2022, all members of the three-member panel of the Kiribati Court of Appeal who decided Judge Lambourne’s constitutional challenge in his favour were also suspended. Proceedings brought by the government aimed at removing them from office on grounds of inability or misbehaviour are now pending.

As a result of all of the foregoing, as of early September 2022, Kiribati had no judges serving on its superior courts—at least, not until 28 October when attorney-general Tetiro Semilota was appointed *per saltum*

to the position of Acting Chief Justice of Kiribati. *The Guardian* newspaper well captures the affront to democracy reflected in that latest of the Kiribati government’s star-crossed anti-constitutional manoeuvres in a sub-headline for a story it ran on 30 October 2022:

*Tetiro Semilota appointed from within ranks of government that fired country’s most senior judge, another from high court and whole court of appeal*

Dr Anna Dziejcz—a legal academic of considerable reputation and stature whose scholarly contributions appear from time to time in the pages of this journal—described the gravity, magnitude and long-term implications of the Kiribati government’s actions in the Lambourne matter in an article recently published in *The Interpreter*.

*Judicial independence and the rule of law have been undermined as the executive refuses to comply with court orders regarding the deportation. The institution of the judiciary has been eroded, which not only means that the people of Kiribati do not have access to justice, but that a key mechanism of government accountability has been removed. This is significant: in the past, the Kiribati judiciary has been a pragmatic actor in Kiribati’s system of government, providing advisory opinions to clarify ambiguous constitutional provisions to facilitate governance. Such constructive checks and balances on power are unlikely under current conditions.*

It seems barely possible to believe that such a spate of flagrantly unconstitutional action could be unfolding in a sophisticated Commonwealth state in 2022. But we live in an era of shifting sands where truth, democratic norms and the Rule of Law itself are all sometimes openly discredited by those bent upon the relentless pursuit of power, advantage and personal gain.

The separation of powers is a pillar of the tripartite arrangement in Parliamentary and constitutional democracies. The place it reserves for the judiciary at times when the executive or legislative branches are alleged to have transgressed is especially important.

The fundamental rights and freedoms of citizens of so-called democratic states where the separation of powers is not honoured through genuine observance by governments of an independent judiciary's constitutional role are placed in grave peril. It is for this reason that entities such as the CMJA, the CLA and the CLEA must and will continue to raise their voices resolutely against the actions of government actors, like those in Kiribati, whose unconstitutional conduct demands both condemnation and reform. In the words of the CMJA, CLA and CLEA joint statement of 3 November 2022:

*Kiribati has committed to the shared fundamental values and principles of the Commonwealth. At the core of these values is a shared belief in, and adherence to, democratic principles including an independent and impartial judiciary. We acknowledge that issues will arise which create challenges, and we respect the independence of Commonwealth members to make decisions, but these should be in accordance with the shared values and international standards.*

*We call upon the Government of Kiribati to respect the orders of the Court in the litigation involving Judge Lambourne, to reconsider the appointment of the Attorney General as Acting Chief Justice and to demonstrate respect for and uphold the independence of the judiciary, Commonwealth Principles, and other relevant international standards of due process.*

*It seems fitting to close this discussion of the crisis in Kiribati with a quotation from de Montesquieu, who famously said as long ago as 1748:*

*When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty... there is no liberty if the power of judging is not separated from the legislative and executive... there would be an end to everything, if the same man or the same body... were to exercise those three powers.*

Plainly, the problems plaguing Kiribati are not new. Neither is the constitutional norm of the

separation of powers, as a remedy for such problems, anything new. History continues to teach us the same lesson: eternal vigilance is, indeed, the price of liberty.

## TOGO AND GABON

On 25 June 2022, at the Commonwealth Heads of Government meeting in Kigali, Rwanda, the former French colonies of Togo and Gabon were admitted as the 55<sup>th</sup> and 56<sup>th</sup> members of the Commonwealth. The official news release concerning the new member states described the eligibility requirements for admission as follows:

*The eligibility criteria for Commonwealth membership, amongst other things, state that an applicant country should demonstrate commitment to democracy and democratic processes, including free and fair elections and representative legislatures; the rule of law and independence of the judiciary; good governance, including a well-trained public service and transparent public accounts; and protection of human rights, freedom of expression, and equality of opportunity.*

## CMJA CONFERENCE IN CARDIFF

While it is some time away, it is not too soon for readers to diarise the CMJA's next annual conference to be held in Cardiff, Wales from 10-14 September 2023.

The COVID-19 pandemic rather spoiled matters in 2020 when Cardiff was to be the host city for that year's conference. Those who were looking forward to gathering together for intellectual stimulation and friendly fellowship in the warm and welcoming company of their Welsh colleagues shall, we think, have their wishes fulfilled at last next September. The conference theme that has been chosen for 2023 is 'Open Justice Today'.

The coronavirus hasn't been invited to the 2023 conference and isn't welcome. Whether it will crash the party, no one can say with certainty. However, conference organisers and prospective attendees are a hopeful lot and so we're all approaching the Cardiff gathering with a robustly positive attitude.