
EDITORIAL

PROMOTING PUBLIC LEGAL LITERACY: A JUDICIAL RESPONSIBILITY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Public knowledge of law and its associated informational and educational practices

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PLAN TO ATTEND THE CMJA TRIENNIAL CONFERENCE IN GHANA

Mark your calendars!

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

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

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

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

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

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

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

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

HYPERLINKS AND THE COMMONWEALTH JUDICIAL JOURNAL: A POLICY ANNOUNCEMENT

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

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

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

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

WHAT AWAITS YOU IN THIS ISSUE

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

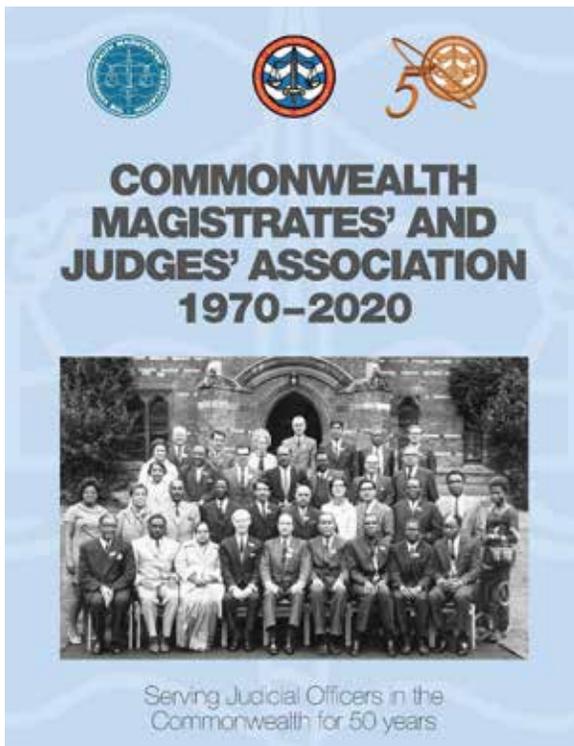
subject matter addressed in the substantive articles published in this journal. For this issue, the content includes articles by:

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

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

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

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



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