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According to a report of the World Bank on the social impact of the financial crisis that hit the world economy in 2008-2009, the crisis transformed the lives of many individuals and families, in both developed and developing countries, where millions of people fell, or are at risk of falling, into poverty and exclusion. For most regions and income groups in developing countries, progress to meet the Millennium Development Goals by 2015 has slowed and income distribution has worsened for a number of countries.

The impact of this crisis on all sectors of society, including the judicial sector, has been profound. In response, governments across the Commonwealth have implemented austerity measures which, in the case of the administration of justice, have included reducing public spending and increasing court fees. These measures have exacerbated existing issues and brought about new challenges in the administration of justice.

In Canada, for instance, this matter came to the fore in the Supreme Court of Canada’s decision in *Trial Lawyers’ Association of British Columbia v. British Columbia (Attorney General)* [2014] 3 S.C.R. 31. This case began as a family action concerning child custody, wherein the plaintiff had asked the trial judge to relieve her from paying the hearing fee based on the impoverishment exemption. As the case developed, the issue became whether court hearing fees imposed by the Province of British Columbia that denied some people access to the courts were constitutional. The majority of the Court responded emphatically that fee structures that served as de facto impediments to access to courts infringed on the core jurisdiction of the superior courts and had to be declared unconstitutional. We are pleased to republish a report of this important case in the Law Report section of this issue, in collaboration with the Law Reports of the Commonwealth (LexisNexis).

In September this year, the Commonwealth Magistrates’ and Judges’ Association issued a resolution on the lack of sufficient resources provided to the courts. In this resolution, the CMJA noted that in every Commonwealth country there are pressures to reduce the cost of providing justice and acknowledged the ever increasing tension between governments who have the responsibility to fund the administration of justice and the courts that have the obligation to deliver justice. In this respect, the resolution noted with concern the continued lack of sufficient resources provided to the courts in many Commonwealth countries, and recalled that Paragraph IV of the Commonwealth (Latimer House) Principles on the Three Branches of Government states that adequate resources should be provided for the judicial system to operate.

While therefore all Commonwealth countries are facing the challenges of what may be termed ‘Austerity Justice,’ it is still not clear how these challenges may have manifested themselves in specific jurisdictions. In view of the significance of this matter, the Commonwealth Judicial Journal will be undertaking a study on how Austerity Justice has impacted and/or continues to impact the administration of justice in the Commonwealth. This study will be led by Nicky Padfield, a former editor of the CJJ and Master of Fitzwilliam College, Cambridge.

In order for this study to be as inclusive as possible, I would like to call on readers of the CJJ to submit any views, cases or comments which may be relevant. We are particularly interested in how Austerity Justice may have impacted the administration of justice in your jurisdiction. The deadline for submissions is 1 April 2016. The study will subsequently be published in a future issue of the CJJ. Please send all submissions by email to Dr Karen Brewer at: kbrewer@cmja.org, or by post to: CMJA, Uganda House, 58-59 Trafalgar Square, London, WC2N 5DX.

With respect to developments, in June, the CMJA, together with the Commonwealth Legal Education Association and the Commonwealth Lawyers Association issued a statement on the
failure by the South African Government to arrest President Omar al-Bashir, President of Sudan, for crimes against humanity. In particular, the three organisations urged the Government of South Africa to respect the Constitution regarding its constitutional and international obligations and to desist from undermining the authority of the judiciary and the courts whose decisions are binding on all persons and organs of the state.

In September, the 17th Triennial CMJA Conference on ‘Independent Judiciaries: Diverse Societies’ was held successfully in Wellington, New Zealand. A selection of papers from this Conference will be published in the CJJ. Also by way of developments,

This issue opens with a Profile of the incoming President of the CMJA, Justice John Allan Lowndes. As usual, we have a wide variety of interesting and topical articles. Lord Hope of Craighead writes about the role of the court in the development of society. The article raises a number of questions related to the role of the courts in society, including whether they have a wider responsibility beyond simply deciding the cases that are brought before them. This is followed by an article on the rule of law and the separation of powers by His Honour Deemster Doyle. This article provides a list of top 10 tips for maintaining the separation of powers on the ground. Dr Karen Brewer discusses judicial appointments in the 21st century Commonwealth. She makes the case for a statutory provision for the establishment of an independent and clearly defined judicial appointments process at all levels. Professor John McLaren addresses the subject of the Judicial Committee of the Privy Council and the disciplining of colonial judges. Finally, Zia Akhtar considers the impact of the Magna Carta on the rule against bias in English law.

The CJJ has once again collaborated with the Law Reports of the Commonwealth (LRC) to publish two cases related to the subject of Austerity Justice, namely: Trial Lawyers Association of British Columbia and Another v Attorney General of British Columbia and Attorney General v Simelane and Others. In this respect, I wish to renew our thanks to Dr Peter E. Slinn and Prof. James S. Read, general editors of the LRC, as well as to Mr. James Neville from LexisNexis / Reed Elsevier (UK) Limited, for allowing us to republish these law reports.

Finally, this Issue also features two book reviews: one of John Hatchard’s book entitled: Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa, which was prepared by Justice Keith Hollis and another of Samuel Kofi Date-Bah’s book entitled: Reflections on the Supreme Court of Ghana, prepared by Dr Peter E. Slinn.
John holds a Batchelor of Arts, Batchelor of Laws and a Masters of Laws (Honours Class 1) from the University of Sydney. He also has a Diploma in Criminology and a Diploma in Jurisprudence from the University of Sydney. In 2005 he completed a Doctor of Philosophy at Charles Darwin University in the Northern Territory. The title of his thesis was “The Criminal Code of the Northern Territory: A Critical Analysis and Appraisal of its Fundamental Principles of Criminal Responsibility”.

After practising as a solicitor for about 14 years, John was appointed a magistrate of the Northern Territory in 1990. Since his appointment he has held the following positions in addition to that of magistrate: Chairman of the Agents Licensing Board, Coroner of the Northern Territory, President of the Mental Health Review Tribunal, Managing Magistrate of the Work Health Court and Chairperson of the Lands, Planning and Mining Tribunal.

In early 2013 John was appointed Deputy Chief Magistrate of the Northern Territory. Later that year he was appointed Chief Magistrate of the Northern Territory and continues to hold that position.

In relation to activities outside the court, John is a former President of the Association of Australian Magistrates (AAM) which is the representative body of Australian magistrates nationally. He is also a former member of the Executive Council of Australasian Tribunals (COAT). Since 2013 he has been a member of the Governing Council of the Judicial Conference of Australia (JCA), Australia’s peak judicial association representing all tiers of the judiciary in Australia, and continues to sit on that council.

Between 2009 and 2012 John was a Council Member for the Pacific Region of CMJA. Between 2012 and 2015 he was Regional Vice-President, before being elected President of CMJA at the 17th Triennial Conference in Wellington, New Zealand in 2015.

John has an interest in high end hi-fi equipment, and is forever upgrading his audio equipment in the hope of reaching “hi-fi nirvana”. He also enjoys listening to music from his large collection of vinyl records and compact discs spanning all genres of music since the mid-1960’s. In addition to that pastime, he has an interest in philosophy, and in particular the works of the ancient Greek philosophers.
THE ROLE OF THE COURT IN THE DEVELOPMENT OF SOCIETY

Lord Hope of Craighead KT.
This article is based on a presentation at the Commonwealth Legal Education Society in April 2015.

Abstract: In the modern societies, the courts have a crucial part to play in seeing that the rule of law is observed by everyone. If they are to play that role they must be equipped with judges who are, and can be relied upon to be, impartial. Their impartiality depends on the separation of powers. This article raises a number of questions related to the role of the courts in society, including: To what extent can it be said that courts develop society by educating citizens to respect the law? Do they have a wider responsibility beyond simply deciding the cases that are brought before them? Does it matter how they decide those cases and how the judges behave when they are doing so? The article explores the function of the courts in society, particularly in light of recent developments such as in the area of counter-terrorism.

Keywords: Rule of law – administration of justice – open justice – counter-terrorism measures

Human beings are social creatures. From the beginning of time they have had to learn to live with each other, and to organise the way their relationships with each other work. Any such organisation depends upon the formulation of rules and of standards of conduct. Rules cannot be relied upon unless they are capable of being enforced, and a system is needed to resolve disputes. The methods for resolving them require the exercise of judgment by a person, or group of persons, who can be relied upon to reach a just result. As society has evolved the responsibility for achieving that result has been given to courts presided over by judges, whose responsibility it is to exercise justice. The concept of justice is moulded according to considerations of law and equity, which have been developed by thinking about what is fair and rational. They are embodied in the figure of the goddess Justice. Tradition has it that she is equipped with three symbols: a sword, to demonstrate the power of her court to exercise authority; a scale in each hand, to show that she seeks to weigh competing claims fairly against each other; and a blindfold over her eyes, to show that she is impartial.

Societies have evolved in different ways, from the most primitive to the most advanced. The most primitive have tended to depend on the exercise of authority by the most powerful. In some, such as those presided over by a dictator or an absolute monarch who asserts that he is above the law, rules are made and enforced according to that person’s own judgment. He seeks to retain power by controlling the way society develops according to his own judgment as to what is in its best interests. The society over which such a ruler presides has little or no part to play in that process. Nor is there room for justice in the way that the goddess Justice portrays that concept. The system of justice is controlled by the ruler, and the judges are subject to his direction. They cannot exercise an impartial judgement in the resolution of any disputes to which he is a party. This is because they lack the essential quality of independence. They are answerable to the ruler for what they decide.

In the modern world most advanced societies are founded instead on the democratic principle. The way such societies have evolved varies according to how each of them has broken free from rule by the monarch or dictator or from rule by a colonial power. They are governed by the people for the people according to fundamental constitutional principles which may, but need not be, written down. The head of state may be a monarch, as in the case of the United Kingdom. But he or she acts always within the boundaries of the constitution. At the centre of the constitution is the principle known as the rule of law. No one is above the law in such a society. The courts have a crucial part to play in seeing that the rule of law is observed by everyone. If they are to play that role they must be equipped with judges who...
are, and can be relied upon to be, impartial. Their impartiality depends on the separation of powers. The system by which the judges are appointed and hold office must be, and must be seen to be, independent from the executive. And, if they are to be impartial, they must be secure against the risk of corruption from any source.

To what extent, then, can it be said that courts develop society by educating citizens to respect the law? Do they have a wider responsibility beyond simply deciding the cases that are brought before them? Does it matter how they decide those cases and how the judges behave when they are doing so? I think that the answer to those questions can be found by looking at the way that courts in which I have appeared before as counsel and on which I have sat as a judge in this country administer justice. There are several features of the way they perform their functions that show that they do have that wider responsibility, and that the way that they conduct their proceedings does perform a significant role in upholding the rule of law throughout our society. I would summarise these features in this way.

First, our courts do, and should, sit in public. The principle is that justice must not only be done. It must be seen to be done. There are some exceptions to protect children and, in very rare cases, in the interests of national security. But the general rule is that every civil dispute and every criminal trial is heard in public. This means that everybody can see and hear the judges and can observe their conduct in court. They can see how the court exercises its authority. Open doors tend enhance the court’s reputation as a place where justice is done between the parties. It also tends to reinforce the idea that people should conduct their affairs with each other according to the rule of law. They can see that the courts are there to enforce the law fairly if they do not.

Second, our courts conduct their proceedings according to rules which are designed to preserve order and to achieve fairness between the parties to the dispute. Each side has a right to be heard, to give and lead evidence in support of its case and to be given notice of the other side’s argument. The careful and orderly way in which proceedings are conducted can be regarded as an example to society at large as to how disputes at whatever level should be sorted out. Basic rules that regulate our society, such as that the judge must hear each side of the argument before he makes his decision and that no man should be a judge in his own cause, have been evolved by the judges themselves. They are put into practice every day in our courts. Everybody can observe how this is done, and then conduct their own affairs accordingly.

Third, the judges give reasons for their decisions. This is an important part of the process of achieving justice as between the parties. Each side has the right to know how and why the case has been decided as it has been. And the public have an interest in this process too. Much of our law is laid down by Parliament. But the application of that law and its development according to the needs of each case is in the hands of the judges. To that extent it can be said that the judges too are law makers. They must, of course, act within the scope of the laws that they are required to apply. But the law must be fitted to the facts of the case. Much of the detail of our law about how to resolve family disputes or the right to damages caused by another person’s negligence, for example, has been evolved in this way. The judges seek, so far as this is within their power, to keep the law for which they are responsible up to date and to meet the needs of society. The giving of reasons is an important part of this process. It opens up their thinking to scrutiny, assists the process of any appeal and ensures that the judges are accountable for what they do. It also has an important educational function for the benefit of the public at large, as well as for those who are studying law.

Fourth, the judges are the guardians of the rule of law. This means they can and do develop human rights law according to the principles set out in the European Convention on Human Rights. By doing this they ensure that public authorities, such as the various branches of executive government, act within the law and respect the fundamental human rights of everyone in society. Those who administer those branches of government know that their actions are open to scrutiny by the judges. This promotes good order and responsible government. It is the key to a civil society which is governed under equal and just laws, by which the rights of minorities are effectively protected. By this means the courts protect
the right of participation in the democratic process, equality of treatment for everyone under the law, freedom of expression and the right to a fair trial. Governments must, of course, be allowed to govern. They are under a duty to protect the public against threats such as that presented by the actions of terrorists. But what governments do must have its limits. Even in an emergency, fundamental rights must not be curtailed further than is absolutely necessary. It is here that the courts have a vital role, in the interests of everyone within society.

The responsibility that rests of on our judges is very great. The processes by which they are appointed, and the security of tenure that they enjoy once they have been appointed, are designed to ensure that they are truly independent from the executive arm of government. They are selected from people who already have substantial experience in the practice of law and from people whose integrity and immunity from corruption is beyond doubt. Were that not so, the contribution that they would be able to give to the development of our society would be much diminished. As it is, they are ideally suited to making that contribution. For that our country has much to be grateful for.

At this point, it is, perhaps, worth reflecting on the historical and constitutional background, before I try to unpick my four headings and express some concerns about where we are now.

In the context of the 800th anniversary of the granting of Magna Carta by King John at Runnymede on 15 June 1215, it will be recalled that he was an English King and that the dispute between him and his rebel barons was essentially an English affair. He had been demanding more and more money from them to fund his military campaigns and, in doing so, had been abusing and exploiting the barons’ long-standing rights. One of the essential points established at Runnymede was that the King was subject to the law like everyone else. Magna Carta also established the fundamental principle that taxes could only be levied with the general consent of the Kingdom, which came to mean that they could only be levied with the consent of Parliament. Then there were the two clauses dealing with rights and liberties, clauses 39 and 40. Clause 39 states that no man shall be seized or imprisoned, or stripped of his rights or possessions, except by the lawful judgment of his equals or by the law of the land. Clause 40 states: “To no one will we sell, to no one deny or delay right or justice.” Almost all of the 63 clauses have fallen by the wayside as the problems they were dealing with have disappeared. But these two clauses, which are the most well-known of all of them all, are still in force today.

Representatives of the other parts of what is now the United Kingdom were not present at Runnymede. As I said, it was essentially an English affair. But by the end of the 13th Century Edward I had conquered Wales, and during the 16th Century the Tudor Kings conquered Ireland. Edward I did not manage to conquer Scotland, as we in Scotland are pleased to remember. But when Elizabeth I died childless in 1603 a Scottish King, James VI, became King of England, and under the Treaty of Union of 1707 the Parliaments of Scotland and England were joined together to create a United Kingdom. By these processes the bargain that was struck at Runnymede became part of our common heritage, and its influence was spread throughout most of what is now the Commonwealth during the colonial era. And it spread to other colonies that are not within the Commonwealth. It is striking how enthusiastically Magna Carta has been embraced in the United States as part of their own heritage. They are among its most ardent admirers.

Magna Carta talked about the levying of taxes and about the relationship between the King and Parliament. It did not say anything about the relationship between the King and the judges. It took a few more centuries to deal with this aspect of the matter. The source of the judges’ independence can be traced back to the ending of the claims of the Stuart Kings to rule by prerogative right. That was established by the Bill of Rights 1688 and by the Act of Settlement of 1700, which are the foundation for our constitutional monarchy. It was the Act of Settlement that established that the judges were to be paid salaries – important for the reasons indicated by Lord Bingham, in his answer to a judge from one of the former Soviet republics who asked how we deal with corruption in our system: “We pay them proper salaries”, he said. And it was that Act that established that the judges could
be lawfully removed only upon the address of both Houses of Parliament. These, in very simple terms, are the building blocks of the kind of society in which our courts operate, whose role in the development of it I was writing about.

I chose four features of our system as providing the key to the courts’ role: the fact that they sit in public; the fact that they conduct their proceedings according to rules that are designed to achieve fairness; the fact that they give reasons for their decisions; and the fact that they are the guardians of the rule of law.

As for the first, we take it for granted that our courts sit in public. This is recognised by the leading international human rights instruments. Article 10 of the Universal Declaration of Human Rights, adopted by the United Nations in 1948, states that everyone is entitled to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations, and of any criminal charge against him. Article 6(1) of the European Convention on Human Rights is in similar terms, as is section 11(d) of the Canadian Charter of Rights and Freedoms which deals with proceedings in criminal and penal matters. It is enshrined too in the common law principle that justice must be seen to be done. But we have to accept that, in our rather dangerous and imperfect world, not everything that takes place in a court can be open to public scrutiny and made the subject of reports in the newspapers. Over the years the legislature has created a considerable number of exceptions to the ordinary rule that proceedings must be held in public and it has laid down statutory restrictions on what can be reported in the press. In 1926 the Westminster Parliament passed an Act, the Judicial Proceedings (Regulation of Reports) Act, to restrict the freedom of the press to report any indecent matter, the publication of which would be calculated to injure public morals. Legislation to a similar effect has been especially frequent in relation to proceedings involving children. Nevertheless in 2005, in In re S (A Child) ([2004] UKHL 47, [2005] 1 AC 593, 604), Lord Steyn said that it needed to be said clearly and unambiguously that the courts have no power to create by analogy, except in the most compelling circumstances, further exceptions to the general principle of open justice. And in 2010, in Guardian News and Media (Guardian News and Media, re HM Treasury v Ahmed and others [2010] UKSC 1, [2010] 2 AC 697), the UK Supreme Court held that the lower courts had been wrong in the case of persons who had been subjected to freezing orders under the Terrorism (United Nations Measures) Order 2006 to use initials only when referring to them in their judgments and addressing anonymity orders to the press. The point was made that publicity provides the important service of informing public debate about our system of justice, in which the public have a legitimate interest. The fact that the appellants were challenging the freezing orders meant that they were presenting the orders as wrongs done to them, rather than as indications that they had done something wrong. Concealing their identities, for which there was no statutory authority, ran counter to the entire thrust of their case. In these two cases we see the House of Lords and the Supreme Court upholding the principle of open justice in the public interest. But they need to be alert to attempts to erode this principle.

Terrorism, both domestic and international, presents a very real challenge. At the heart of the matter, so far as the United Kingdom is concerned, has been the almost irreconcilable conflict between the need to maintain a cloak of secrecy over the information gathering activities of the security services in their fight against terrorism and the most basic rights of the individual – the right to liberty and the right to a fair trial. A fair trial cannot be conducted in secret. Yet the only evidence on which a conviction could be based may be evidence that must be kept secret. If the security services were to be forced to reveal their sources and their information gathering techniques, their efforts to detect threats to public safety would be neutralised. Much of their work is conducted in co-operation with the US security services, whose trust in what the UK is doing is said to have been undermined by some of the consequences of our need to conduct our affairs in a way that is compatible with the ECHR. We are led to believe that we cannot expect our services, especially when supplied with information by the US, to demand answers to questions as to where the information came from or how it was obtained. There are some questions that, in this area of activity, you simply do not ask.
We are used to claims by government agencies for what is called public interest immunity. If the claim succeeds on the ground that it is in the public interest for the information to remain secret, it is kept out of court altogether. But there are cases, such as where the government wishes to exclude someone from the United Kingdom on the grounds of risk to national security, where the government wants to lead the evidence because it is essential to the case it is seeking to make. In that situation the evidence will be known to the government, and it will be seen by the judge. But it will be withheld from the party against whom the order or other remedy or sanction is sought, and the judge cannot mention it in his judgment. His reasons will not be disclosed to the party who most wants to know what they are. Plainly this is incompatible with the principle of open justice. As Lord Neuberger said in Bank Mellat v HM Treasury ([2013] UKSC 38 and 39, [2014] 1 AC 700, para 2), the idea of a court hearing evidence or argument in private is contrary to the principle of open justice, which is fundamental to the dispensation of justice in a modern, democratic society.

Of course there will be situations where the need to preserve national security will prevail. This has been addressed by Parliament in a number of statutes in which it has said that, in certain limited and specified circumstances, a closed material procedure may be adopted by our courts. For example, the Counter-Terrorism Act 2008, which enabled the Treasury to impose very severe financial restrictions on banks or other organisations that were suspected of supporting international terrorism or the development of nuclear weapons, stipulated that rules of court might make provision for various aspects of the proceedings to be conducted by the use of this procedure. The Bank Mellat case, in which an Iranian bank which had been subjected to financial restrictions under that Act sought to have them set aside, was such a case. The government produced some of the evidence on which it relied under the closed material procedure in the lower courts, to which the rules of court applied. The Bank then appealed to the Supreme Court, to which the rules of court sanctioned by Parliament did not apply. One of the issues that that court had to consider was whether it should adopt that procedure too without that sanction, bearing in mind all the undesirable consequences. By a very narrow majority of five to four – I was one of the four who dissented – it held that it should. I have to confess to having felt very unhappy about taking that step without having been directed to do so by Parliament, on the view that it was the court’s role to uphold the principle of open justice. As it was, the evidence that we were asked to look at in the Bank’s absence turned out to be of no assistance whatever. That made it all the more regrettable, in the view of the minority, that the court had decided to look at it all. But it did result in the court reaching a unanimous view that a very high standard had to be set for the admission of such material in that court the future. The reasons that were given were a significant contribution to judicial thinking on this topic.

Turing to my second point, about the need to conduct proceedings according to rules that are designed to achieve fairness, it is worth noting that we have come a long way in England and in Scotland since the 19th Century. That was an era of legal reform, much of it directed to the structure of the courts and the way business before the courts was organised. There was a clear and irreversible shift from systems of procedure that had previously been controlled exclusively by the judges to one sanctioned by Parliament, which ensured that the views of court users were taken into account and was designed to serve the public interest in a transparent and efficient system of justice. The British philosopher and social reformer, Jeremy Bentham, had strong views about this. His complaint was that the laws of procedure were the creation of the judges, not the legislature – that they favoured the interests of the judges as a class, not the interests of the people generally. His vision was of a system that gave effect to the requirements of the substantive law – its servant, in other words, not its master; of a system that prevented delay, vexation, expense and a failure of justice.

There is no doubt that in his time there really was something to complain about. Judges did receive salaries. But they were generally regarded as inadequate, and both in England and in Scotland judges supplemented their income in other ways. Part of the fees that were charged for each step in the progress of a case through the courts went towards their remuneration. There was an obvious incentive
to make the process as complex and lengthy as possible. And just as profit was achieved by complicating and obscuring procedure, so too was the ease and leisure of the judges. People gave up litigating to save expense, or could not afford to litigate at all. This problem was addressed by an increase in the judges’ remuneration, so that they no longer had a financial interest in the way the business of the court was conducted. And gradually the system of procedure which the judges had devised for themselves was replaced by one under which rules are made under powers delegated by statute after consultation with court users, and over whose content the users have had an increasing influence. Parliament set the scene for this but has, very sensibly, been content to abstain from engaging in the detail.

Are rules of procedure, in law, really that important? Well, I think that law without procedure is virtually useless, and that procedure that is ill-conceived can lead to a denial of justice. In Bentham’s analysis, the direct and collateral ends of justice, towards which any system of judicial procedure and organisation should aim, are to give effect to the substantive law, to prevent misdecision and injustice and to prevent delay, vexation and expense (Jeremy Bentham and the Scottish Legal System [1979] JR 22 at p 27). The benefits that he saw as resulting from this were despatch, economy and individual responsibility. The substantive law was no use if it could not be invoked and applied with reasonable speed and economy. His message was that procedure affects everything that a legal system does, and that we must be eternally vigilant lest our own system becomes encased within a procedural web that makes it impossible – or perhaps one should now say, disproportionately difficult – for the law to serve the needs of the public. To understand his message we must appreciate that every aspect of the system may be vulnerable to that criticism, from the way the judges are appointed and courts are organised to the rules of procedure that govern how cases are handled in court at every level. They must be kept under constant review to see that they are still doing what the public interest requires.

The giving by a court of reasons for its decision is another subject that Bentham felt strongly about. Due to the way the courts were organized in his day, there was a lack of transparency in the way that decisions were arrived at. Both in England and in Scotland judges in the senior courts rarely sat alone. The usual practice was for there to be a large court of several judges sitting together, presided over by the Chief Justice or in Scotland by the Lord President. Full reasons were rarely given, and the judges were hostile to the system of law-reporting which was then in its infancy. “The man is takin doon ma verra words”, one Scottish judge is said to have protested, as he watched someone preparing a note of one judgments. Transparency was something to which Bentham attached the greatest importance, although I do not think that he ever used that term. As he put it, publicity is the very soul of justice, the keenest spur to exertion and the surest of all guards against improbity (in a passage quoted by Lord Shaw of Dunfermline in Scott v Scott [1913] AC 417, 477). This was conspicuously lacking in a system where decisions taken collectively by a court of fifteen judges sitting together, which encouraged idleness and masked individual responsibility. He wanted each judge to give his own reasons so that they each could be scrutinised. The reforms which led to judges sitting alone, and having to do just that, were a significant advance in the development of our system of justice.

There is a marked difference between most other European systems, including that adopted by the Court of Justice of the EU that sits in Luxembourg. European judges are trained in writing judgments. This is seen as an application of the rule of law which governs all public authorities. For them the legitimacy of the judicial power is rooted in the idea that the law must be complied with and that everything that a judge does must indeed be regulated. In Spain, for example, it is a constitutional requirement that reasons for judgments must always be given (Spanish Constitution (1978), art 120.3). Not only that, the judgments must be prepared according to the Basic Law of the Judiciary. Regulations in the Civil and Criminal Prosecution laws say how reasons for decisions must be formulated (The Basic Law of the Judiciary (LOPJ-1985), the Law of Criminal Prosecution (LECr 1882) and the Law of Civil Prosecution (LEC-2000). It is not surprising that, in order to meet strict requirements of that kind, judges there are taught (see Lord Rodger of Earlsferry, The
Form and Language of Judicial Opinions (2002) 118 LQR 226 at p 227). The training which they receive is designed to ensure that their judgments conform to a uniform pattern in both their form and their language. There is a fixed format of judicial decisions, with no discussion or acknowledgment that there may be several possible outcomes. This system serves to reinforce the apparent objectivity of the judgment, but it conceals much of the judicial reasoning process (Jacqueline Hodgson, Codified Criminal Procedure and Human Rights: Some Observations on the French Experience [2003] Crim LR 165 at p 168). The product is that of a system which is essentially collegiate in nature, not that of the individual, to which Bentham took such strong objection. All that matters is that the essential requirements for a reasoned decision are satisfied and, in a culture which favours judicial anonymity, the system seeks to ensure that the work of no single individual stands out from the common pattern (in Spain, article 689 of LOPJ-1985 enables a judge, by means of a reserved vote, to dissent from the decision of the majority). There is no encouragement for variation in style according to the writer’s taste or for embellishment.

The style of judges in the common law systems, on the other hand, has been described as that of masterful advocates promoting or defending their own conclusions – the very opposite of that of continental judges ingrained with notions of regulation and officialdom (J Gillis Wetter, The Style of Appellate Judicial Decisions (1960), 35, quoted by Lord Steyn in his Bentham Club lecture, University College London (1996) Does legal formalism hold sway in England? at p 56), the fact that judges under our system are free to express their disagreement with one another, and do so freely and robustly, is a healthy feature of our democratic system.

The point is that, once the judgment is in the public domain, it is there for everyone to read who cares to do so. It should be crafted in such a way as to be readable and accessible to a wide audience. That is the common law tradition. UK judges can read and understand the reasoning of judgments given, for example, in Canada, in Australia and in the Caribbean Court of Justice, and the judges there can read and understand the judgments that are given by the judges in this country. Comparative law across the Commonwealth thrives as a result.

Then there is my fourth point, that the judges are the guardians of the rule of law. This is a source of constant tension between the executive and the judiciary, especially where the safety and security of the people is at risk. The executive sees it as its first duty to protect the lives of its citizens. The threat of terrorism is real and it has to be faced up to every day. On the other hand the duty of the judges is to stand up for the rule of law, and to see that it is extended to everyone. It is the right of everyone, however dangerous and despicable he may be thought to be, to have the benefit of the rights conferred by the ECHR. Persons accused of terrorism activities have the same rights as everyone else. The circumstances in which they may be detained are closely regulated by article 5 which, echoing Magna Carta, declares that everyone has the right to liberty and security of the person. It provides that no-one shall be deprived of his liberty save in certain clearly defined cases, and then only
in accordance with a procedure prescribed by law. If those persons are put on trial, their trial must meet the standards required by article 6 – the presumption of innocence, equality of arms and the right to a fair and public hearing, for example. All the evidence that the prosecution needs to lead in order to secure a conviction must be disclosed to the accused, and under our system is must be disclosed to the jury too. Politicians tend to overlook the presumption of innocence, and they dislike the idea of according rights to those who are suspected of terrorism. It is up to the courts to stand up against them on this issue.

Then there are the constraints on the gathering of information that, under the Torture Convention, must be complied with. Our security services do not obtain information by the use of torture. But some of the countries from which their information comes may do so. Our security services can look at or listen to such information without asking questions. But questions will have to asked, and answered, if it is to be used against someone in court. As Lord Atkin famously said in 1942 in his dissent in *Liversidge v Anderson*, in England, amidst the clash of arms, the law are not silent. They speak the same language in time of war as they do in peace. So too, we should say today, the laws speak the same language in the context of allegations of terrorism too, whether domestic or international. It is for the judges to continue to assert these principles. Professor Aharon Barak, the former Chief Justice of Israel, described this in an address which he gave recently at a seminar in Florence as the supreme test that judges must face. A wrong decision that is given in times of war or some other emergency may last long after in times of peace.

There is a more controversial issue which arises in the United Kingdom, due to the principle of the sovereignty of Parliament. Most states and territories within the Commonwealth have written constitutions which enable legislation to be tested against the usual human rights norms. Some of these cases reach the Privy Council in London, which has the power to declare legislation unconstitutional. But the same judges, when sitting in the UK Supreme Court, do not have that power. Nevertheless one can trace here a process whereby the boundaries between what is acceptable and what is not are explored as a succession of statutes designed to meet the threat of terrorism have come before the courts.

Parliament has enacted no less than nine counter-terrorism measures during the past fourteen years, as successive governments have sought to meet the continuing threat by introducing more and more powers, and imposing more and more restrictions, to meet the challenges that continue to be presented by terrorism in all its forms. These measures have been passed against the backcloth of continuing developments, as the focus of attention has had to widen from that which concentrated on the activities of members of particular groups or organisations to the need to meet the threat of so-called “lone wolves” returning from the conflict zones in Iraq and Syria to which the most recent measure in particular, the Counter-Terrorism and Security Act 2015, is directed.

In conclusion, it is apparent that our courts have to work quite hard to keep up the standards we expect for a modern democratic society. What they do is not universally popular. But we do have, almost everywhere, the huge advantage of a system that respects and guarantees their independence. It is when that system breaks down that we really do need to worry. We must be grateful for all the efforts that the Commonwealth makes to prevent this happening wherever it can, through its various arms and agencies. Long may that continue.
THE RULE OF LAW AND THE SEPARATION OF POWERS

His Honour Deemster Doyle, First Deemster and Clerk of the Rolls, Isle of Man Courts of Justice. This article is based on a lecture delivered as part of the Small Countries Financial Management Programme at the Oxford Union in July 2015.

Abstract: The ability to directly or indirectly question, call to account or hold up to ridicule anyone in public office may be regarded by some as a major step forward for democracy. But this may potentially undermine the effectiveness of the separation of powers within the rule of law which is in itself one of the mainstays of democracy. If the separation of powers is to be maintained the executive and the legislature cannot reasonably expect to have unfettered access to the judiciary. To ensure judicial impartiality a judge must not be subjected to influence by anyone outside the physical or virtual court room whether in government, media, big business or elsewhere. This can be a frustration for some politicians and their advisers who are seeking a quick and popular solution and may well see access to the judiciary as a way towards that solution. However, even just the perception that the judiciary have been inappropriately accessed can be enough to destabilise their impartiality. This article provides a list of top 10 tips for maintaining the separation of powers on the ground.

Keywords: Judicial independence – separation of powers – access – impartiality – justice seen to be done

Opening comments

Today we have unprecedented levels of access to news, information and people. With computing performance now doubling every 18 months, tomorrow will bring levels of connectivity and access that are quite literally beyond our imagination. These rapidly developing technologies are changing the ways in which we communicate and administer justice while also changing the expectations of the users. Access to everything is the growing expectation of everyone. Global communication and the sum of all knowledge in the palm of your hand is a game changer.

But when this is added to what is rapidly becoming unfettered access to news channels, politicians, celebrities and everyone else, the expectation of access grows. For example just one of the social media channels, Twitter, has 217 million active users, Barack Obama has over 60 million followers, but this is somewhat overshadowed by the American pop singer Katy Perry who has over 70 million followers. Well you can sing along with her songs, which you cannot with Barak Obama’s speeches.

The relevance of this situation to my subject is the expectation of access. Access to directly or indirectly question, call to account or hold up to ridicule anyone in public office may be regarded by some as a major step forward for democracy. But this may potentially undermine the effectiveness of the separation of powers within the rule of law which is in itself one of the mainstays of democracy.

If the separation of powers is to be maintained the executive and the legislature cannot reasonably expect to have unfettered access to the judiciary. To ensure judicial impartiality a judge must not be subjected to influence by anyone outside the physical or virtual court room whether in government, media, big business or elsewhere. This can be a frustration for some politicians and their advisers who are seeking a quick and popular solution and may well see access to the judiciary as a way towards that solution.

As I will explain shortly, even just the perception that the judiciary have been inappropriately accessed can be enough to destabilise their impartiality.

So inappropriate access to the judiciary cannot and will not be tolerated and to help you clearly understand what is and what is not appropriate access I have drafted my top 10 tips for maintaining the separation of powers on the ground which I hope will be operationally and practically useful.

Some theory

But first, briefly, some theory.

The separation of powers is not a new idea. There were traces of it in Aristotle’s writings.
One of the chief proponents of the separation of powers was Baron Montesquieu. Born in France in 1689 he lived to the age of 66 and in that time spent 2, what must have been formative years, in England. Not long after returning from England he wrote his treatise on political theory, *The Spirit of the Laws* (1748) in which he stressed the importance of the independence of the judiciary in terms of the separation of powers as follows:

“[T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be the end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise these three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”


Some years earlier, John Locke, *Two Treatises of Government* (1690) (Cambridge, 1994) at 326 had stated:

“It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage.”

James Madison in *Federalist No 47* (1788) commenting on Montesquieu’s views stated:

“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”

Lord Neuberger in *Magna Carta: The Bible of the English Constitution or a disgrace to the English nation?* (18 June 2015) at paragraph 52 commented that:

“Montesquieu’s theory is consistent with the rule of law, and, provided that the legislature is elected periodically by universal suffrage, it is also consistent with democracy. It is unsurprising that, while they are complementary, in some important ways, democracy and the rule of law are in tension. Democratic government is loosely based on the notion that the majority should prevail over the minority and should be able to decide on the laws of the land. Whereas much of the rule of law is concerned with protecting minorities and, in particular the individual against the state. The tension between the rule of law and democracy is reflected in the potential for conflict between the courts and the legislature.”

The Top Ten Tips for maintaining the separation of powers

So here are Deemster Doyle’s Top Ten Tips for maintaining the separation of powers.

**Tip 1**

Number one on the list is do not seek legal advice from a judge.

This may seem counterintuitive, after all who would have a better view of a legal situation than a judge? It is easy to believe that in a fast moving world where speed and expediency is everything, a brief conversation with a judge might point you in the right direction or even give you the inside track to a quick solution.

There must have been occasions when you or those you advise have needed legal advice. On these occasions there may have been a temptation to obtain the advice of the Chief Justice but we all need to understand that the Chief Justice is there in accordance with his or her oath to judge and not to advise. The judge is there to judge, not to advise. The clue is in the name.

No matter how tempting it may be to just slip in a quick question, please do not. In fact do not at any time approach judges for legal advice. Even if it is dressed up in a casual conversational style at a social event. Any good judge should, and will, give you short shrift. So resist the temptation.

The judiciary should not be drawn into inappropriate discussions with the executive or the legislature which may lead to them giving
advice. This applies to everyone, the President, the Chief or Prime Minister, the head of police, the lead regulator, the central banker or whoever. No-one should have special access to the Chief Justice, not even, or perhaps especially not, the President or the Chief Minister.

Australian Chief Justice Robert French in *The Chief Justice and the Governor-General* (29 October 2009) powerfully stressed that it is not appropriate for judges to provide legal advice to the Governor General. That is not part of their function and it compromises their independence and impartiality if they provide legal advice.

When my friends (yes surprise, surprise, I do still have some) ask me for legal advice (and that is rare because most of them know it is inappropriate) they are sometimes affronted when I say:

“It is inappropriate for me to give you legal advice, get advice from a good lawyer”

And when they ask me to give them the name of a good lawyer I decline. Not because there are no good lawyers on the Isle of Man but because it would be inappropriate and unfair of me to indicate a preference.

**Tip 2**

Practical Tip number 2: Do not discuss pending cases or even past judicial decisions with judges.

Whether publically or privately do not discuss pending cases or even past judicial decisions with judges. Past judicial decisions speak for themselves and a copy of the reasons for the decision should be publicly available. So if you want to know a judge’s position on the legal issue read the judgment.

Sir Jack Beatson in *Closer Engagement with Parliament: the importance of developing new conventions* (2 July 2015) at pages 4-5 made the point as follows:

“The general constitutional principles about what is required to protect judicial independence means that judges are not to be questioned about cases which they have decided or in which they have been involved, and do not comment on such cases …”

The Standing Committee of Tynwald on Public Accounts in its Report (PP0097/13, May 2013) respectfully and properly recognised this important constitutional principle and the importance of parliamentary committees not commenting on and not interfering with judicial decisions when at paragraph 39 it was stated:

“… the decision to grant legal aid had been made by His Honour the First Deemster after hearing the matter in open court. The decision itself is not therefore open to scrutiny by a parliamentary committee.”

It is inappropriate and unseemly to engage in a debate with a judge about his previous decisions. More fundamentally in respect of pending cases the judge must decide them only on the evidence and argument presented in open court, whether physical or virtual, in the presence of the parties or their legal representatives and not on the basis of secret discussions behind closed doors or firewalls in the absence of all the relevant parties.

The Practice Rules for Manx Advocates (2001 para 19 (2)) states that:

“Except when making an application to the Court, an advocate must not discuss the merits of the case with a judge, magistrate or other adjudicator before whom the case is pending, or may be heard, unless invited to do so in the presence of the advocate for the other side, or the other party.”

So in short, a member of judiciary can only discuss cases with members of court staff or others insofar as it is appropriate and necessary to enable them to do their jobs.

**Tip 3**

Practical Tip number 3: Take care what you say if you or those you advise disagree with a judicial decision.

Not all judicial decisions will be popular with everybody. Some of them will not be popular with anybody. There will be occasions when Presidents, heads of state, Ministers and maybe even you disagree with a judicial decision.

So, what do you do?

Well, first of all I would recommend that you do not make rapid or ill-informed criticism of
the judicial decision. I say ill-informed because it would be almost impossible for you to see all the information that was presented to the judge upon which he or she reached judgment. Worse still, you may be tempted to openly criticise individual judges.

In Australia, a jurisdiction known for robust debates and frank exchanges of views, Standing Order 193 of the Australian Parliament provides that a politician:

“... shall not use offensive words ... against a judicial officer, and all imputations of improper motives and all reflections on those ... officers shall be considered highly disorderly.”

In the Manx Customary Laws of 1601 it was expressly provided that anyone who criticised a Deemster would be fined £10 for each time offending and “their ears to be cut off besides”. Sadly the Act was repealed in 1876. Had it been otherwise any self-respecting journalist or legal academic who possessed both ears would regard them as badges of shame! (See Judge of Appeal Hylton's comments in *Barr 1990-92 MLR 398* at page 410).

But on a serious note please beware of making personal criticisms of judges, not out of respect for the judges (although that would be nice), but out of respect for the constitution.

The two oft-quoted examples of David Blunkett and Charles Clarke provide evidence in respect of the tensions between government and the judiciary. You may recall that there was considerable coverage, at the time, of David Blunkett’s attacks on English judges for their decisions on asylum-seeker cases. Charles Clarke, also a former Home Secretary in England, tried to speak privately to senior judges to obtain their advice about terrorist control orders. Commentators use these two examples as classic examples of how politicians should not conduct themselves in their dealings with the judiciary.

Lord Falconer (a former Lord Chancellor) provided the best advice to politicians when before the House of Lords Constitution Committee he said:

*If you disagree with a decision, say what you are going to do; if you are going to appeal, say you will appeal; if you are going to change the law, say you will change the law.*

If you cannot appeal and cannot change the law then my advice would be to keep quiet because there is not much you can do about it.

It is a pretty unwise thing for a minister to say that there is something [wrong with the law] but we are not going to do anything about it.

What is objectionable... is something which expressly or impliedly says that there is something wrong with these judges for reaching this conclusion.”

This wise advice was followed by the Manx Chief Minister in a written answer provided on 28 February 2012 when he stated:

“Judicial independence is a fundamental principle of the legal system and decisions made by judicial officers can only be challenged through any appeal procedures which are provided by law.”

The Manx Treasury Minister (in response to a question in the House of Keys, 23 October 2012) stated:

“It is important to recognise the fundamental principles of the rule of law, the separation of powers and the independence of the judiciary. The relationship between the judiciary, the legislature and the executive branches of Government should be one of mutual respect for each other, recognising the proper role of the other parties.”

Lord Neuberger (the President of the UK Supreme Court), who kindly spared some of his limited time to join us on the Island for Tynwald Day this year, put it this way:

“It does society no good whatsoever if [politicians and judges] start to criticise each other personally. Mutual respect must be the order of the day every day.”

(Judges and Policy : A Delicate Balance 18 June 2013 at paragraph 6)

Our Commonwealth (Latimer House) Principles on the Three Branches of Government give very good guidance to all:

“While dialogue between the judiciary and government may be desirable or appropriate, in no circumstances should
such dialogue compromise judicial independence.”

Tip 4

Practical Tip number 4: Be careful if you are thinking of consulting judges on proposed legislation or government policy.

Judges must resolve disputes which often concern the legality of actions and the interpretation of legislation. If a judge is involved in the creation of the legislation he may not be perceived to be impartial when it comes to administering justice.

It is therefore not normally appropriate for judges, who may be called upon to interpret or decide disputes on such legislation, to give advice or comments on legislation. In this situation advice should be provided by the Attorney General and other lawyers engaged by the government and there should, of course, be full public consultation.

It may seem like common sense to seek judicial comment on proposed government policy but judges should not comment on political matters or matters of political policy. However, judges may sometimes comment on the practical consequences of policy choices and proposed legislation especially if such could adversely impact on the rule of law.

There are recent signs that the tide in England may be turning in favour of more engagement between the various branches of government in specific areas (see for example Sir Jack Beatson’s comments on 2 July 2015 in Closer engagement with Parliament: the importance of developing new conventions referring to The Politics of Judicial Independence in the UK’s Changing Constitution by Gee, Hazell, Malleson and O’Brien). All this must however be set in its proper context. England is a large jurisdiction which has an extremely sophisticated constitutional structure and a jurisdiction where the well-established ground rules in respect of engagement between judges and politicians, with a few notable exceptions, seem to be increasingly better understood by leading academics, senior politicians and members of the judiciary.

But beware in small compact jurisdictions - commenting on government policy is still a minefield for judges and politicians. Comment by the judiciary may quickly become ammunition for those seeking to gain political advantage and may be the subject of spin by the various players in the political process. This could damage both the government and the judiciary.

It is important however that judges do not become isolated from the communities they serve. There is sometimes a fine line between what may be perceived as unhelpful isolation and unwise participation.

Judges are sometimes ideally placed to suggest areas of law reform that would merit further consideration by the legislature (see for example my judgment in Lombard Manx Limited v The Spirit of Montpelier delivered on 11 December 2014 referring at paragraphs 90-99 to the need for modern insolvency legislation and previous calls for reform by Deemster Corlett in Kaupthing Singer & Friedlander (Isle of Man) Limited 2009 MLR 516 at paragraphs [13] and [14] and Deemster Gough in Munnin Navigation Limited v Petrodel Resources Limited judgment delivered 12 September 2014 at paragraph 63).

Moreover there are times when it is necessary and appropriate to participate in the public consultation process on policy or legislative proposals. To take just two relatively recent examples:

- as First Deemster I provided the government with a response to its consultation on Criminal Justice Strategy in 2012. It is worthy of note that in the formal consultation document our Minister of Home Affairs cautioned that “we must be respectful of the independence of the Judiciary”;

- I also provided a response to a document issued by the Council of Ministers inviting comments on the Scope of Government in 2012 in which I was keen to underline the need for the continuing independence of the support services provided to the judiciary.

Lord Neuberger in Where Angels Fear to Tread (2 March 2012) put it succinctly at paragraph 29 as follows:

“[Judges] cannot comment on political matters or matters of public policy, but can rather comment on the practical consequences of certain policy choices.”
Sir Jack Beatson in *Judicial Independence and Accountability: Pressures and Opportunities* (16 April 2008) stated that judges should not comment:

“...on the merits, meaning or likely effect of provisions in any Bill or other prospective legislation, or on the merits of Government policy, save in very limited circumstances. To do so could be seen to call into question their impartiality in the event of subsequently being called upon to apply or interpret those provisions in a court case.”

**Tip 5**

Practical Tip number 5: Do not ask a serving judge to chair a public inquiry.

No matter what size the jurisdiction, judges should resist being sucked into the political controversies of the day by chairing public inquiries. For a small compact jurisdiction, there are further dangers in inviting serving judges to chair public inquiries. With few judges available, using their precious time to chair public inquiries can take them away from vital judicial work and risk them being disqualified from judicial involvement in the issues surrounding the public inquiry.

Dame Heather Hallett in *Independence Under Threat* (14 March 2012) referred to:

“... the dangers of judges becoming involved in public inquiries blurring the edge which marks the sharp definitions of the functions of the judiciary on the one hand and the executive and legislature on the other.”

Kemy Bokhary (of the Hong Kong Court of Final Appeal and Crocky the Crocodile fame, see *Crocky at Law* and *The Law is a Crocodile*) in his *Recollections* at page 358 concisely and clearly outlined the main problems well when he stated:

“One of the problems caused when judges undertake inquiries is of course that the number of judges available for judicial work is reduced. It is true that a deputy can be appointed, but it is not a complete solution.

Another problem is that inquiries can involve the judge in controversy. That is not to be downplayed ...”

Judges should always be on their guard against being abused for political purposes and avoid any conduct that may be perceived to undermine their judicial authority.

**Tip 6**

Practical Tip number 6: Do not seek to privately or publicly influence a judge.

The separation of powers must be defended by avoiding private discussions with judges and inappropriate comments in public. Unfortunately lack of direct private access to the judiciary can infuriate some politicians such as English Home Secretaries who are often desperate to quickly define the best course of action for the public good. This frustration may tempt some politicians to apply pressure, by cultivating, via the media or other public pronouncements, the public perception that the judiciary are aloof or simply do not want to get involved and do not care. Nothing could be further from the truth.

The main motivation of the judiciary is to uphold the constitution and the rule of law.

The judiciary are conscious that the discussions the politician is seeking may be baby steps which could lead, if left unchecked, toward the breakdown of the separation of powers. Whether inadvertent or intentional, politicians should not be permitted to take any steps that may lead to a perception that they are trying to inappropriately influence the judiciary. Mere perception can put judicial independence at risk. Even if public perception has no factual basis it can become tantamount to a public fact. Lord Hughes in *Misick* [2015] UKPC 31 at paragraph 21 stated:

“Part of the significance of independence is that it ensures a public perception of impartiality.”

**Tip 7**

Practical Tip number 7: If you pick a fight with a judge be prepared to be disappointed.

Now this is not to suggest that ‘picking a fight’ with a judge may be similar to ‘picking a fight’ with Arnold Schwarzenegger, Sylvester Stallone or Bruce Willis, or indeed all three. There is unlikely to be a knife or machine-gun wielding judge or breath-taking explosions. However, you will still most certainly risk great damage to your reputation and more
importantly damage public confidence in the administration of justice.

Lord David Pannick, the well-respected English QC, wrote an article in *The Times* (28 February 2013) entitled “Home Secretary needs to be reminded about separation of powers” in which he stated:

“It is always unseemly for ministers to pick fights with the judiciary. On this occasion, the weakness of Ms May’s case makes her attack especially foolish …

It would be more appropriate for the Home Secretary to appeal to the Court of Appeal and, if necessary, the Supreme Court against decisions to which she objects rather than to appeal to the readers of the *Mail of Sunday* with a degree of aggression that, in other contexts, would lead to an anti-social behaviour order …

It is, of course, equally essential to democracy that the laws made by Parliament are interpreted and applied to the circumstances of individual cases by independent judges, and not by ministers … ministers [are required] to “uphold the continued independence of the judiciary”. It is surprising and regrettable that a Home Secretary needs to be reminded of the principle of the separation of powers.”

Lord Phillips (a former President of the UK Supreme Court) in *Judges must not only be independent but must be seen to be independent – the birth of the UK Supreme Court* (9 December 2013 in Hong Kong) referred to David Cameron’s reaction to a Supreme Court decision which ruled that it was incompatible with the Human Rights Convention to put sex offenders on the sex offenders’ register for life, without giving them the chance, in due course, to demonstrate that they no longer posed a danger and should be taken off it and stated:

“David Cameron … said publically that he was appalled by our decision, a comment that was echoed by the Home Secretary … Using the Supreme Court as a political punch-bag is not desirable, and I have reason to believe that Ken Clarke performed his duty as Lord Chancellor by making that clear to the Prime Minister. I hope that the present Lord Chancellor will be similarly robust should the need arise.”

**Tip 8**

Practical Tip number 8: Think about the potential implications of asking a judge to be a member of a committee.

Given that most judges are devoid of ego, never opinionated and are frequently found speaking in public (in the case of your speaker tonight only one out of three is not bad) it is hardly surprising that there may be occasions when you might be tempted to invite a judge to be a member of a committee. After all with knowledge of the law, clear thinking and professional objectivity, a judge on a good day, can be useful in a committee environment, but beware there is always a need to think through the potential implications. Unnecessary involvement in committees also takes valuable and scarce judicial time away from the core judicial function, namely judging.

Moreover, serving on a committee could be incompatible with a judge’s duties. This incompatibility may be practical, professional or just the way it may be perceived by others.

Lord Justice Leveson resigned on 9 May 2007:

“… from the new Board of the Ministry [of Justice] on the basis that membership of a board responsible for prizes was not compatible with judicial office.”


For an example closer to home, I took steps for the First Deemster (that’s me) to be removed from the Tynwald Membership Pension Scheme Management Committee. You may be surprised to hear that this was not because I thought it may be just too exciting for a man of my constitution. It was in fact because I felt that this position plainly conflicted with the need for judicial independence. It was just not right to have a serving judge (a chief justice) chairing a committee which dealt with the pensions of politicians - potentially a very hot political potato. Added to this I might be unable to hear any legal dispute or appeal that might relate to the activity of the committee.

In compact jurisdictions with limited resources it may be tempting to involve judges in work other than judging. Resist that temptation because if judges are asked to wear too many
hats the independence of the judiciary may be compromised.

**Tip 9**
Practical Tip number 9: If you ask a judge to give a public lecture, take care with the topic.

Now you are thinking “If only we’d known this earlier we could have made tonight so much more enjoyable”. Maybe by requesting a topic such as prize pumpkin cultivation on the Isle of Man. My specialist subject. But then again, maybe not.

As it stands I think you are fairly safe with this evening’s topic, “The rule of law and the separation of powers”, because of the breadth and general nature of the topic. The moment you ask a judge to talk about past, recent or imminent judgments, or politically charged issues or issues which may lead to public controversy, you are putting your speaker, the judge, in a potentially tricky position.

Lord Steyn unfortunately had to step down from judicial involvement in one of the UK cases concerning the unlawful detention of suspected terrorists because of a lecture he had given in respect of those detained in Guantanamo Bay without trial.

In my own backyard on the Isle of Man the Code of Conduct for Members of the Judiciary (paragraph 11) clearly states that:

> “Members of the judiciary may write, lecture, teach and participate in activities concerning the law, the legal system and related activities provided that such activities do not compromise or prejudice the performance of their duties or functions.”

So when in doubt take a step back and look at the big picture. A controversial subject may look irresistibly delicious on a running order and may even deliver a very engaging presentation. However, the negative knock-on effects of the presentation may create a destructive tidal wave in its wake that eventually swamps the rule of law and benefits no one.

**Tip 10**
And finally, Practical Tip number 10: Ensure that those who provide administrative support to the judiciary are independent.

It is vital that the judiciary’s support staff (including registrars, court service chief executives, court clerks, personal assistants, librarians, ushers and others) are not subjected to any political direction or improper political influence as that would also taint the independence of the judiciary.

Lord Woolf in *Judicial Independence not Judicial Isolation* (26 April 2007) stressed that those providing administrative support to the judiciary need:

> “… to be conscious of the special nature and responsibility of their work for the courts and the judiciary involving as it did the need to preserve the independence of the judiciary.”

Lord Phillips in his lecture on *Judicial Independence & Accountability* (8 February 2011) underlined the need for the administrative support provided to the judiciary to be independent of the executive and stated that the chief executive of the court must owe his or her primary loyalty to the President of the Court and not to a politician.

Aharon Barak also put it well in *The Judge in a Democracy* at pages 79-80 when he stated:

> “Judicial independence means building a protective wall around the individual judge that will guard against the possibility of influencing decisions …

Institutional independence is designed to build a protective wall around the judicial branch that prevents the legislative and executive branches from influencing the way judges realize their roles as protectors of the constitution and its values. The judicial branch must therefore be run, on an organizational level, in an independent manner. It should not be part of the executive branch and should not be subject to the administrative decisions of the executive branch.”

Michael Gove (appointed Lord Chancellor and Secretary of State for Justice on 10 May 2015) has recently reiterated the need for the insulation of the British judiciary from politics. In his first major speech at the Legatum Institute on 21 June 2015 Mr Gove stated:

> “So both as a matter of enlightened economic self-interest, and as a matter of deep democratic principle, it is vital
that the institutions which sustain and uphold the rule of law are defended and strengthened. That means vigilance to make sure the judiciary maintain their independence and their insulation from politics.”

From April of this year the Isle of Man’s General Registry, which provides administrative support for the judiciary (in effect our Court Service), was restructured. The Minister of Policy and Reform recognised the need for the Manx judiciary to be insulated from politics and for the judiciary’s support staff to be independent. It is his stated intention that the restructure will enable the Courts Service to “focus on supporting the independent judicial process and enhancing the high international reputation of the Island’s courts”. For me this also highlights the need for continuous improvement in every aspect of legal process.

Closing comments

As I hope my top tips have demonstrated, the separation of powers is not a high-flown academic ideal. It is fundamentally practical common sense that often requires strict self-control on the part of the legislature, the executive and the judiciary and all those who assist them in carrying out their important and burdensome public functions.

When driven by a vision and tempted by opportunity or the need for speed even good people cannot always be relied on to do the right thing for everyone involved.

It is the way we respect and nurture the body of fundamental principles that make up a constitution that maintains proper behaviour within a civilised community. And the separation of powers is a vital plank in any constitution. History has time and again shown that unlimited power in the hands of one person or group in most cases means that others are suppressed or their powers curtailed. The separation of powers in a democracy is to prevent the abuse of power and to safeguard freedom and justice for all.

However, in some jurisdictions there is no pretence and there is no separation of powers. There is just an edict from on high.

But perhaps the more dangerous are those jurisdictions where the separation of powers is just showy pretence and as such represents a thin veneer that is used to mask deep set corruption and the judiciary is forced to put on a show of sham impartiality and illusory independence.

Just as dangerous as that are those jurisdictions where politicians and others do not fully understand the importance of the separation of powers to a country’s constitution. This is a danger created through ignorance rather than bad intent but the adverse impact on the rule of law may be the same.

This is why the separation of powers is such a precious jewel that needs to be polished and defended at every turn. This is why we must all remain vigilant in the protection of the separation of powers especially with the simple practical stuff such as my Top Ten Tips.

The modern obsession with speed, immediacy and the shortest distance between two points, combined with the pressures of public office, politics and the ballot box can make it hard for some politicians to observe the separation of powers. As Lord Neuberger recognised in Magna Carta: The Bible of the English Constitution or a disgrace to the English nation? (18 June 2013) at paragraph 62:

“The need to offer oneself for re-election sometimes makes it hard to make unpopular, but correct decisions.”

Politicians must however respect and strictly adhere to the fundamental constitutional principle of the separation of powers and in particular avoid taking steps which may compromise, or appear to compromise, the independence of the judiciary. The separation of powers can be the fine line between a functioning democracy and a country in chaos.

To maintain the separation of powers all judges need the help of every member of the communities which they serve. In particular we need the help of those advisers and decision-makers in positions of influence.
MODEL FORM FOR JUDICIAL APPOINTMENTS IN THE 21ST CENTURY COMMONWEALTH - THE NEED FOR INDEPENDENT FUNCTIONING APPOINTMENTS SYSTEMS

Dr Karen Brewer, Secretary General of the Commonwealth Magistrates' and Judges' Association

Abstract: A key element in ensuring judicial independence is through the appointment process. Unfortunately the appointment process has been used by the executive and parliament to exert pressure and control over the judiciary. Indeed, there are too many examples in the Commonwealth today of undue influences in the appointments process which can only lead to weakening of the independence of the judiciary. This article refers to the work of the Expert Group of Ministers and Commonwealth Associations which formulated the Commonwealth (Latimer House) Principles. It makes the point that there needs to be a statutory provision for the establishment of an independent and clearly defined judicial appointments process otherwise, it may be open to abuse. This provision should relate to appointments at all levels.

Keywords: Judicial appointments – judicial independence – judges – magistrates – Latimer House Principles

Introduction

We live today in a world that seems to have lost the respect for the separation of powers and the gains made in last century in the rule of law seem to be slipping away from us. Respect for the independence of the judiciary is suffering with governments trying and, in some cases, succeeding in influencing the judiciary. The Latimer House Principles on Accountability and Relationship between the Three Branches of Government of 2005 call for:

"each institution to exercise responsibility and restraint in the exercise of power within its own constitutional sphere so as not to encroach on the legitimate discharge of the constitutional functions of other institutions".

They go on to state that:

“An independent, impartial, honest and competent judiciary is integral to upholding the rule of law; engendering public confidence and dispensing justice”.

A key element in ensuring independence is through the appointment process. Unfortunately the appointment process has been used by the Executive and Parliament to exert pressure and control over the judiciary. You can’t really talk today about any appointment system in the Commonwealth without raising the issue of the processes for the removal of judges. Many of the recent controversial appointments made have resulted from the unconstitutional removal of judges in post and the deliberate selection or promotion of judicial officers by “improper means”, contrary to the UN Basic Principles on the Independence of Judges of 1985.

Whilst modern constitutions contain provisions relating to judicial appointments, not all systems of judicial appointments function in the same way. There is currently no harmonised view of what a judicial appointments system should look like in the Commonwealth.

The Latimer House Principles and Judicial Appointments

When the Latimer House Guidelines on “Parliamentary Supremacy and Judicial Independence” were first drafted in 1998, there was a great deal of debate about the suggestion that the best method to ensure independence was to set up a Judicial Appointments Commission. The Guidelines of 1998 provide that “where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute)
or by an appropriate officer of state acting on the recommendation of such a commission”.

Some countries, such as Australia, felt that their inherited system of informal and confidential consultations with the judiciary and legal profession was sufficient. The Guidelines were therefore refined and a footnote added: “The Guidelines clearly recognise that, in certain jurisdictions, appropriate mechanisms for judicial appointments not involving a judicial service commission are in place.”

The Expert Group of Ministers and Commonwealth Associations which formulated the Commonwealth (Latimer House) Principles which were distilled from the Guidelines agreed that:

“Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:

1. Equality of opportunity for all who are eligible for judicial office;
2. Appointment on merit;
3. That appropriate consideration be given to the need for the progressive attainment of gender equity and the removal of historic factors of discrimination.”

This clause was designed to meet cases where no commission existed but where that process was in practice seen to be independent though opinion is changing on that score. Rachel Davis and George Williams in their paper “Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia” note: “A developing body of …. research suggests that not only do commissions produce judges of equal quality to those nominated under purely executive appointments systems, but they have the potential to result in greater diversity of applicants and appointments. Most importantly, they contribute directly to public confidence in the judicial appointments process.”

The Nairobi Plan of Action on the Latimer House Principles (as well as the Edinburgh Plan of Action) commends governments to:

“set in place clearly defined criteria and a publicly declared process for judicial appointments”, and the Latimer House Working Group have favoured the structured, constitutionally enshrined independent judicial appointments commission or board.

Constitutional provisions

There needs to be a statutory provision for the establishment of an independent and clearly defined judicial appointments process otherwise, it may be open to abuse. Legislative provisions setting out the procedures for judicial appointments must not conflict with the Executive or more particularly, the Head of State’s powers under the constitution. Otherwise this can lead to confusion and conflict between the judiciary and the executive and to accusations of politicization of the judiciary. Any judicial process should be entrenched in a constitutional document to ensure that there is no abuse of process and to ensure that the Executive cannot just ignore the process by abolishing the legislation as happened in Tonga when the King abolished the independent process of appointment in 2010 in favour of a regressive system with a Lord Chancellor and a non-independent “Judicial Appointments and Disciplinary Board”.

In August 2014, the Tongan Parliament passed an Act to amend the Constitution and to change the appointments system for judicial officers. Parliament removed the responsibilities of the Lord Chancellor and the Judicial Appointments and Discipline Panel (JADP) in appointments and voted to re-establish a Judicial and Legal Services Commission (JLSC) to make recommendations for the appointment of judges, the Attorney General and the Director of Public Prosecutions. The Judicial and Legal Service Commission Act 2014 provides for a JLSC chaired by the Lord Chief Justice of Tonga with the Chairman of the Public Services Commission, the President of the Law Society and two representatives from the public of good character appointed by the Ministry of Justice.

Unfortunately this Act has not received royal assent and the King has sent it back to his Privy Council for further investigation, a Privy Council that includes members of the existing Judicial Appointments and Disciplinary Board and the Lord Chancellor so there is definitely a conflict of interest here.

Entrenchment of the provisions into the constitutional document would have avoided
the issues that arose in Sri Lanka when in 2010, the 18th amendment to the constitution abolished the previous amendment establishing an independent judicial appointments system. To quote Dr Peter Slinn in his article in the Commonwealth Lawyer on the issue: “Had it been properly implemented, the 17th amendment might have provided a model of compliance with CLHP in terms of the protection of judicial independence and the imposition of effective restraints on the exercise of presidential executive power”. We look forward to the seeing the new President’s commitment to implementing the Latimer House Principles by the re-instatement of an independent appointments system through a proposed 19th Amendment.

Most constitutional provisions relate to the appointment of the senior judiciary especially in the High Court and above but it should relate to appointments at all levels. In most jurisdictions the legislative safeguards for magistrates’ or judges of limited jurisdiction are minimal if they exist at all. The latter are still considered as “civil servants” in some jurisdictions and their modes of appointment/removal reflect this. In South Africa where magistrates have not been considered “civil servants” since the ending of apartheid. However the Executive still think they should under their control and should be treated like any other civil servant. Magistrates’ continue to be appointed by a separate commission despite the government’s commitment to amalgamating the Magistrates Commission with the Judicial Services Commissions.

In other jurisdictions, the Attorney General or Minister of Justice is responsible for the appointment of magistrates. In 2001, the Scottish Supreme Court found in the Starrs v Procurator Fiscal (Linlithgow) case that that the existing system of appointment of temporary sheriffs brought into question their independence as they were appointed by the Lord Advocate at the time. Not only was the system contrary to the Latimer House Principles but also to the European Convention on Human Rights and created a perception of bias in favour of the government. As a result, the Scottish judiciary had to change its appointment process.

In the CMJA’s report on the Status of Magistrates in the Commonwealth published in 2013, a holistic approach to appointments is suggested and all judicial officers whatever their rank should be appointed in the same manner through the same institution, be it at federal or state level though it is understood that the appointment of the Chief Justice may require a special procedure. In those countries where the lay magistracy exists, the JAC may delegate the appointment but the process should be approved and remain under the ultimate authority of the JAC. This is essential to ensure judicial independence.

The CLA, CLEA and CMJA’s project scrutinising judicial appointments in the Commonwealth outlined the basic principles needed in constitutional documents for a Judicial Appointments Commission to be effective.

**Who should make the decisions on appointments?**

There must be a transparent system for appointment for persons chosen to nominate judicial officers. In England and Wales all Commissioners are chosen through open competition and a public process advertised widely.

The composition of JACs vary. The Latimer House Guidelines recommended a majority of judges as they are best placed to assess the competences required for judicial office. However this can lead to perceptions that the process in entirely judge-led and accusations, as we saw in the Maldives, when the JSC was accused of being over-influenced by the judges in post.

In some countries members of the Executive are members of JAC. The politicization (or the perceived politicization) of the Commissioners is to be avoided at all costs. In some of the smaller dependent states (such as the Gibraltar) the Governor, as the independent representative of the Queen is responsible for appointments. However, in most British Overseas territories, they must check with the British Foreign and Commonwealth Office, a government department, as to "suitability" of the proposed candidate!

In Canada, in the Nadon case of October 2013, the Supreme Court challenged the Executive insistence on appointing a judge that was deemed “ineligible” to sit on the Supreme Court. However, when the Canadian government finally appointed another judge
to the position, they ignored the existing processes (including a public hearing and a selection committee). The Minister of Justice stated when challenged: “these appointments have always been a matter for the executive and continue to be.”

In 1995, Sir Garfield Barwick, former CJ of Australia, pointed out that ‘Left to politicians, the appointments are not always made exclusively upon the professional standing, character and competence of the appointee’.

Public scrutiny, transparency and balance can be provided by including a lay presence on the JAC. The legal profession should also be represented on the JAC. In Swaziland, controversy arose when these representatives were nominated by the King without consultation with the Law Society. Some constitutions have included in their list of Commissioners a law teacher or law academic. Any such appointments must be done through a transparent system.

The membership of the JAC must reflect the composition of the community in terms of gender, ethnicity, social and religious groups as well as regional balance and there should be a limitation on their term of service. Whilst consideration has been given to an ideal number of Commissioners, each jurisdiction needs to adapt to their own needs, especially in small jurisdictions.

Once selected, the Commissioners are deemed to be appointed in their own right and mustn’t represent the views of the professional body they come from. Those making the appointments must be seen to be independent. As we have seen in South Africa, the perception of political influence in the JSC has affected the applications to the Commission by judges and lawyers alike and the continued perception that it is not independent Scotland has introduced a Code of Conduct for Board members which outlines the principles all board members should comply with: public service, selflessness, integrity, objectivity, accountability and stewardship, openness, honesty, leadership and respect. Commissioners are required to complete a detailed declaration of interests as well.

There has been some debate in the Commonwealth as to who should Chair the JAC. Some believe that the Chief Justice, who is usually the Head of the Judiciary, should be responsible as he/she are responsible for the running of the courts though he can delegate this responsibility to another senior judge. In some of the UK’s dependent territories, it is the President of the Court of Appeal who is responsible but this is not ideal especially if there is no permanent Court of Appeal as (as in Gibraltar), the President of the Court of Appeal can have little understanding, if any, of the local requirements.

Others have placed the responsibility in the hands of lay persons (England and Wales) to ensure that the question of public scrutiny and accountability is complied with.

There should be a permanent Secretariat for the JAC. The Secretariat must call the meetings on a regular basis and definitely within 4 weeks of a vacancy being notified. Criticism has been levelled at some regional Judicial and Legal Commissions, which include members from Courts of Appeal resident outside the jurisdiction who only meet irregularly. Filling vacancies take months, causing delays to court proceedings in the particular jurisdiction in question. Criticism has also been levelled in countries where the Executive through their control of resources of the secretariat has caused undue delays in calling meetings and this has put the administration of justice into difficulties. For the same reason the Secretariat for the JAC should also be independent of Executive influence and should be administered separately, with specific resources approved by Parliament or under the auspices of the judicial budget.

The Executive (through the Minister of Justice, Prime Minister or Head of State) usually has ultimate authority to approve the appointments following the recommendation of the JAC though again the Latimer House Working Group see a limited role for the Executive with no power of veto. In Barbados we saw the refusal of the Prime Minister to accept the recommendation of the JAC based on seniority for the post of Chief Justice and his insistence on his choice of candidate (publicly debated in the press) leading to an amendment of the constitution and the nationality laws. This in turn lead, rightly or wrongly, to the perception that the judiciary was no longer independent.
Criteria for selection of candidates for judicial office

The CLA, CLEA and CMJA, in their examination of judicial appointments processes, have looked at the criteria for the selection of judicial officers. Of course the Latimer House Principles set out the overall criteria. However, the detail is left to JACs themselves.

The persons selected must be of good character and selection must be made having regard to diversity in the range of persons selected in line with the Latimer House Principle of appointments being made bearing in mind the "need for the progressive attainment of gender equity and the removal of historic factors of discrimination."

These selection requirements are appropriate not only for judicial officers starting out in post but also for any promotions. There needs to be an appropriate mechanism in place for all appointments at all levels so that there can be no perception of undue influence being brought to bear.

In many jurisdictions candidates for appointment are limited by the age of retirement of the judges in the Constitution. Whilst there should be no discrimination in relation to age, these provisions, if they are included in the constitutions must be complied with by the Executive. We witnessed the controversy over President Sata's appointment of a retired justice as acting chief justice of Zambia and the refusal by Parliament to confirm the appointment of this Acting Chief Justice in her post as she is over the age of retirement provided for in the Zambia constitution. And in South Africa, we saw President Zuma try to extend the term of officer of a former Chief Justice.

A number of countries now provide for a Judicial Appointments Ombudsman who has the responsibility for the handling of complaints about the appointments process. The JAO has specific duties to check to see if there has been any maladministration but also to provide feedback on improving standards. All judicial officers have a right to have complaints or appeals against the appointments process being heard by an independent process. Whilst the judiciary of Kenya agreed to the controversial vetting of existing judicial officers under the new constitution, critics of the process have pointed out that allowing disgruntled defenders/parties the opportunity to air their personal grievances in public was not helpful and that there should have been appeal process built into such a system to enable judicial officers to appeal against their livelihood being taken away from them. After all the vetting process in Kenya amounts to a re-appointment process.

Conclusion

We know that it is impossible to design a one size fits all model judicial appointments process or Commission. However, it is hoped that the model clause the CLA, CLEA and CMJA worked on in their report might be of assistance to those who are redrafting their constitutions – though the recent constitutions of Zimbabwe and Fiji may need further work in this area as there are provisions relating to the role of the Executive on the JAC.

However, it is all very well to establish a model clause or principles for a statutory body or process to deal with appointments, but the appointment of judicial officers remains a problematic area. Provisions, where they exist, are continually subject to amendment, misinterpretation, lack of implementation or abrogation.

It is high time for governments to recognise that democracy can only be achieved by selecting the right people for the jobs not the most maniable or politically convenient.

All Commonwealth countries have signed up to the Commonwealth fundamental values including Latimer House. These are not aspirational in nature but are the basic requirements of membership of this club.

There are too many examples in the Commonwealth today of undue influences in the appointments process which can only lead to weakening of the independence of the judiciary. Judicial independence is the right of every citizen and they should be allowed a fair hearing in accordance with international principles and norms by a judge who has been independently selected.
This article is based on a keynote lecture presented at the Summer Exhibition at the Supreme Court of the United Kingdom in September 2014.

Abstract: This article looks at the recent opinions of the JCPC on the disciplining of colonial judges in the broader historical context of the Privy Council's jurisdiction in these matters - a jurisdiction that dates back to the 17th century. It considers the record of the JCPC in supervising the colonial judiciary through a sample of cases and the legal regimes and guidelines developed to give the responsibility substance. It suggests that the opinions in Hearing on the Report on the Chief Justice of Gibraltar (2009) and Hearing on Madam Justice Levers of the Grand Court of the Cayman Islands (2010) with their detailed analysis of the relevant facts and allegations, examination of context, and careful application of comprehensible guidelines on judicial behaviour are a refreshing relief from the terse quality and obfuscation of older opinions from the Committee.

Keywords: Britain – colonies – judges – independence – discipline – rule of law

On 12 November 2009, the Judicial Committee of the Privy Council (JCPC) delivered its advice concerning a tribunal hearing into the conduct of Derek Schofield, Chief Justice of Gibraltar, [2009] UKPC 43. In a split opinion of four to three judges, the Committee concluded that the judge should be dismissed on the grounds of a perceived inability to carry out the responsibilities of Chief Justice. This was evident in his strained relations with the executive in the colony, reflecting an obsession with judicial independence and imagined threats to it and him, and in his implicit condoning of his wife’s public campaign to defend him against his “detractors”. The minority considered that, despite instances of lack of judgment on the part of the Chief Justice, his concern for judicial independence was not misplaced, and that the allegations of misbehaviour in failing to caution his wife resulting in an inability to carry out his responsibilities were not proven.

In this article I place the JCPC’s record of dealing with the disciplining of colonial judges in both its historical and contemporary context and comment on the performance of the Committee in matter of judicial discipline, and in developing or adopting criteria to guide itself and others in these matters.

The Judicial Committee Act of 1833, 3&4 Will. IV, c. 4, establishing the JCPC, makes no specific mention of colonial judicial discipline. However, from the broad terms of its jurisdiction under section 3 of the statute, and the earlier involvement of the Privy Council in such matters this important supervisory role fell to it. From the middle of the 17th century, the Crown sought to establish control over the administration of justice in the colonies. The Council’s power to review colonial legislation and receive appeals from colonial courts allowed for authoritative responses to both local attempts to dictate the contours of colonial justice, and to individual disputes involving challenges to judicial officers. London refused to countenance either the impeachment of colonial judges claimed by several North American legislatures, or extension of the judicial independence enshrined in section 3 of the Act of Settlement of 1701 to the colonial judiciary. A general diktat of the Council in 1760 insisted that no colonial judicial commission was good, unless it specifically stated that the holder served “at the pleasure of the Crown.” Although the imperial government made it clear that colonial judges should only be removed for cause, it also expected cooperation and loyalty from those officers in addressing the challenges of colonial governance.
The quality of justice in some colonies proved to be an irritant in several colonies. New York’s Governor, the Earl of Belmont, complained in 1697 that the chief justice’s military experience and gentlemanly qualities were no substitute for his lack of legal knowledge. A Barbadian colonist in 1700 asserted that colonial merchants “find more security and better and more speedy justice in the most distant provinces of the Ottoman dominions from their bashaws than they do in some of the American colonies …”

Disputes over judicial performance outlived the loss of the thirteen colonies. In the late 18th century several cases came to the Plantations Committee of the Privy Council, involving judges’ appeals against disciplinary action by colonial executives for, or petitions from legislatures seeking relief from judicial “misbehaviour”. These cases typically involved charges of unwarranted interference with the workings of government, incompetence or ill-considered partiality. In each of these instances, the Council sided with the judges in question. By way of example, Peter Livius, Chief Justice of Quebec, successfully appealed his removal from office by Governor Guy Carlton in 1778 for questioning the terms of the latter’s commission and criticising his manipulation of his Council. The investigating committee found that there was some substance in the jurist’s allegation, and that “cause” was lacking because there was no complaints against him in a judicial capacity.

These cases and several others provide ample evidence of the Privy Council’s prerogative jurisdiction over judicial discipline, whether in the nature of a trial on petition from colonial legislative bodies, or on appeal by an aggrieved jurist. The Council’s appellate role arguably received legislative affirmation in Burke’s Act (1782) 22 Geo. III, c. 75. That statute granted colonial executives a power of removal (“amoval”) of colonial officers for “misbehaviour”. However, its exercise was subject to right of appeal to “His Majesty in Council.”

Imperial supervision of the administration of justice in the colonies shifted in the early years of the 19th century from the Board of Trade and Plantations to the newly established Colonial Office. The loss of the American colonies and later the French and Napoleonic Wars produced an imperial mindset obsessed with matters of state security at home and abroad. The need for unswerving loyalty among colonial officials was stressed, and impatience with “faction” and dissenting voices in both Britain and its possessions demonstrated. Several colonial judges fell afoul of this attitude in London for their criticism of the governance of the jurisdictions in which they served. George Smith, Chief Justice of Trinidad, appointed in 1808, paid the price of removal from office in 1811 for his ongoing criticism of the partiality of both Governor Thomas Hyslop and the British planters on the island; his resistance to representative government he feared would favour those planter interests; and for his espousal of the inherited Spanish law as preferable to British colonial law in dealing justly with the slave population, and in countering indebtedness. Despite this fall from grace Smith survived and rebounded. Although the Privy Council refused to advise restoring him to office in Trinidad, he received further preferment as Chief Justice of Mauritius.

If “reformist” judges paid the price for their temerity in exposing the excesses of closed, oligarchic colonial government during the early 19th century, their conservative counterparts had little to fear for their draconian actions and collusion with executives, especially in the face of criticism by reformist legislatures. So in 1814 Chief Justice Jonathan Sewell of Lower Canada and Chief Justice James Monk of Montreal escaped the scrutiny of the Privy Council for their alleged complicity in abuses of the rule of law during the state of emergency ordered by Governor James Craig in 1810-1811. The House of Assembly in which the reformist parti Canadien held sway had impeached them. Colonial Secretary Lord Bathurst ruled their alleged complicity in “Craig’s reign of terror” non-justiciable.

The early 19th century cases suggest that colonial judges were considered dispensable by the Council, if they engaged in a pattern of ongoing carping against and perceived subversion of the governing regimes they were meant to serve.

By contrast a case occurring during major political reforms in Britain and on the eve of the changes to the Privy Council’s jural status in 1833, indicated that there were circumstances in which principled criticisms by judges over abuses of the rule of law might
expect support rather than punishment, even if the sentiments were expressed in intemperate language. As with other instances the opinion is terse in the extreme. Accordingly, reference to other sources, especially Colonial Office correspondence and departmental notations, is crucial to understanding motives and objectives. Jeffrey Hart Bent, the Chief Justice of Grenada, received the benefit of the doubt from the Privy Council, over an unseemly squabble with the acting governor of the island and its plantocracy. This was so, even though, as legal adviser James Stephen Jnr. observed in a brief to the Office, in his largely correct application of the law the judge had overreacted, and his rhetoric was intemperate and irresponsible. Bent had taken the part of a radical Roman Catholic priest, popular with his slave and freed flock, who both the Church hierarchy and the local planters wanted to be rid of. The judge insulted the representatives of the Bishop; protected the priest from attempts to incarcerate him; railed against the incestuous nature of governance and justice on the island; and, offered a forum for complaints from slaves about their treatment at the hands of their masters. Suspended from office, he appealed to London. In its 1832 opinion the Privy Council summarily concluded that there was insufficient evidence to support Bent’s removal and advised that he be restored to office. Reading between the lines in the context of the imperial history of that era, neither the Privy Council nor the Colonial Office were willing to sacrifice a judge espousing the interests of the slave population and English interpretations of the rule of law, on the altar of planter angst - this, at a point in time when London, with Stephen as the main architect of reform, was preparing to abolish the slave trade throughout the empire.

Lord Brougham designed the JCPC to bring clear legal reasoning and greater consistency to imperial jurisprudence. This was to be achieved in part by ensuring that high judicial officers would render the opinions. In the matter of colonial judicial discipline the record shows that that little changed from the pattern set in earlier cases, such as Bent. Opinions continued to be terse, frustratingly so. As a consequence they provide no detailed guidance on what could and could not be accounted judicial misbehaviour warranting removal from office. Moreover, a divorcement between legal and political considerations proved difficult to realize.

At about the same time as the establishment of the Judicial Committee, the British government began to concede a greater measure of judicial independence to the Cape Colony and Upper and Lower Canada, and to curtail the executive functions of colonial judges in those particular North American possessions. The method of proceeding against a troublesome jurist was aligned with that in the Act of Settlement, that is by an address from Parliament, although an appeal to the Privy Council was preserved. The later grant of representative government in settler colonies was to vest judicial appointment in these colonial governments and others in North America in the late 1840s, and ultimately Australia and New Zealand during the 1850s.

More immediately the attention of both the Colonial Office O and JCPC was directed to the turbulent politics of Newfoundland and the conduct of its Chief Justice, Henry John Boulton. An arch Tory and formerly member of the exclusivist “Family Compact” in Upper Canada, this man had surprisingly received appointment to the island colony in 1833. Britain had just granted to this rugged Atlantic outpost a representative assembly with a broad male franchise. That and newly won Catholic emancipation meant that the religious interests of the majority of the population, as well as reformist sentiment, were well-represented in the lower house. The arrival of a Chief Justice with an anti-democratic reputation who served on both the Executive and Legislative Councils, and was charged with pressing the claims of English law and bringing greater “law and order” on the island, quickly made for toxic relations between the judge and legislators, as well as with the Roman Catholic bishop. Boulton was vilified, in some instances unjustifiably, for conspiring with merchant interests, being tough on criminals (most of who happened to be Catholic), rigging the jury system and admission to the legal profession, seeking to abandon customary fishing and property rights, abusing press freedom, and undermining the will of the Assembly. After he counselled voiding a general election in 1837 on technical grounds the Assembly petitioned the Privy Council to advise his removal, in 1838. The Colonial Office had already decided that Boulton, now an embarrassment to the imperial government, must go. The JCPC
proved hesitant about taking the case because of its political dimensions. Instead, it was remitted to a special ad hoc committee of the Council, comprising two ministers of the Crown and the Lord Chief Justice. The Secretary of State for the Colonies Lord Glenelg sat with them. The panel found Boulton guiltless of corrupt motives and intentional deviation from his duties as a judge. However, they added that in some matters he had been indiscreet in his conduct and “that he had permitted himself so much to participate in the strong feelings which appear unfortunately to have influenced different parties in the colony.” Accordingly, it was inexpedient that he continue in office. The implicit distinction between the judicial and political appears disingenuous, given the overlapping responsibilities of a colonial chief justice and the difficulty of disentangling the two roles. However, the motivation of the Council in this case becomes clearer when placed in a broader imperial context. The proceedings came to head during the rebellions in Upper and Lower Canada of 1837-38. There seems little doubt that Boulton was sacrificed to British government fears about encouraging further disaffection among the colonial children.

If a special committee of the Council, subject to strong political influences, felt able to make an essentially political decision, several later cases considered by the JCPC proper suggest that it was less than candid about having crossed the line between law and politics in framing its opinions. The disposition of the appeal of John Walpole Willis against Governor George Gipps’ amoval of him from the Supreme Court of New South Wales in 1843 is one such example.

Willis had already suffered removal from the Upper Canadian bench in 1828 for injudicious challenges to the colonial executive there. Although failing in an appeal to the Privy Council, the Colonial Office ultimately appointed him associate justice in British Guiana in the early 1830s. Warned off involvement in local politics, he had managed largely to keep out of trouble. He did, however, develop chronic health problems. Desperate to move to a more hospitable climate, he jumped at the chance to serve in the Antipodes. Shortly after his arrival in Sydney in 1837 he managed to alienate his colleagues on the Bench, especially Chief Justice Dowling. He also allied himself with those who demonstrated antipathy towards the Roman Catholic population of the colony. Governor George Gipps, uncertain about removing this egotistical jurist from office, decided to “solve” the problem by sending him in 1839 as sole resident judge to the burgeoning frontier community of Port Phillip (modern-day Melbourne). Alas, the change of scenery did nothing to resolve Willis’ distempers. About his legal decisions there was overall little to complain. He cracked down on the fraudulent machinations that marked a period of economic boom in the life of this settlement, and in dealing with the inevitable insolvencies that occurred as the economy took a serious downtown. It was primarily his bilious demeanour that got him into trouble. He openly berated his judicial colleagues for getting their law wrong. With some justification Willis criticized high government officials for turning a blind eye to, or even engaging in irresponsible speculation, charges made summarily in public. Superintendent La Trobe, who supervised the territory, the judge criticized for his “incompetence” in allowing the mess to develop. Willis treated those he despised or managed to cross him with rudeness, whatever their status. He was drawn to a close relationship with newspaperman, William Kerr, a self-professed radical. Fearful that that this turbulent judge would implicate himself in the first municipal election campaign in Melbourne as a critic of the elite, Governor Gipps amoved him from office. The Governor claimed that the litany of complaints against Willis provided cumulative evidence that the judge had seriously compromised the administration of justice in the territory. It was that general charge that constituted the nub of Gipp’s case against the appeal that Willis launched before the JCPC. For his part Willis denied the substance of the charges against him, and complained that the process of amoval was void because the Governor had not allowed him an opportunity to defend himself.

The JCPC first made it clear that the source of a governor’s authority to remove a judge was Burke’s Act. On the merits, the Committee concluded briefly that while the facts before the Governor in Council and established before their Lordships were “sufficient grounds for a motion”, the order must be reversed because Gipps had been denied the judge an opportunity to be heard. So ostensibly the decision was one on procedural ground freeing
the Committee from underlining the particular substantive failings of which Willis was guilty. The decision proved a pyrrhic victory for the judge who the Colonial Office made clear would receive no further preferment. Notable in the report of the opinion is the listing of William Gladstone, then Secretary of State for the Colonies, as a member of the panel – *Willis v. Gipps* (1846) 13 E.R. 536. As in *Boulton’s* case, the presence of that minister suggests a deep concern in London with the political dimensions of the case, in particular anxiety about Willis’ apparent ideological leanings in this immature frontier community.

Willis had proven a troublesome jurist in the minds of Colonial Office officials in part because of a tendency to invoke repugnancy to English law as a mantra to strike down local legislation or regulations to which he took exception. With the advent of responsible government in settler colonies, concerns developed in London about the free and easy use of this device for second guessing the policies of local colonial legislatures. The issue was to come to a head through the turbulent judicial career of Benjamin Boothby, associate justice of the Supreme Court of South Australia. Shortly after his appointment to the Bench in 1852 the imperial government granted the colony responsible government, including the power of appointment of its judges “during good behaviour”. The colony’s Constitution Act gave the local Parliament the power to remove a judge on a joint motion of both houses, without providing a right of appeal to the Privy Council. The remarkable story of Boothby’s subversive activities and local and imperial steps to deal with them is well-known. What is important here are the effects of this case on the Judicial Committee and its understanding of its jurisdiction over colonial judges. In 1867 Governor Daly conducted a hearing of charges against Boothby with his executive council. Boothby was found guilty as charged and amoved under Burke’s Act. The jurist died before he could appeal to London. The Boothby saga had, however, raised a key issue over the process for disciplinary action against a judge in a colony with responsible government. Did effective authority lie with the local legislature, as applicable constitutional legislation suggested, or did local executives have the option of proceeding under Burke’s Act which was, of course, subject to review by the JCPC if a judge appealed? Moreover, if the local legislature proceeded against a troublesome judge on a joint address (as the South Australian Parliament had tried twice to do against Boothby) did the JCPC or the imperial Crown have a residual final say in the matter (as two secretaries of state had asserted during the Boothby affair)?

Concerns about the situation in settler colonies generated by the Boothby case coincided with a dispute in the crown colony of the Straits Settlements between Governor Ord on the one hand and the Chief Justice, Sir Peter Maxwell, and his supporters in the Asian and European merchant communities, on the other. The latter objected vigorously to proposed legislation that gave the governor a power of suspension of judges in the colony, and argued the importance of judicial independence within colonial governance. This dispute raised in bold relief the status of judges and their relations with executive government in the multi-racial empire which London ruled as Crown colonies.

And, what of the status of the original jurisdiction of the Privy Council to hear a petition from a colonial legislature seeking the removal of a judge? The latter jurisdiction was exercised in the case of Chief Justice Joseph Beaumont of British Guiana in 1868. The judge had crossed swords with Governor Francis Hincks over who, the executive or judiciary, had control of the administration of gaol delivery and the pardon system, and accused the executive of being complicit in surreptitiously altering a pardon record. He also took the part of indentured East Indian labourers in the face of the injustices visited on them by local planter magistrates in appeals from the latter’s decisions. Despite the judge’s evident concern to uphold the rule of law the Judicial Committee advised removal, finding that in some transactions there was proof “of indiscretion and want of judicial temper”, and that Beaumont “in the exercise of the judicial office [had] allowed himself to be influenced by a desire to embarrass the Executive Government rather than promote the ends of justice.” In the multi-racial empire, especially in the Caribbean, where almost all possessions were accounted Crown colonies in the wake of the inter-racial and state-induced violence in Jamaica during 1865, London was clearly concerned to emphasize the loyalty of colonial judges to the governments they served in these territories.
The Secretary of State for the Colonies, Earl Granville, faced with these uncertainties, submitted a question to members of the Judicial Committee with experience in these matters seeking their advice on the disciplining of colonial judges. The answer from the Lords in Council was issued in 1870 - *Memorandum on the Removal of Colonial Judges* (1870) 20 E.R. 447 (Appendix). Having stressed the need for a system that ensured fairness and a concern for judicial independence in dealing with an accused judge, the Memorandum concluded that even though a colonial constitution provided for removal on a joint address, the final word on proceedings would lie with the imperial officers of the Crown and disposition through a hearing before the JCPC. Amoval by a colonial executive was also possible under Burke’s Act (the expedient used in Boothby’s case). Where a jurist had been suspended rather than amoved, it was the view of their Lordships that the matter must be referred to the Secretary of State who would forward the matter to the JCPC, or could decide the matter himself. The Memorandum then sought to distinguish between forms of judicial misbehaviour and their treatment. In cases of personal misbehaviour (gross personal immorality or misconduct, or corruption) on the one hand, suspension and appeal were preferred. This expedient would at one and the same time remove the immediate problem in the colony, while requiring the colonial executive to make a convincing case on procedural and substantive grounds in London for final disciplinary action. On the other hand, in “a cumulative case of judicial perversity, tending to lower the dignity of the office, and perhaps “to set the community in a flame”, either amoval or a legislative petition were the avenues to take. Although colonial legislatures could not be denied the right to petition to remove an allegedly troublesome jurist in these circumstances, the jurisprudence in such cases pointed to distinct difficulties in the Committee having to act as a trial court. The processes of amoval or suspension with and reference to appellate jurisdiction allowed for speedier and more reliable justice. No mention was made in the memorandum of the Colonial Office’s residual discretion in itself recalling a troublesome jurist, although Lord Chancellor Chelmsford suggested that internal discipline by that office was undesirable, even in cases where the conduct involved ongoing misbehaviour in court. That there was continuing justification, as the Colonial Office argued, for the different terms of judicial appointments in colonies with responsible government and in crown colonies was not questioned. Judicial independence was to retain its relative character in the British colonial world.

If the authors imagined that this memorandum would act as a lasting influential directive on how the disciplining of colonial judges would be handled they might have been disappointed. The issue of imperial government involvement in discipline in possessions with responsible government became otiose with constitutional legislation granting them dominion status and control over judicial appointments (for example, under the British North America Act of 1867). The attempt to draw a substantive boundary between personal misconduct and judicial misbehaviour was described as difficult in a memo from Lord Chancellor Hailsham to Secretary of State Lord Passfield, dated March 25, 1929. In the view of that Lord Chancellor in cases of supreme or high court justices, proceeding under Burke’s Act, or by a reference by the colonial or imperial authorities to the Judicial Committee should be the only options available. In practice, solutions engineered in the Colonial Office seem to have become in practice the preferred option in the 20th century, as sensitivity to the independence of colonial judges became more apparent in imperial circles.

Judicial independence was an important general factor emphasized by Lord Hailsham in his 1929 correspondence. He saw it as the key element in determining the correctness or otherwise of disciplinary action against colonial judges, in his mind demanding ultimate determination by a judicial tribunal. The absence of reported decisions by the JCPC on judicial discipline during the 20th century suggests that the Colonial Office which was so often in the eye of the storm in cases involving bad blood between judges on the one hand and executives and local authorities on the other, seems to have concluded that the preferable way to deal with these situations was informally by moving one of the combatants, typically the judge, hors de combat. This it did successfully in a case in 1936 following a contretemps between General Arthur Wauchope, the High Commissioner of the Mandated Territory of Palestine, and the possession’s Chief Justice, Sir Michael McDonnell. Their relations were
already strained on how to handle Palestinian resistance to British rule and the influence of Zionism. In litigation involving the use of emergency powers by the colonial administration to demolish part of the old city of Jaffa during the Arab Revolt of 1936, the Chief Justice in his judgment openly castigated the regime for its dishonesty and cowardice in shrouding the military reasons for the action taken, and made his displeasure known to London. Wauchope angrily demanded that London fire the judge or transfer him to another colony. The Office, mindful of the dangers in publicly traducing the judge’s reputation, while uncertain about this judge’s demeanour, chose the middle road of negotiating the jurist’s early retirement and pension.

The dearth of formal disciplinary action against colonial judges in the last century is not surprising. The terse character of the opinions and political machinations that marked the JCPC’s performance on this type of issue during the 19th century provided nothing in the way of detailed analysis, let alone specific guidance on what constituted judicial “misbehaviour.” Unlike the Committee’s decisions in other areas of the law extensive reasons were eschewed. If, as the 1870 Memorandum suggests, the JCPC was a crucial arbiter of judicial behaviour and the treatment of colonial judges, guided by a concern for protecting judicial independence, one might have expected clearer discussion of the basics of what was and was not misbehaviour. It is true that the issue was ill-defined in Britain itself, as the very few attempts to unseat English or Irish judges demonstrate, but the fact that the volume of colonial cases was greater surely provided some basis for comparison and contrast and even rationalization. Perhaps there was some distaste for a full airing of a jurist’s dirty linen in public. Judges, even colonial judges, were, after all, gentlemen. What we can glean from conclusions rather than reasoning is that judges who indulged in an ongoing pattern of behaviour on the bench which was “perverse” and tending to lower the dignity of the office, or who otherwise were seen as subverting the administration of justice or the orderly conduct of government, were likely candidates for disciplinary action and losers before the JCPC. How these broad benchmarks worked out in practice was sometimes influenced by shifting imperial and local colonial political imperatives, depending on time and place, as the Bent, Boulton, Willis and Beaumont suggest. At a procedural level, reading the entrails is easier. There had to be “cause” for the disciplinary action taken and the rules of natural justice observed in requiring hearing of the judges’ response to charges against him. But, even if irregularities in the process existed, this did not inhibit the JCPC suggesting, or at least hinting, that the facts supported the executive decision made in the colony, as in Willis. The presence of the Secretary of State in two celebrated hearings, while not repeated in other instances, suggests that the key arbiter in matters of judicial discipline was in fact the Colonial Office – no doubt appropriate in the bureaucratic mind, as that Office had responsibility for the administration of justice in the colonies. In the absence of a more robust record of substantive direction by the Judicial Committee on these issues, is seems that it was the Office’s balancing of dangers to the stability of colonial governance with the truncated notion of judicial independence operative in direct rule colonies that dictated results. Perhaps the pragmatism involved in administering such an ungainly and unpredictable behemoth as the British Empire made this inevitable during that earlier time period.

These reflections on the historical record take on contemporary significance in light of two opinions rendered by a re-constituted JCPC in 2009 and 2010, in which that body vigorously reasserted its ultimate authority over disciplining of colonial judges. Unlike the complicated system contemplated in the Memorandum of 1870 the Committee in the recent cases was working within a settled process provided for in the constitution of the two colonies. By this process an executive complaint against and request to discipline a judge requires a hearing by a judicial tribunal to advise the governor whether he should seek a referral of the case to the JCPC for ultimate determination. If the tribunal so advises, the governor must refer the matter to the Committee and s/he may suspend the jurist from office until its advice be known. In contrast with the earlier cases discussed, both these opinions, that in the Schofield Hearing and that in Hearing re Justice Levers of the Grand Court of the Cayman Islands [2010] UKPC 24 proceed from a discussion of both international and domestic principles and guidelines relating to judicial independence and

Both cases exemplify the value of a full canvassing and assessment of the facts and the use of accepted principles, guidelines and jurisprudence to appraise judicial conduct and whether it amounts to culpable misbehaviour and brings the administration of justice into disrepute. This is not to suggest that it an easy task to balance principles of judicial independence with executive concerns about judicial behaviour, particularly where it leads to strained relations between the judiciary and colonial government. Of the two recent cases the Levers case was clearly the easier for the JCPC to deal with. Here a judge of agreed legal ability had unhappily fallen into a pattern of making demeaning and discriminatory comments about litigants and witnesses in both criminal and family law litigation that came before her, as well as derogatory comments about her colleagues on the bench to members of the staff serving the justice system. The Committee was unanimous in its strong criticism of the judge and in advising removal from office for misbehaviour that clearly adversely affected her ability to do her job properly, and the administration of justice in the colony. The Schofield case was more contentious, evident in the split on the Committee hearing it as to the interpretation of the facts, the importance of socio-political context, and where the balance between judicial independence and accountability should be set. The majority determined that combining the judge’s obsession about judicial independence and his own professional future, and the strains that those attitudes put on his relations with the government of the colony, and his tacit concurrence with his wife’s vigorous campaign against the government and leading members of the colonial Bar on his behalf, compromised his position and effectiveness and so merited dismissal. While the majority in assessing the facts tended to stress the Bangalore principles and domestic judicial guidelines, e as they related to generic types of misbehaviour, to reach a conclusion, the minority (including both Scottish judges and the only female judge) were more concerned to underline the principle of judicial independence and to place the facts within the political and social context of the colony in which the Chief Justice served. What the majority characterised as an obsession with judicial independence the dissenters saw as a legitimate, if sometimes misguided, concern to preserve a fundamental principle of the rule of law in the British legal tradition. Moreover, it was noted, these events occurred in a small jurisdiction in which there were close connections between government and the legal profession, and a very lively and intrusive press. The minority also pointed out Britain itself had experienced and defused these tensions and concerns about judicial independence, without removing judges from office. They were less certain than their colleagues that Schofield had an obligation to restrain, or at least exercise a degree of control over his wife’s conduct. She was, after all, entitled to her own opinions and free to express them - less a femme fatale and more a thoroughly modern woman. Moreover, the principles and guidelines on judicial behaviour appealed to provided no precise guidance on that type of circumstance. The dissentents’ conclusion was that the chief justice should be given the option of resigning from his post and that “no adverse inferences of any kind should be drawn against him.”

What resulted was a vigorous and open debate on these matters. This is such a refreshing relief from the earlier canon of cases from the JCPC with their elliptical musings and avoidance of substantive reasons. Times have of course changed. There is less reticence now about publicizing investigations into alleged judicial misconduct. This has been assisted by discussions among and recommendations emanating from senior judicial officials over the balance between concerns about judicial impropriety and preserving a robust notion of judicial independence, at an international level, and their adoption and application domestically. Opinions will differ in specific cases, but at least the public and profession may be confident that a degree of transparency has replaced obfuscation in matters of judicial discipline in the Commonwealth.
Abstract: Clause 39 of the Magna Carta determined that the English courts had to accept the rules of natural justice by the invocation of a fair hearing and the rule that no man was to be a judge in his own cause. This has become a part of the common law tradition and implemented by the courts in proceedings at a trial. These principles were recently set out in the document that culminated in the UK Guide to Judicial Conduct issued in March 2013. This establishes guidelines for judges to prevent any appearance of bias which includes the six principles adopted at the 59th session of the UN Human Rights Commission at Geneva in April 2003 to ensure the integrity of the judiciary. In substance they have to meet the requirement of Article 6.1 of the European Convention on Human Rights, as adopted in the Human Rights Act 1998, that provides the right to a fair trial. This principle is also enshrined in Articles 41 and 47 of the EU Charter of Fundamental Rights ("EUCFR") 2010. The English courts adhere to these principles and the rights of the parties in a trial are respected by the enforcement of these provisions.

Clause 39 provides:

No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

The European Human Rights Convention Article 6.1 as adopted in the Human Rights Act 1998 stipulates a Right to a Fair Trial. This principle is also enshrined in Articles 41 and 47 of the EU Charter of Fundamental Rights ("EUCFR") 2010. The English courts adhere to these principles and the rights of the parties in a trial are respected by the enforcement of these provisions.

The term ‘bias’ must be seen to arise in different circumstances where it may manifest itself and affect a decision by the court. It can broadly be classified into six categories that may be grouped into personal bias; pecuniary bias; subject matter bias; departmental bias; preconceived bias; or obstinacy led bias. The test of evaluation is between actual bias and presumed bias which prescribes a different test in these two circumstances.
The judge would be automatically eliminated or will have to recuse himself if it was proved that he shared a common interest with one of the parties in the trial. The rules of natural justice require that the judge has no interest in the outcome of the case and if there was a pecuniary or political interest then the law would automatically assume bias. This is a very strict test and a decision will be vitiated for actual bias if there is an economic benefit that will be derived from a judicial determination that is in favour of one of the parties.

The operation of the Judicial Code of Conduct 2013 became effective in March 2013. It incorporates the six core principles known as the 'Bangalore Principles of Judicial Conduct' recommended at the 59th session of the UN Human Rights Commission at Geneva in April 2003. They are as follows:

i. Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

ii. Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

iii. Integrity is essential to the proper discharge of the judicial office.

iv. Propriety, and the appearance of propriety, are essential to the performance of all of the activities of the judge.

v. Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

vi. Competence and diligence are prerequisites to the due performance of judicial office.

These salient rules are viewed as a progression from the pre existing principles of judicial rules of impartiality. Rule 2.1 states “Judicial independence is sometimes mistakenly perceived as a privilege enjoyed by judges, whereas it is in fact a cornerstone of our system of government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law “.

The question whether an appearance of bias or possible conflict of interest is sufficient to disqualify a Justice from taking part in a particular case is the subject of United Kingdom and Strasbourg jurisprudence which will guide the Justices in specific situations (Rule 3.8).

The circumstances will vary infinitely and guidelines can do no more than seek to assist the individual judge in arriving to his judgment, which involves, by virtue of the authorities, considering the perception the fair-minded and informed observer would have. The impact of the Judicial Code of Conduct has to be seen with the implementation of the Civil Procedure Rules and Criminal Procedures Rules 2013. These have codified a set of procedures for the case management of cases and the key rules are set out in CPR 1.4, and 3, 18, 19, 26, 29, 31 and 39. The new rules are comprehensive and they emphasise speed and efficiency in the progress of the case.

This paper looks at the effect of the Magna Carta on natural justice and in particular the rule against bias. It will then discuss the present standards relating to judicial bias and some of the judgments on this subject. It will also reflect on the issue of case management in this context.

Circumventing the powers of judicial review

Procedural fairness is as vital a consideration as substantive law. It is a requirement that is derived from the philosophical roots that can be traced to the Magna Carta, which sets down the elementary rules considered as an inherent part of these natural justice principles. Besides Clause 39 which is a clear indication that there should be a fair hearing and that the judges should be unbiased there are other provisions in the document that compliment this process.

Clause 17 that provides for litigation to be heard locally by stating “ordinary law suits shall not follow the royal court around but shall be held in a fixed place”. This is to provide certainty, uniformity and stability to the application in the common law jurisdiction. Clause 40 takes the judicial application of fairness and honesty further by stating “To no one will we sell, or deny or delay right to justice”.

It sets out a point of reference for judges to be honest in their dealings and this implies that there must be no pecuniary interest between the parties and the judges that may cause the
possibility of bias to arise in the ruling of the judges. Furthermore, Clause 45 states “We will appoint no justices, only such as know the law of the realm and means to observe it well”. This identifies the qualities that are important for judges to have which are knowledge of domestic law and loyalty to the rule of law.

The concept of natural justice has been defined as a part of the Commonwealth courts’ underlying concept of law. This lies at the centre of the judicial function and conditions in the exercise of a large range of administrative powers concerning the rights, responsibilities, vestiges and immunities of individuals and public. It has emanated from the original source of common law and percolated to the different parts of the world where law is based on precedent of the courts.

The Australian Chief Justice Robert S French in a lecture on administrative law and due process stated that the rules of procedural fairness originated from natural law as interpreted in English cases of the seventeenth and eighteenth centuries. He invoked the 17th century English Chief Justice Coke, noting that his rulings gave supremacy to the common law over the Royal Prerogative.

The law report of these years when Coke conducted his trials in the Court of Common Pleas mention the concept of procedural justice. He is quoted as stating that “no man ought to be condemned without answer”. His major contributor was the exposition of the remedy of mandamus that inferred that the prerogative writ arose directly from the text of the Magna Carta. In Dr Bonham’s Case (1610) 8 TR 209 at 210 [101 ER 1349] the Royal College of Physicians had fined Dr Bonham and secured his imprisonment when he had continued to practice in London after being refused permission to do so by the College. The defendant brought a suit for false imprisonment in the Court of Common Pleas. In the course of the judgment, Coke said of the College, which was entitled to keep some of the fine which it imposed, that:

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\text{the censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture...}
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Coke characterised the rule against bias as a kind of natural or constitutional limit upon parliamentary power, and ascribed to it the superiority of judge-made law over the parliamentary legislation. He stated: “when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void.”

The constitutional force allowed to natural justice and natural law by Chief Justice Coke in Dr Bonham’s Case was tested by the growth of the doctrine of parliamentary supremacy. In City of London v Wood (1702) 12 Mod 669 [88 ER 1592]. Thomas Wood sued the City of London to recover a penalty imposed upon him for refusing to accept nomination as a sheriff. This was because anyone who refused to accept such a nomination could be punished by a fine which was four hundred pounds. The nomination of unwilling but wealthy individuals to the office of sheriff was employed by the City of London as a method of raising revenue from those who were prepared to pay rather than to serve.

The City brought its action of debt against Mr Wood with the Mayor as plaintiff and a hearing was held in the Mayor’s Court, which consisted formally of the Mayor and the Alderman. The judicial functions of the Court had for a duration been carried out by the Recorder. However, court ruled the proceedings could not be held before the Mayor and the Alderman.

Chief Justice Holt applied the precedent of the Bonham’s Case by stating:

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\text{... it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be Judge and party, for the Judge is to determine between party and party, or between the Government and the party; and an Act of Parliament can do no wrong, although it may do several things that look pretty odd; for it may discharge one from his allegiance to the Government he lives under, and restore him to the state of nature; but it cannot make one that lives under a Government Judge and party.}
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In Cooper v Wandsworth Board of Works (1863) 14 CB (NS) 180 [143 ER 414] the Board of Works demolished a building where the builder had not complied with a statutory requirement of seven days notice before commencing construction. The dismantlement of the structure was without the builder being allowed the opportunity of explaining his omission. The decision of the Board was held void because of its failure to provide a hearing and its actions were deemed as a trespass. In the course of his judgment Byles J, stated:

... a long course of decisions, beginning with Dr Bentley’s case, and ending with some very recent cases, establish that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.

The English approach has been to treat the omission of the legislature as one of statutory interpretation in the review of the Act in question. This can be inferred from the ruling in Wiseman v Borneman [1971] AC 297 Lord Guest held:

... the courts will imply into the statutory provision a rule that the principles of natural justice should be applied. This implication will be made upon the basis that Parliament is not to be presumed to take away parties’ rights without giving them an opportunity of being heard in their interest.

The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in procedural fairness, during the course of the making of administrative decisions. These concern the rights, interests and legitimate expectations, unless there is a clear manifestation of a contrary statutory intention expressed in the form of an ouster clause. This will then bring up a different set of considerations that the courts will have to apply in determining if it was valid.

**Precedent in the rule against bias**

The core values enshrined in the Judicial Code of Conduct 2013 have the objective of setting out minimum standards of procedural fairness that are independence, impartiality, integrity, propriety, equality competence and diligence. These values are followed up by the relevant principles and there are detailed statements on their application. They have to be set against the rule against bias in the English courts that has been established in the courts and serves as legal precedent in allegations of apparent bias.

The test for an appearance of bias in English law was set out in Porter v Magill [2002] 2 AC 357 when the House of Lords unanimously confirmed the decision of the District Auditor of misconduct in office of the Westminster City Council’s former leader Dame Shirley Porter and her deputy David Weeks. This was for directing a policy of selling homes for electoral advantages and not as prescribed by the Housing Act 1985.

While pursuing his investigation the Auditor had applied the test laid down in R v Gough (1993) AC 646 which was based on Lord Goff’s judgment that had established that the tribunal had to ascertain the test of bias by asking the question whether there was a real danger of bias in any particular case and it had to be assessed by the court in the light of all the evidence before it. This reasoning was based on the test of a reasonable suspicion of bias as the valid exercise of a determination of bias.

Lord Goff stated that the ‘real danger of bias’ was the criteria to ascertain if the decision could be vitiated for bias. His Lordship rejected the notion of an objective “reasonable man, because the court in such cases as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which is not necessarily available to an observer in court at the relevant time”.

Thus, the real danger test became a standard test for judicial and administrative proceedings at all levels.

This test of apparent bias was affirmed at the Court of Appeal in Locabail UK v Bayfield UK Ltd v Bayfield Properties Ltd and another (1999) 2 All ER where it was held that the apparent bias was established on an allegation of a real danger of bias in circumstances where there was a personal friendship or animosity between the judge and any party involved in the case.

Lord Bingham ruled that this will give rise to circumstances where bias can be inferred but “no attention will be paid to any statement by the judge as to the impact of any knowledge on his or her mind”. His Lordship held that
there will be a real danger of bias where “if for any other reason there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections” then recusal would be necessary.

However, there was a period of time after which the danger would dissipate and this will depend on the interval between the events and the hearing or trial and it will then be a relevant factor. His Lordship ruled: “The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.”

The most effective protection afforded by this rule for the disqualification of a judge, and the setting aside of a decision, is if on examination of all the relevant circumstances the court concludes that there was a real danger (or possibility) of bias. This case established that if there was a trial that could arguably be said to give rise to a danger of bias for either party then it would generally be desirable that they should be disclosed to the parties in advance of the hearing. The judge must consider all the objections made and, if there are any grounds for doubt about the possibility of bias then he should exclude himself.

Lord Hope after evaluating all the variables in case before him reasoned that the auditor was not biased in acting in the judicial capacity in addition to his other functions. The proper test was not a real danger of bias but the ruling in Re Medicaments and Related Goods (No 2) (2001) WLR 700 which was a Court of Appeal judgment that enquired whether there were circumstances that could rise to a reasonable apprehension of bias, and that the onlooker who perceived that bias was an informed and fair minded observer who based his assumption on a real possibility of bias. This proposition sets out that the court should first assess all the relevant circumstances which would lead to a fair minded and informed observer to conclude that there was a real possibility of bias. The implication is that apparent bias would not vitiate a decision and that a tribunal’s decision could still be valid even if there was an appearance of bias because the reasonable man could still be objectively impartial by the fact that he was well informed and fair minded.

Lord Hope’s formulation in Porter v McGill was based on the Medicaments reasoning of when bias could arise and that the fair minded and informed observer differed from the causal observer because “the reasonable observer took account of all the relevant circumstances in the case; where as a casual observer would be responding instinctively and without the knowledge of all the facts” in the context in which the tribunal was assessing the case.

The role of the court his Lordship stated was to “first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility … that the tribunal was biased.” This is a distinction that seems superficial on the surface because a casual observer might have formed a view of bias when the Auditor in his preliminary findings made a public statement on 13 January 1994 to the media about the misconduct in public office of Lady Porter and her colleagues. He ruled that the councillors were protected by Article 6.1 of the HRA and were entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The fair-minded and informed observer would have considered the circumstances when these comments were made and may also have concluded that they would necessarily effect the entire investigation and conclusions of the investigation.

There were two major changes in the reasoning of judges that transpired between the old test as set out in R v Gough and Lord Hope’s exposition in Porter v Magill, which were that the matter is to be judged from the perspective...
of the fair-minded and informed observer, and
the threshold is a ‘real possibility’ and not of
the ‘danger of bias’. This would be an enquiry
based not on any extraneous considerations
which may have influenced the judge but
on the notion of what the court implied the
reasonable man may have concluded is the
evidence of bias.

In *Helow v Secretary of State for the Home
Department* (2008) I WLR 2416 there was an
immigration appeal by a Palestinian asylum
seeker who discovered that the Court of
Session judge, Lady Cosgove was a founder
member of the International Association of
Jewish Lawyers and Jurists (IAJLJ). The journal
produced by this society had carried many anti
Palestinian articles, and the appellant stated
that a fair minded and informed observer would
infer that there would be a real possibility of
bias by the judge in her membership of this
association. The House of Lords rejected this
argument and in an application of the Porter v
Magill ruling was set out as follows:

Lord Hope ruled:

*The observer who is far mined is the sort
of person who always reserves judgment
on every point until she has seen and fully
understood both sides of the argument.
She is not unduly sensitive or suspicious.
Her approach must not be confused
with that of the person who has brought
the complaint. The “real possibility”
test ensures that there is a measure of
detachment. The assumptions that the
complainer makes are not to be attributed
to the observer unless they can be justified
objectively.*

This is a subjective interpretation of who is
a “fair minded and informed observer.” The
reasonable man was credited by his Lordship
to be knowledgeable of the substance of the
issues and to place the circumstances into
their “overall social, political or geographical
context”. This case raises the question of
the amount of knowledge is to be imputed
to the observer and just how informed is
he in reaching a decision when there is an
inference of apparent bias. The test infers that
in principle the observer should know only
what is within “the knowledge of ordinary
reasonably well informed members of the
public “, but in this instance the court would
be stretching the envelope in determining
the integrity of the judge on the basis of the
correctness of their judgment.

The courts have attempted to define more
clearly what constitutes the perception of a
reasonable man in the view of the courts
recently in *Lesage v Mauritius Commercial
Bank Ltd* [2012] UKPC 41. The Privy Council
highlighted the importance of looking at the
proceedings as a whole and, while looking
at the particular facts, questioning whether,
overall, the proceedings would have created
at least the impression of bias and unfairness.

Lord Kerr ruled:

‘Whether, in the mind of the informed
observer, the failure to consider the
propriety of their continuing to hear
the case creates a possibility of bias is
to be judged both prospectively and
retrospectively. The actual conduct of the
judges during the trial is to be examined
therefore to see whether it supports or
detracts from the suggestion that there
was the appearance of possible prejudice.’

**Judicial conduct and procedural constraints**

The determination by Lord Hope in Porter v
Magill elevates the reasoning of the courts to
the level where they assume the hallmarks of
the reasonable man. In considering the impact
of this test the Judicial Code of Conduct
sets out what is the duty of the judge in
circumstances where bias may be perceived. R
3.15 states:

*If circumstances which may give rise to a
suggestion of bias, or the appearance of
bias, are present, they should be disclosed
to the parties well before the hearing, if
possible. Otherwise the parties may be
placed in a difficult position when deciding
whether or not to proceed. Sometimes,
however, advance notification may not be
possible.*

The changes in the management of civil, family
and criminal proceedings requires judges
to focus and refine the issues, and identify
the evidence necessary to resolve the main
dispute. It can be done where possible at ‘issue
resolution hearings’, and they can provide
a course of action in the legal proceedings.
This is pertinent in the family law hearings
where there is a duty to further the overriding
objective of the child’s welfare issues.
The cases can be actively managed under (FPR 2010, rr 1.1(1) and 1.4(1)). The active case management involves a range of matters set out at (FPR 2010, r 1.4(2)) which include identifying the issues at the preliminary stage (r 1.4(2)(b)(i)) and deciding immediately which issues need full investigation and hearing and which do not (r 1.4(2)(c)(i)).

The task of the family judge in these cases is complex as he is required to be interventionist in managing the proceedings and in identifying the key issues and relevant evidence. At the same time the judge must not refrain from making an adjudication at a preliminary stage and should only go on to determine issues in the proceedings after having conducted a fair judicial process.

The role of the judge can be distinguished between the preliminary hearing inviting a party to consider their argument on a particular point, which is permissible and to be encouraged, and the judge summarily deciding the point then and there without a fair and balanced hearing, which is not permissible.

There are similar duties in the civil cases that fall upon the Court under the Civil Procedure Code 2013, R 1.1(1) and (2) and 1.4(1) and especially 1.4(2)(b), (c) and (d). These powers are further set out at CPR 3.1. The judges have the regulatory framework available to conduct a ‘robust case management’ and could seem to arrive at the conclusions which may provide the appearance of bias in the case.

In Re Q (Fact-Finding Hearing: Apparent Judicial Bias) [2014] EWCA Civ 918, [2014] 2 FLR each party, with the exception of the children’s guardian, had issued a Notice of Appeal complaining about one aspect or another of the judge’s conduct of a fact finding exercise in an application for a care order. In total there were seven Notices of Appeal issued by the court under the judge’s case management, and the preliminary issue was whether the judge should have acceded to the mother’s application for him to withdraw from the case.

The Judge, at an early case management hearing confided to the parties that the local authority was going to find it onerous to accept that Children Act 1989 section 31 conditions under which it can apply for a Care order were satisfied. The complaint was based on the evidence of the mother’s allegations against the father and at the same case management hearing the judge had called for a police file which he read but did not disclose to the parties. He then expressed his conviction that many of the witnesses would provide in all likelihood credible evidence.

This expression of this opinion was interpreted by the mother as bias. McFarlane LJ in his leading judgment stated that the Case Management Hearing was seriously flawed because a fair-minded and informed observer would have concluded that there was a real possibility that the judge had formed a view on the mother’s allegations and her overall veracity in the proceedings.

‘The judge having strayed beyond the case management role by engaging in an analysis, which by definition could only have been one-sided, of the veracity of the evidence and of the mother’s general credibility. The situation was compounded by the judge giving voice to the result of his analysis in unambiguous and conclusive terms in a manner that can only have established in the mind of a fair-minded and informed observer that there was a real possibility that the judge had formed a concluded and adverse view of the mother and her allegations at a preliminary stage in the trial process.’

The conduct of the judges has come for scrutiny where the issue was if the case management decisions reflected apparent bias. In Re K (Return Order: Failure to Comply: Committal) [2014] EWCA Civ 905, [2014] 2 FLR (forthcoming) the Court of Appeal had to deal with a father’s appeal in contested wardship proceedings. This concerned an instance where a judge had refused to recuse herself from the proceedings and sentenced the father to 18 months imprisonment for contempt (for refusing to arrange the return of his child to the jurisdiction). The appellant argued that in earlier hearings the judge had twice threatened to commit him to prison for an extended period of time and on several occasions had uttered prejudicial statements.

McFarlane LJ invoked the precedent of Porter v Magill by stating that the judge, in making the observations was seeking to convey to the father just how important it was to comply with orders of the court, and out of particular
concern for the child’s welfare. However, the apparent bias existed by the father’s complaints when “the judge rejected the application for recusal, and had not explained why, notwithstanding her earlier comments. She had already ruled that the father was in deliberate breach of the courts orders and should be sentenced to a considerable span of imprisonment.”

The allegations of bias have also arisen in the context of the Criminal Procedure Rules 2013. In the Matter of Ian Stuart West [2014] EWCA Crim 1480 a defence barrister had refused to have a conference with the accused to resolve issues arising from a police interview, failed to attend an adjourned hearing, refused to provide a written explanation for his behaviour and instead demanded an apology from the judge.

Judge Kelson QC ruled that his behaviour 'constituted wilful and deliberate disobedience of an order of the court as an act of defiance'. This was serious misconduct which was a breach of his professional duties and in conflict with his duty to the court and amounted to a contempt of court.

The Court of Appeal (Criminal Division) allowed his appeal from the finding of contempt on the basis that the judge had followed the wrong procedure under the Criminal Procedure Rules 2013. However, the Appeal Court was asked to consider if the judge should have recused himself from the contempt proceedings.

Sir Brian Leveson held:

'Porter v Magill [2002] 2 AC 357 makes it clear that, save where actual bias is established, personal impartiality is to be presumed but the question whether the material facts give rise to a legitimate fear that the judge might not have been impartial must be determined on the basis whether a fair minded observer would consider there to be a real danger of bias. Reflecting the common law, CPR 62.8(5) (b) provides that the court which conducts the enquiry may include the same member of the court that observed the conduct unless that would be unfair.'

The Court ruled that the bias could not be confirmed under the Porter v Magill test because while the actions of the appellant had been insulting to the judge it was excessive to deem that he could not deliver an impartial judgment. It was not acceptable for the barrister to argue that it would be bias for the judge to conduct this hearing if the case management had been satisfactory and not over robust.

Conclusion

The Magna Carta 1215 was an instrument that provides the grounds for the judges to act with procedural fairness and to prevent the miscarriage of justice on account, inter alia, of bias by the court. Clause 39 sets the standard for both the right to a fair hearing and the manifestation of the rule against bias which are cardinal principles of English law.

The test for bias has now to be viewed against the framework of the Judicial Code of Conduct 2013 that was implemented to set up an ethical conduct for judges. The adoption of written codes of conduct accords with international practice and incorporated the Bangalore Principles which were inaugurated at the UN Human Rights Commission at Geneva of 2003. The judges have an obligation to be impartial, efficient and diligent in conducting their hearings at court.

These substantive changes have been accompanied by the Civil Procedure Rules 2013 that vest the management of civil and family proceedings for the judges to take an increasingly more pro-active role in managing cases as they enter trial stage. The Practice Directions for a Multi Track approach empower the judges to deal with “complex and different claims” and provides “flexibility “in how they deal with the matters before them.

The enforcement of the CPR accompanied by the increase in the litigants in person will increase the pressure on the judges to expedite their cases. In view of this, it has to be recalled that the rule against bias is a fundamental principle of justice both at common law and under Article 6 of the HRA that there must be a fair trial, and while the framework exists in substantive law the procedural rules must not allowed to be undermined.

The Court ruled that the bias could not be confirmed under the Porter v Magill test because while the actions of the appellant had been insulting to the judge it was excessive to
Following the breakdown of the couple’s relationship, the mother began a family action in the courts of the Province of British Columbia (the Province) for custody of their child and an interest in the father’s property. In accordance with the Supreme Court Rules, BC Reg 221/90, as amended by BC Reg 10/96 and BC Reg 95/98—which were enacted as subordinate legislation under the Court Rules Act RSBC 1996 (and now replaced by the Supreme Court Civil Rules, BC Reg 168/2009)—the mother, as the party who had set a case down for trial, had to pay the hearing fee. That fee was levied by the Province in accordance with its power to administer justice under s 92(14) of the Constitution Act 1867. Before the hearing the mother asked the judge to relieve her from paying the fee; at that time a judge could waive all fees for a person who was ‘indigent’. The current exemption from the hearing fee, contained in r 20–5(1) of the Supreme Court Civil Rules, applied to people in receipt of certain statutory benefits, or ‘otherwise impoverished’ (the exemption provision). The judge reserved his decision until the end of the trial. The parties were not represented by lawyers and the hearing lasted ten days. Under the Supreme Court Rules the fee for a ten-day trial was $3,500—almost the net monthly income of the family. The mother could not afford the hearing fee. The Trial Lawyers Association of British Columbia and the British Columbia branch of the Canadian Bar Association (the appellants) intervened and argued that people like the mother—possessing some means but not able to pay the hearing fee—had the right to have a court adjudicate their legal dispute and that the hearing fee regime essentially denied them that right, in violation of s 96 of the Constitution Act 1867. The trial judge ruled that the hearing fee scheme was unconstitutional. The Court of Appeal agreed that the scheme could not stand as it was but preferred the remedy of ‘reading in’ the words ‘or in need’ into the exemption provision. The appellants appealed the remedy to the Supreme Court. The Province, represented by the Attorney General of British Columbia (the respondent), cross-appealed on the grounds that the hearing fee scheme was a valid exercise of the provincial power over the administration of justice under s 92(14) of the Constitution Act 1867 and that the exemption provision should be interpreted broadly to allow a judge to waive the hearing fee in appropriate cases, thereby avoiding the potentially unconstitutional impact of the scheme.


(1) Per MacLachlin CJ, LeBel, Abella, Moldaver and Karakatsanis JJ. The Province could establish hearing fees under its power to administer justice under s 92(14) of the Constitution Act 1867. However, whilst s 92(14) did not, on its face, limit the powers of the provinces to impose hearing fees, that did not mean the Province could impose hearing fees in any fashion it chose. Section 92(14) did not operate in isolation: its ambit had to be determined, not only by reference to its bare wording, but with respect to other powers
conferred by the Constitution. The section also had to be interpreted with requirements that flowed by necessary implication from those words. In the present case, s 96 of the Constitution Act 1867—which had been held to guarantee the core jurisdiction of provincial superior courts throughout the country—had to be considered. The legislation at issue barred access to the superior courts by imposing hearing fees that prevented some individuals from having their private and public law disputes resolved by the courts of superior jurisdiction—the hallmark of what superior courts existed to do. To prevent that business being done struck at the core of the jurisdiction of the superior courts protected by s 96. It followed that the Province’s power to impose hearing fees could not deny people the right to have their disputes resolved in the superior courts. Rather the Province’s powers under s 92(14) had to be exercised in a manner that was consistent with the right of individuals to bring their cases to the superior courts and have them resolved there. Furthermore, the connection between s 96 and access to justice was also supported by considerations relating to the rule of law. Access to justice was essential to the rule of law. Thus the s 96 judicial function and the rule of law were inextricably intertwined. As access to justice was fundamental to the rule of law and the rule of law was fostered by the continued existence of the s 96 courts, it was only natural that s 96 provided some degree of constitutional protection for access to justice. Accordingly, s 92(14), read in the context of the Constitution as a whole, did not give the provinces the power to administer justice in a way that denied the right to access courts of superior jurisdiction. Any attempt to do so would run afoul of the constitutional protection for superior courts found in s 96.

Per Cromwell J. The matter could be resolved on administrative law grounds alone. There was a common law right of reasonable access to civil justice. That common law right was preserved by the Court Rules Act. As the hearing fees in dispute were found in subordinate legislation made under the authority of the Court Rules Act, they should be reviewed for consistency with the Court Rules Act. Subordinate legislation purportedly adopted pursuant to the Court Rules Act which was inconsistent with that common law right of access to civil justice was accordingly ultra vires. The case could therefore be resolved on administrative law grounds.

Per Rothstein J (dissenting). It was well-established that provinces had the power under s 92(14) of the Constitution Act 1867 to enact laws that prescribed conditions on access to the courts. Although it was true that s 96 of the Constitution Act 1867 protected the core jurisdiction of superior courts that was integral to their operations, no aspect of that core jurisdiction was removed by legislation that merely placed limits on access to superior courts. The hearing fees were a financing mechanism and did not go to the very existence of the court as a judicial body or limit the types of power it exercised. Therefore the concept of core jurisdiction in s 96 could not justify striking down the regulations at issue in the present appeal. Furthermore, there were no gaps in the text of s 92(14) to enable the courts to turn to unwritten principles to fill those gaps. Nor was there an express right of general access to superior courts for civil disputes in the text of the Constitution. Rather, the Constitution specified the particular instances in which access to courts was guaranteed. Section 24(1) of the Canadian Charter of Rights and Freedoms 1982 provided that persons whose Charter rights had been infringed or denied could apply to the courts for a remedy. Thus the rule of law did not demand that the court invalidate the hearing fee scheme—if anything, it demanded that it was upheld. Even if there was a constitutional basis upon which to challenge the hearing fee scheme, it would not be unconstitutional. Taking into consideration the measures that offset the burden of hearing fees or eliminated them altogether, there was no indication that the fees at issue would prevent litigants from bringing meritorious claims.

(2) Per MacLachlin CJ, LeBel, Abella, Moldaver and Karakatsanis JJ. As a general rule, hearing fees had to be coupled with an exemption that allowed judges to waive the fees for people who could not, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court. Hearing
fees had to be set at an amount such that anyone who was not impoverished could afford them. They had to be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they required litigants to forgo reasonable expenses in order to bring claims. The plain meaning of the words ‘impoverished’ and ‘indigent’ in the exemption provision did not cover people of modest means who were none the less prevented from having a trial because of the hearing fees. The courts had to read the word ‘impoverished’ in its ordinary sense: a judge could waive fees for the very poor, and no one else. The exemptions did not provide sufficient discretion to the trial judge to exempt litigants from having to pay hearing fees in appropriate circumstances. However, reading-in was a remedy rarely used, available only where it was clear that the legislature, faced with a ruling of unconstitutionality, would have made the proposed change. Moreover, modifying the exemption as suggested by the Court of Appeal might still not cure the problem; it was not clear that the term ‘or in need’ would cover all litigants who could not afford the hearing fee and other provisions might be required in order to avoid the onerous or undignified process of proving that one fell within the exemption. Accordingly, the proper remedy was to declare the scheme as it stood unconstitutional and leave it to the legislature or the Lieutenant Governor in Council to enact new provisions, should they chose to do so.

Per Cromwell J. The hearing fees exemptions under the Court Rules Act could not be interpreted so they were consistent with the common law right of access to justice. It followed that the fees were ultra vires the regulation-making authority conferred by the Court Rules Act.

Per Rothstein J (dissenting). The updated impoverishment exemption in r 20–5(1) in the Supreme Court Civil Rules provided a measure of discretion to trial judges in determining its application. The term ‘may’ established a foundational discretion. But the addition of the phrase ‘otherwise impoverished’ indicated that a trial judge might exercise that discretion where the hearing fees themselves would be a source of impoverishment. However, whilst the courts had discretion in applying the impoverishment exemption, it was not unlimited: it should be exercised only where a litigant was impoverished or, if not impoverished, would be rendered so if required to pay the hearing fees. The financial burden of hearing fees, a disbursement, might be reapportioned through both interim and final costs awards (r 14–1 of the Supreme Court Civil Rules). Judges might consider factors such as the success of a party, the reasonableness of the positions taken, the importance of the case and whether one party was responsible for an excessively lengthy hearing. Most importantly, judges had a key role to play in limiting hearing fees: they had an obligation to ensure that trials did not consume unnecessarily lengthy periods. Furthermore, there was no reason to believe that a 10-day trial was standard. Under the scheme, the first three days were free, which incentivized short, efficient trials. Therefore active judicial case management was critical to ensuring reasonable timelines in civil proceedings and efficient use of court resources, especially in the case of self-represented litigants.
Following the dissolution of the Cabinet of Ministers, at a time when there was no Minister available to enact any subordinate legislation, the Principal Secretary of the Ministry of Finance purported to enact a piece of subordinate legislation entitled Legal Notice No 177 of 2013, Prescription of Salaries and Allowances of Officers of the Superior Courts Notice 2013 (the Legal Notice). The Legal Notice stated that it was issued under s 208 of the Constitution of the Kingdom of Swaziland Act 2005 and purported to revoke Legal Notice No 171 of 2007. If valid, the effect of the Legal Notice would be to reduce the salaries and allowances of judicial officers. Although its preamble stated that ‘the Minister for Finance issues the following Notice’, the signature line bore the name and title of the Principal Secretary and did not profess to have been issued by any person who had been appointed as the Minister for Finance. The respondents, who comprised a number of members of the judiciary, challenged the validity of the Legal Notice. The High Court found that the Principal Secretary had no power or right in terms of s 208 of the Constitution or any other law to issue the second schedule of the Legal Notice. However, in order to avoid a constitutional crisis, the High Court ruled that certain words could be read into and severed from the Legal Notice. An appeal against the ruling to read down the terms of the Legal Notice was made to the Supreme Court in the name of the Attorney General. The Principal Secretary contended that it had been expedient and in the public interest for her to make subordinate legislation. The Supreme Court sat as a panel of five judges. Four of those judges had initially been applicants before the High Court, but had been struck off as parties in the course of the proceedings. In those circumstances, a recusal application was made on the grounds that, as the judges hearing the appeal had a personal interest in the subject matter of the appeal and had a close professional relationship with other members of the judiciary, there was a reasonable apprehension of bias.

HELD: Appeal dismissed. Legal Notice No 177 of 2013 declared to be null, void and of no legal effect.

(1) Judges of superior courts were true to their oaths and would dispense justice fairly and fearlessly. This was particularly well-illustrated in the well-known judgment of the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)*, where the judges unanimously decided that their esteemed colleague was ineligible to sit because of his connection with Amnesty International which had an interest in the proceedings. It was less than fitting to suggest that the judges of the Supreme Court of Swaziland were incapable of the same judicial detachment as was exhibited and applied by their Lordships of the House of Lords.

(2) The concept of constitutional supremacy was expressly declared in the preamble to the Constitution of the Kingdom of Swaziland Act 2005 and restated in s 2(1), which read: ‘This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void’. The Constitution contained a number of provisions setting out various aspects of the independence of the judiciary. The effect of s 139(5), which provided that the Chief Justice was the head of the judiciary and was responsible for its administration, was that any purported exercise of any of the functions, powers or duties of the Chief Justice by any other person or authority
was constitutionally impermissible and was of no legal force, effect or efficacy whatsoever. Section 62 set out some of the objectives and characteristics of judicial independence. It read: ‘(1) The independence of the judiciary as enshrined in this Constitution or any other law shall be guaranteed by the State. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary … (6) The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.’ Further, s 141 provided: ‘(1) In the exercise of the judicial power, the Judiciary, in both its judicial and administrative functions, including financial administration, shall be independent and subject only to this Constitution, and shall not be subject to the control or direction of any person or authority … (6) The salary, allowances, privileges and rights in respect of leave of absence, gratuity, pension and other conditions of service of a Judge of a superior court or any judicial officer or other person exercising judicial power, shall not be varied to the disadvantage of that Judge or judicial officer or other person’. The integrity of the remuneration of judges of the superior courts was protected in s 208, which provided: ‘(3) The salary and the terms of office … shall not be altered to the disadvantage of the holder’. The above provisions made it clear that the purported discontinuation by the Principal Secretary of allowances and conditions which were being enjoyed by appointed members of the judiciary was a legal nullity and an egregious breach of the protective provisions of the Constitution which were designed to safeguard the salaries, allowances, terms and conditions of judicial officers from unconstitutional degradation.

(3) Section 67(2) of the Constitution of the Kingdom of Swaziland Act 2005 provided that the King was to appoint Ministers on the recommendation of the Prime Minister and s 72 provided that where a Minister was unable to exercise the office of that Minister, the Minister could delegate the functions of the office to another Minister in writing. It was impossible to determine how the Principal Secretary, who was not a member of Parliament, could extract from those provisions an authority to exercise the powers of a Minister without being appointed to the office of Minister. The Principal Secretary was not empowered by the Constitution or by any other law to have issued the Legal Notice, which was therefore void and of no effect.
Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa

John Hatchard
Edward Elgar Publishing, 2014

We know that “there is no new thing under the sun”. Corruption within government has existed since man first began to organise and govern himself. A “dark side” to judicial systems was soon to appear. The corrupt judge or administrator was clearly un-independent and irredeemably tainted.

John Hatchard retells the story of the corrupt judge Sisamnes, told with horror by Herodotus, the “father of history”. Sisamnes was a Persian judge, convicted of taking bribes in the 5th century BCE. He consequently delivered a crooked verdict. His punishment was a grim one. We are told that he was “flayed alive from top to toe” and that “when the skinning was finished thongs were made from the hide and used to string” the judicial bench. Sisamnes’ own son, Otanes, was then appointed in his place and the King commanded him to “Bear well in mind the chair on which you sit as you deliver your judgements”.

The story resonated down the ages and across the world, to the extent that a depiction of this dreadful story was painted by Gerard David in 1498, and was to be hung in the mercantile court in the City of Bruges, doubtless to keep the judicial officers of the day on their toes.

Nowadays we have a whole panoply of constitutions, legislation, international conventions, anti-corruption commissions, and other legal checks. The fate of those convicted of corruption, or seeking to corrupt, is generally a serious one, if not as grim as that which befell Sisamnes, and yet the problem remains and, doubtless, to a greater or lesser extent will always do so.

That is not to be thought of as a counsel of despair. It should be recognised as a fact, and accepted that the best should not be the enemy of the good. Corruption will exist because of human nature and greed. It is the duty of each and everyone of us in the public service to be alert to the problem and to take our own stand when and if it comes our way. This of course is easier in countries where wealth is more equitably shared, where judges are properly rewarded for their task, and who work in an atmosphere of support and collegiality. Where an accused can be confident of a fair hearing if ever a finger is pointed in their direction. The behaviour of the judicial officer or administrator who succumbs to corruption under those circumstances is especially reprehensible.

Perhaps we can look with a less severe eye on the administrator or judicial officer who succumbs to temptation in a jurisdiction where he is inadequately rewarded, where a country is poorly organised and where corruption is all around him or her in the public service. The virtuous administrator or judge in such a situation is especially vulnerable to the taint of false accusations, made by, and perhaps even adjudicated by, those who seek to pull in others to their own corrupt behaviour. It is so much easier too for that administrator or judge to take that first fatal step that sets him or her down the slope of corruption.

This is an immensely valuable book, which should be on the desk of of every senior judge, administrator, and legislator in Africa, and not only in Commonwealth Africa. John Hatchard writes from huge experience and with a great understanding of the centrality of addressing the issue of corruption within its cultural context in order to achieve good governance and integrity.

He approaches the issue of corruption from three premises:

that the development and maintenance of good governance, law, and institutions are the foundation upon which African states can and must seek to enhance integrity and combat corruption

that the art of persuasion is fundamental to developing the necessary political will to make the legal strategies work, and

that supporting good governance and combating corruption is not just an African concern but is also a global issue.
Having “set the scene” the book goes on to discuss definitions of corruption and good governance, the development of supportive laws, with both national and transnational initiatives, preventive measures, and the central role of what he calls the “art of persuasion” and “persuasive accountability”, which he defines as the establishment of “effective monitoring mechanisms which check on state compliance and which publicly hold states to account for any failure to uphold the convention or other obligations”.

As well as addressing the institutional tools that are available, he considers the position of the corporate sector in their dealings with one another and with the institutions of state, drawing on examples of both good and bad practices.

The focus of this book is not on Commonwealth Africa, but there are a number of references to Commonwealth documents. The book should be compulsory reading for every new appointment to the Secretariat, which has a real role to play if it is to be respected as a relevant international institution, especially in the promotion of “persuasive accountability”. There is no need to reinvent the wheel, all the institutional tools are in place. What is needed is a real will to support individual countries as they challenge corruption at every level and on every occasion. To do this I would suggest that the Secretariat needs to develop a much stronger culture of institutional memory and build on so much work that has already been done. It is no criticism of the existing Secretary General to say that the appointment of his successor later this year presents a real opportunity for reform for the Secretariat to enable this to happen. Training programmes already developed by the Secretariat with expert help from across the Commonwealth, and with the invaluable assistance of this book, have a real role to play in promoting the “persuasive” aspect of Hatchard’s prescription and in the promotion of collegiality, which would underpin that persuasion.

There is much wisdom in this book. Wisdom which policy makers both in Africa, and in countries and corporations which deal with Africa would do well to bear in mind. Hatchard reminds us that corruption thrives on the fact that it is often seen, quite wrongly, as a “victimless crime”, and that it is in the interests of all involved to deny everything. He sets the challenge to develop a new principle of “reveal everything”, citing the Lahmeyer cases in Lesotho as an example. Faced with the risk of a second corruption conviction that company adopted a “reveal everything” approach not only to their ethical credit but also, of course, to their eventual commercial advantage. That example has been followed by other international corporations. The legal and ethical difficulties that can arise are obvious, but the establishment of so very many mechanisms for addressing corruption throughout the continent set out in this book demonstrates the real will that there is in Africa to tame this beast.

This book demonstrates how increased economic prosperity and political stability, surely both essential prerequisites, coupled with the legal and persuasive approaches it describes, offer real hope for the real victims of this most serious of crimes, the poor of Africa.

Keith Hollis

*Member of the Editorial Board of the Commonwealth Judicial Journal*

**Reflections on the Supreme Court of Ghana**

*Samuel Kofi Date-Bah*

*Wildy, Simmons & Hill Publishing London 2015*

Our judicial readership (along with academic and practising lawyers throughout the Commonwealth) will expect to find some valuable insights into the role of an apex court and into the development of substantive law from the reflections on retirement of one of Ghana’s most distinguished Supreme Court Justices. They will not be disappointed. As the author writes in his introduction to the first Chapter:

‘The primary purpose of this book is to throw light on Ghana’s Supreme Court as an important national governance institution and to make a contribution to comparative law.’

Justice Date-Bah and his judicial colleagues operating within the democratic constitutional framework established in 1992 had to come to terms with Ghana’s turbulent past. Thus, in his first Chapter on the position of the Supreme Court within Ghana’s court structure, he argues that the courts so established were ‘new’ courts and therefore not absolutely bound by precedents established under previous dispensations. Chapter 2 contains a detailed analysis of the Supreme Court’s role
as a constitutional court. In one case, *Dexter Johnson v The Republic* (see p 53), the author found that the Court had ‘faltered somewhat’ in its responsibility as a constitutional court. The majority declined to strike down as unconstitutional the statutory mandatory death penalty for murder on the basis that, even if there was a conflict with the Constitution, it was for Parliament not the Courts to resolve the conflict. The author himself gave a forceful dissenting judgment arguing that, by failing to strike down unconstitutional legislation, the Supreme Court was failing to discharge its ‘sacred duty’ as a constitutional court.

Chapter 4 deals with the role of the Supreme Court as an appellate court. The author advocates judicial activism for the apex court of a developing country in adapting the common law to the needs of a society in transition. In Chapter 8, the author gives some revealing insights into the working methods of the Supreme Court, lamenting the absence of a well-resourced system of law clerks to assist the justices as existing in other Commonwealth jurisdictions – he also notes (p232) that, despite a private initiative in relation to Supreme Court Reports, the official Ghana Law Reports have been in arrears for years to the detriment of the timely dissemination of judicial decisions. After reviewing some landmark decisions of the Supreme Court in chapter 9, chapter 10 assesses the Supreme Court’s contribution to the development of Ghanaian law, including the adoption of a purposive approach to the interpretation of the Constitution, particularly it must be said from the evidence of these pages, under the impetus of the author’s own judgments. Chapter 11 reflects on the Court’s broader societal role, particularly in the promotion and enforcement of constitutionalism. The role of the judges as impartial arbiters in a highly competitive political environment requires the entrenchment of judicial independence. The author acknowledges that that independence is ‘fulsomely’ conferred by the Constitution but that it needs to be buttressed by case law and administrative practice. In this context, readers will be well aware that issues relating to the mode of judicial appointments are of concern throughout the Commonwealth (Currently the subject of model clauses being drafted by the Rule of Law Division of the Commonwealth Secretariat). In relation to the Ghana arrangements, the author highlights a familiar problem. The Constitution (article 144) provides for the appointment of Supreme Court Justices by the President, *acting on the advice of the Judicial Council*, in consultation with the Council of State and with the approval of Parliament. However, the author notes that Presidents of the Fourth (current) Republic have not considered themselves bound by the advice of the Judicial Council in relation to such nominations and on occasion have refused to accept the Council’s nominees. There has been no legal challenge of such a refusal, so there is no judicial clarification of the meaning of article 144. Does ‘on the advice of’ mean or should it mean ‘in accordance with the advice of’?

Another issue of current Commonwealth-wide controversy discussed here in the Ghanaian and comparative context is that of prosecutions for the contempt of ‘scandalising the court’. The author approves of the exercise by the Supreme Court of its contempt powers during a period of tension generated by the hearing of a presidential election petition. As the author notes, the determination of the balance between freedom of expression and protection of national security and the due administration of justice may evolve over time. In more tranquil times, judges may take a more relaxed view of scurrilous abuse.

In his final chapter, the author offers some concluding reflections. He advocates a purposive interpretative approach to the law which stresses the discovery and assessment of law’s impact on society. Law can then serve the interests of society and become an instrument for social action. Perhaps the author’s most interesting concluding observation relates to the need for an apex court to sustain its leadership role in purposive judicial adjudication by maintaining among its membership a healthy climate of intellectual discourse and tolerance of dissent. The author, who was himself often a dissenting voice, is able to recall with pleasure the remarkable collegiate spirit of the Justices during his decade of service on the Supreme Court. He was evidently not at risk of suffering the alleged fate of Lord Atkin after his judgment in *Liversidge v Anderson*.

I hope that this review has conveyed the flavour of this book which is an enjoyable as well as a stimulating ‘insider’s view’ of the judicial process at the highest level.

Dr Peter Slinn

*Vice-President of the Commonwealth Legal Education Association and Chairperson of the Editorial Board of the CJJ*
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