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# Judicial Journal



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# COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION

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## EDITORIAL

The Commonwealth Magistrates' and Judges' Association (CMJA) held another successful Triennial Conference in September 2018, with over 450 participants from 49 Jurisdictions in the Commonwealth. We have published some of the papers arising from this Conference in this issue of the Commonwealth Judicial Journal. During this Conference, the CMJA General Assembly also agreed the 'Declaration on the Independence and Integrity of Judicial Officers of the Lower Courts'. This Declaration, which follows on from the work that the CMJA has been doing over the years in supporting judicial officers of the lower courts or of limited jurisdiction, reiterates the importance of securing and safeguarding the independence of the judiciary as an important prerequisite for upholding the rule of law. The Declaration emphasises, in particular, three facets of such independence – institutional independence, adjudicatory independence and administrative independence. As the preamble to this Declaration itself recognises, an independent and integrity-led judiciary at all levels plays a vital role in ensuring the realisation of the Commonwealth vision of a just and progressive society. The full Declaration is available on [www.cmja.org](http://www.cmja.org)

Unfortunately, attacks on the independence of the judiciary continue to happen within the Commonwealth and beyond. I have referred to a number of these in my previous editorials. In September 2018, the CMJA issued a statement expressing grave concern over the decision of the government of Lesotho to suspend the Chief Justice, pending an impeachment investigation. The CMJA together with the Commonwealth Lawyers Association (CLA) and the Commonwealth Legal Education Association (CLEA) had previously expressed shock and dismay at the unprecedented vitriolic verbal attack mounted by the Minister of Law in Lesotho against the Chief Justice of Lesotho. This attack had been calculated to undermine the independence of the judiciary and to diminish the authority the judiciary wields in the perception of the general public. In light of these developments, it is hoped that international and regional organisations such as the Commonwealth Secretariat and Southern African Development Community will step in to reaffirm and demand observance of

principles, such as respect for the independence of the judiciary and the rule of law, that lie at the heart of their constitutions.

Meanwhile, the next CMJA Conference will be held in Port Moresby, Papua New Guinea from 8-12 September 2019 on 'Parliamentary Democracy and the Role of the Judiciary'. For those who wish to attend, more details and registration information will be available on the CMJA website: <https://cmja.biz/>

I would also like to remind readers that I would warmly welcome letters to the editor regarding any themes relevant to the Commonwealth Judicial Journal. These will be published in future issues of the Journal. Please submit your letters to the CMJA email address: [info@cmja.org](mailto:info@cmja.org).

This issue opens with a tribute to the life of Derek Ingram, who served the Commonwealth as a journalist with special distinction. This is followed by Sian Elias' article on *Managing Modern Criminal Justice*, which focuses on three aspects of the criminal justice system in the context of 'doing justice', namely: use of audio visual technology, measures to incentivise guilty pleas and increased discretion in charging, diversion and disposals. Staying on the theme of criminal justice systems, in *Judicial Accountability in the 21st Century*, Iain Bonomy addresses what he considers to be some of the unsatisfactory aspects of the international criminal justice system. In *What is the Need for Judicial Education?*, John Carey examines the need and implications of judicial education for judicial development and justice. The next article in this issue is a reflection by Ah Foon Chui Yew Cheong and Nicola Padfield on a recent workshop on sentencing held for the judiciary in Mauritius and entitled: *A Workshop on Sentencing – Mauritian-Style*. Subsequently, Thomas S. Woods discusses whether the practice of circulating draft judgments to counsel for comment before they are made final is one that ought to be considered for adoption in Canada and other jurisdictions in the common law world in *Paragraph 168: A Cautionary Tale Concerning the Circulation of Draft Judgments to Counsel*. And in *A Privilege to Serve the Nation – Fighting Corruption and*

*Maladministration*, B. Rajendran addresses the question of how should a judge, armed with the power of judicial review, seek to vindicate the constitutional right to a corruption free government? with particular reference to India.

The Journal has collaborated with LexisNexis to publish three cases from the Law Reports of the Commonwealth (LRC). There are *Economic Freedom Fighters*

*And Others v Speaker Of The National Assembly And Another (No 2)*, *Ferguson v Attorney General*; *Outbermuda And Others V Attorney General*, and *Hyles v Director Of Public Prosecutions*; *Williams V Director Of Public Prosecutions*. These reports have been reproduced by permission of RELX (UK) Limited, trading as LexisNexis. Finally, the issue closes with a review of *Corruption and Misuse of Public Office*, written by Nicholls *et al*.

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## CALL FOR PAPERS

The **Commonwealth Judicial Journal (CJJ)** is the flagship publication of the Commonwealth Magistrates' and Judges' Association and has a readership of judges, magistrates and other legal practitioners from the Commonwealth and beyond. The CJJ invites submissions of manuscripts on various aspects of the law, in particular manuscripts focusing on the judicial function at the domestic, regional and/or international level.

Essays, book reviews and related contributions are also encouraged.

Please read the following instructions carefully before proceeding to submit a manuscript or contribution.

### Contact Details

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

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

### Information for Authors

1. Manuscripts should ideally be submitted in Microsoft Word format.
2. Articles should include a 200-word (maximum) abstract.
3. Submissions should be accompanied by details as to whether the manuscript has been published, submitted, or accepted elsewhere.
4. Manuscripts should normally range from 2,000 to 3,500 words in length.
5. Any references and/or citations should be integrated in the main body of the

manuscript, as footnotes/endnotes will normally be removed.

6. The CJJ encourages authors to refer to material from one or more jurisdictions across the Commonwealth.
7. All manuscripts received are evaluated by our Editor in consultation with the Editorial Board. Notification of acceptance, rejection or need for revision will generally be given within 12 weeks of receipt of the manuscript, although exceptions to this time frame may occur. Please note that our evaluation process takes account of several criteria, including the need for a balance of topics, the CJJ's particular areas of interest which may change over time, etc., and this may also influence the final decision. Therefore, a rejection does not necessarily reflect upon the quality of a piece. The Editorial Board retains the discretion as to whether or not an article may or may not be published.
8. Please note that by submitting an article or other contribution for publication, you confirm that the piece is original and you are the author or co-author, and owner of the relevant copyright and other applicable rights over the article and/or contribution. You also confirm that you are the corresponding/submitting author and that the CJJ may retain your email address for the purpose of communicating with you about the article. You agree to notify CJJ immediately if your details change.
9. Please note that the CMJA retains the copyright of any articles once these are published in the Journal but in the interests of the widest dissemination, the CMJA may authorize publication of the articles in other appropriate publications.

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## OBITUARY - DEREK INGRAM

Whilst Derek Ingram was not directly connected with the judiciary having been a career journalist, he was known across the Commonwealth for his unparalleled knowledge of the organisation and its membership. Although his contribution had diminished over the last few years as his mobility suffered, he still kept a watchful eye on developments in the Commonwealth until the end. He passed away in June 2018 just before his 93<sup>rd</sup> birthday. He was one of the founding fathers in 1978 of our sister organisation, the Commonwealth Journalists Association, but members may not be aware that Derek was the longest serving member of the Editorial Board of the Commonwealth Judicial Journal from 1974-1996. For over 22 years he provided valuable advice and contributed a number of articles on Commonwealth issues.

There have been many public tributes to him from the world of journalism. Richard Bourne, a fellow Commonwealth journalist said of him:

*“He travelled widely in the Commonwealth, and attended 20 Commonwealth summits, always reporting with knowledge and conviction. He founded the Gemini news feature service in 1967, which gave opportunities and world-wide exposure to many journalists round the world, such as Cameron Duodu in Ghana, the young Trevor McDonald in Trinidad, and Lindsey Hilsom, now international editor for Channel Four News, in the United Kingdom. Although London-based it took the anti-apartheid line in the struggle between Mrs Thatcher and the majority of Commonwealth governments.”*

Former Commonwealth Secretary General, Sir Shiridath Ramphal said:

*“A light has gone out of the Commonwealth with Derek Ingram’s passing; but the brightness it cast for over half a century will never be dimmed. It wasn’t only that Derek served the Commonwealth as a journalist with special distinction, it is that he believed in and cared for the Commonwealth with such integrity and passion that he uplifted the Commonwealth as he laboured in its cause.*

*There were times when the Commonwealth needed that measure of understanding and support that only parental care could bring to it; and Derek Ingram brought it. It was caring that sometimes required from him the chastisement of love; and he did not withhold it; but always got the Commonwealth’s betterment. Professionally, he was an icon to a whole generation of working journalists and an inspiration beyond his time. He was a part of all that was good in the Commonwealth he served. We shall miss him; but much of him is already forever.”*

He started his career at the Daily Mail, rising through the ranks to be Deputy Editor. In 1967 founded the Gemini News Feature Service which focussed on developing country issues, especially in a Commonwealth context. Until his mobility was impaired he travelled extensively around the Commonwealth gathering stories and participating in many Commonwealth Heads of Government Meetings and Ministerial Meetings

In 1987 he was a key player in the establishment of the Commonwealth Human Rights Initiative still going strong today. Ten years later he toured the world for the Commonwealth Secretariat to try and re-brand the Commonwealth. The insightful *Review of the Commonwealth Secretariat’s Information Programme*, known as the Ingram Report, which was the fruit of his investigations put forward useful suggestions which are still relevant today.

He was supporter of democracy and good governance in the Commonwealth. As a journalist, he participated in the Joint Colloquium which led to the drafting of the Commonwealth (Latimer House) Guidelines on Parliamentary Supremacy and Judicial Independence and was instrumental in ensuring that a reference was made to freedom of expression in the Guidelines as well as in the Commonwealth (Latimer House) Principles. He was a mentor to many young journalists and other professionals working in the Commonwealth including yours truly. As a young executive in the late 80s and even when he no longer came to Commonwealth meetings, I could always count on Derek to

provide sound and wise advice. The Eminent Nigerian Journalist, Kayode Soyinka, in the obituary in the Cable on 21 June 2018, said of him:

*“He will be remembered as a distinguished Commonwealth writer, journalist and editor, a passionate believer in and fighter for freedom of the press, most especially, using his preferred phrase, the “independence of the journalist”.*

He was above all a man of great integrity. As His Excellency Matthew Neuhaus, Ambassador of Australia to the Netherlands and former Director of the Political Division of the Commonwealth Secretariat observed, *“In these days of fake news, spin and opinion journalism his example is so important. Our collective memory is the poorer for his passing.”*

Dr Karen Brewer  
Secretary General, CMJA

# CMJA'S 50<sup>TH</sup> ANNIVERSARY 2020

The CMJA will be celebrating its 50th Anniversary in 2020.

We are looking for interesting anecdotes from our Membership to celebrate this eventful occasion.

Do you remember participating in any events that were memorable?

In what way?

How has your membership helped you in your career in the judiciary?

Have you any funny /interesting stories to tell about your experiences with the CMJA?

**HAVE YOU ANY IDEAS ABOUT HOW WE SHOULD BE  
CELEBRATING THIS MOMENTOUS EVENT?**

We would love to hear from you.

Please send the information to the Secretary General, CMJA,  
Uganda House, 58-50 Trafalgar Square, London WC2N 5DX

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# MANAGING MODERN CRIMINAL JUSTICE

**The Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand. This article is based on an address delivered at the CMJA Triennial Conference, Brisbane, September 2018. Footnotes have been omitted to comply with house style.**

**Abstract:** *The aim of modern reforms to criminal justice have expanded beyond the more limited aim of ensuring that what is fair and just is done between prosecutors and accused in process that is thought to minimise error in convictions. However, the extent to which criminal justice can be managed to meet goals of public administration needs to be challenged. Courts need to stand apart. They are not properly seen as part of a pipeline. The goals of efficiency and timeliness in the delivery of criminal justice are subsidiary to the end of achieving verdicts that are safe through processes that are open, fair and just. This article focuses on three aspects of the criminal justice system in the context of 'doing justice', namely: use of audio visual technology, measures to incentivise guilty pleas and increased discretion in charging, diversion and disposals.*

**Keywords:** Criminal justice – public administration – efficiency – audio-visual technology – measures to incentivise guilty pleas – discretion in charging, diversion and disposals

## Introduction

In a conference which takes as its theme “becoming stronger together”, it may seem ungracious to start by questioning whether convergence is always a good thing. But it is possible to see in the transformation of the administration of criminal justice in many of the jurisdictions represented at the conference a cautionary tale about global fashion and borrowings. It is a wave that has seen the application to criminal courts of the methods of modern public administration and a repositioning of criminal justice around the interests of the victim. These developments have taken place against rising public anxiety about crime which has fuelled scepticism about the institutions and systems by which criminal justice is delivered. The distinct function performed by courts is obscured and may not be valued in what is seen as an integrated government response to crime – a “pipeline”,

as it is referred to by New Zealand’s Ministry of Justice – in which courts are seen as part only of the overall government response. The purpose is much more ambitious than effective and efficient administration. It impacts on the principles and assumptions of the system of proof of guilt in public demonstration of the rule of law.

It is necessary to say immediately that efficiency and reduction of costs in the delivery of criminal justice is something to be welcomed and modern technology offers opportunities for better administration all of us should be keen to use. We cannot expect to divert more and more resources away from other important social services into courts because of nostalgia for the way things have been or because of inertia and complacency. But, as with any reform, it is important not to throw the baby out with the bathwater. There are important values served by the criminal justice system that can be overlooked or easily eroded, and not only by public servants applying principles of modern public administration. A number of reforms have been judge-led too.

## What are the ends of criminal justice today?

The purpose of the system most of us share is the public and safe determination of culpability in a system that is accusatory (because innocence is presumed). It is built around a detached judge, an independent prosecutor representing the public interest in safe verdicts and right outcomes, and defence testing of the prosecution case.

The rules of practice and procedure we observe were originally developed by judges concerned to ensure, as Lord Devlin once put it, that “what was fair and just was done between prosecution and accused”. Although these processes reflected wider rule of law values, their observance was also thought to minimise error in convictions and equality of treatment. Today, many of the rules of practice and procedure are codified and are kept up to

date by legislation. That means that setting the rules for the administration of criminal justice is increasingly a political responsibility. Since it is undertaken at a time of increasing politicisation of crime, it is not surprising that the rules reflect interests other than ensuring that what is fair and just is done between prosecution and accused. There seems to be diminishing appetite for fair process and its public demonstration.

Much of this has been driven by fear of crime and associated reaction to a system which is seen to be too costly, too time-consuming, too tender of the interests of defendants and too much of a gravy train for lawyers. Indeed anti-lawyer rhetoric has been a striking background to reform in a number of jurisdictions. There has been a significant repositioning of the place of the victim. This is significant reversal of the view acted on in the last 200 years that it was not safe and was too erratic to leave crime to private prosecution. It has implications for the functions of judge and prosecutor and may be loading more on to the criminal justice system than it can bear without more substantial overhaul.

I do not develop this point today, although I think commentators such as Andrew Ashworth are right to point out the profound effect it is having. Instead, I want to talk about a second feature of modern changes, the shifts in management of criminal justice driven by modern models of public administration with their drive to efficiency and cost-effectiveness and measurement of success in timely disposal of cases. With them has come pressure for inter-agency cooperation in recognition that most of the levers which control cost and timeliness in criminal justice are operated by public agencies: police, prosecutors, legal aid, courts administrators among them. So in New Zealand the Ministry of Justice latest annual report talks about the importance of “collaboration” between judges, lawyers, the Ministry of Justice, Police and Corrections. Similar language is seen in publications of the Ministry of Justice in the UK such as the 2012 “*Swift and Sure*” White Paper. It is echoed in explanations of reforms in Australia and other jurisdictions. Maintaining proper boundaries between these different agencies and courts is increasingly difficult. If the courts are not seen as distinct from the whole of government

effort in relation to crime and its causes, the courts become part of the “culture of control” described by Nicola Lacey by which successive governments in a number of jurisdictions have sought to demonstrate that their strategies on crime are effective. If timely disposals are the principal measure of success, the detachment of the judge which has been considered to be the central feature of British criminal justice is under some threat if judges are required to manage cases according to measures of efficiency and cost effectiveness.

The accusatory model of criminal justice in which the prosecution establishes culpability according to law in front of a judge who comes to the case only as a judge is not of course the only safe system of criminal justice. But if we modify its central balances, then we need to compensate with other protections for safe verdicts and right sentences - and they will not be costless.

### Features of modern criminal procedure

The aim of modern reforms to criminal justice have expanded beyond the more limited aim of ensuring that what is fair and just is done between prosecutors and accused in process that is thought to minimise error in convictions.

In the UK, the Criminal Procedure Rules 2010 now explain that dealing with a criminal case “justly” includes not only “dealing with the prosecution and the defence fairly” and “recognising the rights of a defendant”, but also “acquitting the innocent and convicting the guilty”, “dealing with the case efficiently and expeditiously”, “respecting the interests of witnesses, victims and jurors” and dealing with cases in a way which takes into account “the needs of other cases” (Criminal Procedure Rules 2010 (UK), r 1.1). Similar goals appear in reforms elsewhere in the common law world.

Commonly encountered features are:

- push to reduce “court events” and adjournments (in NZ a reform in 2011 aimed to achieve 43,000 fewer court events and a sharp decrease in the number of jury trials);
- the view that trial is system failure and corresponding measures to incentivise

- early guilty pleas
- application of modern case management patterned on the processes adopted for civil cases;
- reduction of the use of juries by wider use of summary trial and adjustment of requirements of jury unanimity in cases tried by a jury;
- reduction in the number of courthouses, enabled in part by a move away from physical appearances in courts;
- greater prosecutorial and in particular police discretion in charging and in diverting prosecutions out of the courts for informal resolution;
- reduction of resources for legal aid and fixed fees on a transaction model, affecting both defence and prosecution and leading to some acknowledged failures such as the “systemic failures” recently the subject of apology by the Crown Prosecution Service in England and Wales which resulted in the discontinuation of 47 rape or sexual offence cases because of lack of disclosure;
- dependence on data and interagency cooperation in its use, with the courts seen as part of a joined-up justice “sector.”

In my remarks today I concentrate on three of these matters: use of audio visual technology, measures to incentivise guilty pleas and increased discretion in charging, diversion and disposals.

### **Avoidance of court appearances**

There is increasing push across jurisdictions towards the reduction of “unnecessary” physical appearances by use of audio-visual technology. In New Zealand, the default position is now that appearances of defendants in custody for all “criminal procedural” matters (defined as those where no evidence is called) must be by AVL unless a judicial officer determines that its use is contrary to the interests of justice. In England and Wales, although such appearances have been enabled by legislation for some time, Criminal Practice Directions amended last year now require courts to exercise their statutory and other powers to conduct hearings by live link or telephone wherever it is “lawful and in the interests of justice to do so” and in accordance with the earlier 2015 recommendation made by the President of the Queen’s Bench

Division. In Victoria, Australia, there is now a presumption that an accused will appear via an AVL for all criminal hearings except contested trials, committal hearings, first appearances (unless the accused consents) and any inquiry into the accused’s fitness to plead. In New South Wales, too, legislation provides that appearances of those in custody must be by AVL except for trials, inquiries into fitness to plead and first appearances.

There is no doubt that there are real benefits in the use of audio visual technology, especially in relation to the evidence of vulnerable witnesses, expert witnesses, and the ability of lawyers and litigants, including prisoners, to participate in hearings in which their attendance is unnecessary. It saves the time and cost of travel and is very helpful for emergencies where the court is at a distance. An early indication from the United Kingdom suggested too that audio visual technology can reduce delay in criminal case progression and reduce failures to appear in court for first hearing. The same study, however, found that guilty pleas were slightly higher (3%) among defendants appearing by AVL and the proportion of defendants with representation lower (54% compared to 68%) when AVL was used. Custody as a sentence outcome was also higher for people appearing by AVL (at 10% compared to 7% for those appearing in a traditional courtroom). In a more recent survey of 300 court users, 58% of respondents thought appearing on video made it more difficult for defendants to understand what was going on and to participate, and a significant number said it was difficult to recognise whether someone who was on video had a disability.

The use of AVL for first appearances where the accused is held in police custody is controversial. In New Zealand the legislation which sets up a presumption of appearances by audio visual means is now being systemised by administrative measures to set up police custody units in centralised locations which is expected to result in most first appearances being by audio visual means.

First appearance in this way is not permitted in a number of jurisdictions and it is difficult to reconcile with deep-seated assumptions (recognised in human rights instruments) that someone arrested must be brought before the

court at the first available opportunity. The reason is explained in the case law as a salutary check on the abuse of power. As was said in one New Zealand case “[i]t prevents the police from keeping those arrested incommunicado and from exerting unreasonable pressure on them in a coercive environment.” The Grand Chamber of the European Court of Human Rights has similarly described the right of those arrested to be brought “physically” before a judge “provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment”. Commentators have reported that assessment of vulnerability or mental disorder is compromised where audio visual technology is used. Often judgements as to whether a person is vulnerable or is in need of immediate medical attention are left to the police. The physical delivery of the person arrested also serves rule of law and constitutional ends. It brings a person detained unmistakably under the authority of the Court.

Again, it can readily be accepted that there are significant benefits in the use of audio visual technology in many situations. But some of the proposals put forward for administrative reasons which may be perfectly sensible if seen in those terms alone need to be questioned against the purpose and values of the criminal justice system. Further down the line are quite ambitious suggestions that where judges and counsel are located is immaterial. Cases may be queued to be dealt with by the first available judicial officer anywhere in the country, with counsel and accused attending by video link wherever they happen to be. We are not quite there yet. But there are straws in the wind in the closure of courthouses in a number of jurisdictions.

### Measures to incentivise guilty plea

As we know, only a tiny proportion of cases go to trial. In all systems it is recognised that there are considerable savings in time and cost if guilty pleas are entered at an early stage. It is understandable, then, that early pleas of guilty are encouraged. (Indeed, one writer said as early as 1976 that “the whole system of criminal justice would collapse administratively if defendants exercised their right to plead not guilty in any significantly greater numbers”). In that context references in prosecution

guidelines to the facilitation of “principled plea discussions and arrangements” make sense. So too do the greater discounts available when guilty pleas are entered early. But care is needed because a guilty plea waives the fair trial rights against self-incrimination and to determination of guilt and rush to plea in particular may result in real injustice.

Judges have been drawn into the promotion of early guilty pleas. In New Zealand we now have an elaborate system for sentence indications by judges, established by legislation and available before plea. The judge can determine whether or not to give a sentence indication and, if so, the type of indication to be given. Increasingly, judges have been prepared to indicate the sentence considered appropriate before the defendant pleads, rather than giving a range or indication that it will be custodial or non-custodial. There is general acknowledgement that the willingness to give such indications has led to an increase in guilty pleas. It has to be acknowledged that in some courts and among some judges the preparedness to give sentence indications was evident before the legislation permitted it and was seen as an effective tool of case management. Other jurisdictions have been more cautious about sentence indications, permitting indications of maximums only or whether a custodial sentence is in prospect. So, in England and Wales, under appellate guidance and practice directions, judges in the Crown Court may indicate a maximum sentence to be imposed if a guilty plea is made at the stage of the indication. In Victoria, judges may indicate whether a custodial or non-custodial sentence would be imposed.

Obtaining pleas through sentence indications is now widely seen as an important end of case management. It is difficult to get a handle on whether judges are consciously or unconsciously attempting to obtain pleas by offering discounts that provide incentives. I have been surprised to hear senior judges speak of success in obtaining pleas on sentence indications. It is troubling to hear senior practitioners say that at pre-trial review hearings it is not unknown for judges to interrogate defendants directly, even defendants who are represented, about the defence or the conduct of the case. Some judges are said to give sentence indications without invitation in

apparent effort to move a case to resolution. In a recent decision the New Zealand Court of Appeal has allowed an appeal against conviction where the defendant said she was bullied into entering a plea by the judge in this way. It is also worrying to hear reports that counsel both for the defence and for the Crown sometimes feel under pressure from the judge when seeking necessary adjournments or when seeking further disclosure on the basis that there is little point because the defendant knows what he has done. It is difficult to know whether these reports give an accurate picture of what is happening. They are, however, commonly heard. It is striking that many of the complaints about overbearing behaviour from judges by practitioners arises in the context of case management and plea indications in criminal cases. If these indicate a shift in culture in which judges assume responsibility for managing cases to achieve prompt guilty pleas, they represent a move away from the idea of the detached judge.

Some commentators see the modern criminal justice system as characterised by the “mass production of guilty pleas” and a culture that measures the rate and timeliness of disposals as the principal marker of success. It is not right to treat trial as system failure. Criminal trial represents public determination of guilt and demonstration of adherence to the rule of law. It is one of the hallmarks of a civil society under law.

But that is not the only reason we should be concerned. We should not overlook that guilty pleas may be false. They may be entered into because of a calculation of risk or simply to put an end to uncertainty, rather than because a guilty plea is right. Pleas are often entered on inadequate information.

Guilty pleas which are known to be incorrect may arise more frequently in relatively trivial cases where the costs and vexation of pleading not guilty make it seem unworthwhile. We should not be complacent about admissions of guilt in those circumstances. But there is also reason to believe that the inducements to get matters resolved at a cost that is less than may be risked by post-trial sentence apply also to more serious offending. In a case in the United States Supreme Court, the defendant pleaded guilty to murder despite

maintaining his innocence because he did not want to be in jeopardy of the death penalty. Similar calculations are being made whenever a defendant is urged to plead to a lesser charge rather than risk conviction on a sentence bearing a heavier penalty.

There are very high stakes indeed when alternatives available according to whether a plea is entered as soon as possible or at a late stage are apart by a number of years’ imprisonment or where a minimum non-parole period hangs in the balance. These are powerful incentives to take the discount in very serious cases. They may be exacerbated by the absence of effective legal advice, so that the defendant may not appreciate that he is not guilty in law of the offence charged, particularly if he feels some responsibility for what has happened.

### Discretion in charging and out-of-court resolution

Decisions as to plea only arise if there is a criminal charge in the first place. Increasingly, however, criminal cases are being kept out of court altogether. According to a report in 2015, 40 per cent of police apprehensions in New Zealand now are dealt with by alternative processes which do not lead to prosecution. They include “diversion” and formal police warnings. Neither are statutory processes (although there is some recognition of diversion in legislation). As a result, much offending has moved out of the supervision of the courts altogether.

A recent report by the Independent Police Conduct Authority in New Zealand has found inconsistency in use of pre-charge warnings and disparity in the treatment of Maori and non-Maori. The Authority found varying practices in relation to consultation with victims and the extent to which previous criminal history was disqualifying. It found there was a lack of integration with the other alternative actions of informal warnings and diversion. Informal warnings were, perversely, often given in respect of offending too serious to receive a pre-charge warning. Pre-charge warnings were sometimes given to those who were not eligible for diversion under the guidelines. The Independent Police Conduct Authority found inadequate recording and

inadequate observance of guidelines as to the seriousness of offences.

Similar lack of consistency has been identified in the comparable out of court police warning system in England and Wales. Reports in 2011 and 2015 have found non-compliance with guidelines and significant regional variations in application. As is the case in New Zealand, the recording of warnings was unsatisfactory and meant that previous warnings were sometimes overlooked. There was a lack of clarity about the circumstances in which alternative methods of dealing with offenders were used instead of out of court warnings.

Police warnings and police diversion are not the only way in which cases are being resolved outside the courts. In England and Wales and in New Zealand some offenders are dealt with by neighbourhood or community justice panels. In New Zealand, this is under a pilot programme in one city (Christchurch). There is no statutory underpinning for the process. Removal at the option of the police to community or neighbourhood panels is used in the case of offending where warnings are thought not to be a sufficient response. The cases are said to be at “the upper-level of offences that can be resolved without charge and prosecution”. The review of the pilot indicates that some relatively serious offending has been referred, including a small number of family violence cases as well as other offending generally thought to require charge before restorative justice is attempted (such as burglary, assault on a child and common and domestic assault). It is not clear how decisions to refer to community panels have been taken in such cases. The panel pilot scheme is reported to have been successful. Only about 20 per cent of those referred are returned to be dealt with through the courts. There are plans to expand panels in partnership with local iwi (tribes) in particular areas. And other pilots are being undertaken for therapeutic courts and for cases of sexual violence, if the victim agrees.

There are certainly promising aspects to these schemes. I do not underestimate the extent of the problems and the need to adopt better ways of dealing with them, but there are risks in such systems to the principle of public justice and a risk that the door is opened to unequal application of the criminal law in cases of

serious offending, according to the attitude of the victim. What is easily overlooked by defendants is that pre-charge warnings, and the resolution of cases through community justice panels have consequences for those who are dealt with under them.

Offending must be admitted. Although the actual offence cannot be prosecuted once there is resolution, the admission forms part of the police record and is maintained as part of the person’s “criminal history”. The person receiving a pre-charge warning is required to sign a statement acknowledging that “a record of this warning will be held by Police and may be used to determine your eligibility for any subsequent warnings, and may also be presented to the court during any future court proceedings”. The information obtained through these processes, including the acknowledgement of guilt, is also information which may be shared by the police with other agencies and can be used in the police vetting increasingly resorted to by public and private bodies. The acknowledgement of guilt is also evidence that may be led as propensity evidence in respect of subsequent offending. These are therefore significant public law powers which potentially provide opportunities for intrusive social control of the individuals affected. There is a risk of over-criminalisation if people are incentivised into acquiescing in alternative resolution because it seems comparatively costless at the time.

We should be very cautious about going down a path which relies heavily on law enforcement agencies to decide the laws they enforce and the manner of enforcement. Making substantive criminal responsibility depend on police or complainant procedural choice is a fundamental change in the direction taken by criminal justice in the last 200 years. It is also a fundamental departure from equality before the law if criminal justice outcomes depend on access to programmes which are available to some only, without any rational basis for distinction.

William Stuntz, in his sobering book *The Collapse of American Criminal Justice*, referred to criminal justice in the United States as a “disorderly legal order, and a discriminatory one” where justice is dispensed not according to law but according to official discretion. He raises concerns about the legitimacy of such a system and points to scholarship that suggests

that perceptions of illegitimacy themselves raise crime rates and exacerbate the difficulty of its control. He suggests closer attention to the fundamental value of equality before the law and more public determination of guilt, including through trial by jury. He expresses concerns about “assembly line adjudication” (in which “quick and casual” investigation and inadequate representation leads to “equally quick and casual plea bargain between lawyers”). Our systems may not be in comparable crisis. But it is deeply worrying if the early reports on the new system of police warnings are showing indications in England and Wales and New Zealand of unequal

treatment and discrimination. The criminal justice system cannot afford such taint.

### **Conclusion**

The extent to which criminal justice can be managed to meet goals of public administration and by the methods of public administration needs to be challenged. Courts need to stand apart. They are not properly seen as part of a pipeline. The goals of efficiency and timeliness in the delivery of criminal justice are subsidiary to the end of achieving verdicts that are safe through processes that are open, fair and just.

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# JUDICIAL ACCOUNTABILITY IN THE 21ST CENTURY

**Lord Bonomy, former Senator of the College of Justice and judge of the Supreme Courts of Scotland. This article is based on a paper presented at the CMJA Conference, Dar-es-Salaam, September 2017.**

**Abstract:** *This article focuses on the role of judges as managers of cases. The last 25 years have seen the steady development of a more proactive role for judges in managing the progress and the conduct of court proceedings in domestic jurisdictions. And the trend is towards expansion of the management role with judges taking greater responsibility for adapting the judicial system to the demands of the age in which we live, in order to satisfy public expectations. However, the international criminal justice system is lagging behind in this area. In this context, the author address what he considers to be unsatisfactory aspects of the selection process for international judges. He focuses on the impact that the inadequacy of the selection process has on the quality and hence the effectiveness, accountability and inclusivity of the international judiciary and in turn on the effectiveness of the international criminal justice system.*

**Keywords:** Case management – judicial selection committee – international criminal justice system – inadequacy of selection process – delay – effectiveness

## Introduction

Traditionally judges have not been leaders – certainly in the context of the conduct of court proceedings. Their job was to react to the submissions presented. Counsel set the agenda. In Scotland the judge's role was likened to that of a referee at a boxing match in these words of the Lord Justice Clerk in 1962 when he said:

“It is an essential feature of the Judge's function to see that the litigation is carried on fairly between the parties. Judges sometimes flatter themselves by thinking that their function is the ascertainment of truth. This is so only in a very limited sense. Our system for administering justice in civil affairs proceeds on the footing that each side, working at arm's length, selects its own evidence. Each side's selection of its own evidence may, for various reasons, be partial in every sense of the term.

A litigation is in essence a trial of skill between opposing parties conducted under recognised rules, and the prize is the Judge's decision. We have rejected inquisitorial methods and prefer to regard our judges as entirely independent. Like at boxing contests, they see that the rules are kept and count the points.”

Times have changed. In domestic jurisdictions judges have assumed a role as managers of cases. Although management was not traditionally a skill that came naturally to lawyers, judges readily demonstrated an enthusiasm to learn, and acclimatised quickly. So it now is commonplace for there to be early procedural hearings at which the judge sets the time-table for the case and makes orders regulating aspects of the conduct of the case. Other forms of case management have evolved, such as that in Scotland for reparation actions where a time-table setting a trial date and working back through all earlier stages of procedure is automatically generated upon the first calling of the case, and judicial intervention occurs only as and when a party seeks to depart from that time-table. The core point is that the last 25 years have seen the steady development of a more proactive role for judges in managing the progress and the conduct of court proceedings. And the trend is towards expansion of the management role with judges taking greater responsibility for adapting the judicial system to the demands of the age in which we live, in order to satisfy public expectations. As Lord Woolf, when Lord Chief Justice of England and Wales, said, our judicial independence carries with it responsibilities. Judges are increasingly viewed by the public as the ones who are accountable for the quality and success of our judicial systems. By and large I think it can be said that the judiciary are succeeding in meeting that challenge.

We are already, and shall continue to be, subject to ever-increasing public scrutiny, and have to react accordingly. Even in the 20 years since I was appointed to the Bench there have been a number of fairly fundamental changes, some instigated by politicians and others by

judges themselves, which have modernised the judiciary and made us appear less remote and more in touch with current daily life and culture. Perhaps number one is the development of programmes of judicial training, previously thought unnecessary, and now not only keeping judges fully abreast of developments in legislation and the law in general, but also leading to better understanding of, and a better response to, the needs of the huge variety of people whose interaction with our courts is inhibited by physical, cultural or psychological impediments. Other notable developments have been the introduction of independent judicial appointment commissions, a retiral age, the promotion of cultural, age and gender diversity, the expansion of the ambit of human rights legislation, and ultimately the transfer of significant control of their budget and management to the judges themselves, leading to the development of complaints and disciplinary procedures for judicial misconduct to which the public have access. All of this has led directly or indirectly to far greater transparency in the working of judicial systems. A good example of the effect of an accumulation of modernising measures can be seen in the transformation of the fairly remote Judicial Committee of the House of Lords into the user-friendly United Kingdom Supreme Court of which much has been written and broadcast.

### **The situation in international criminal tribunals and courts - introduction**

It is axiomatic that the principal ingredient for a high-quality judicial system is able and talented judges. They are the core element of the judicial system. As the result of the developments to which I have just referred, it is now widely accepted that the selection of judges with the characteristics and qualities that ensure that a judicial system is both fair and effective is through an open, transparent selection process in which every candidate with the necessary qualifications has an equally fair chance of being appointed on merit. To enable that to happen may require adjustment or tweaking of the system to reflect historical anomalies which have impeded the progress of ethnic minorities and women, with a view to ensuring an inclusive judiciary properly reflecting racial, gender and, possibly, age diversity. Although this may largely result in

the appointment of the same judges as were in the past appointed by systems of patronage, it is to the public more acceptable. Judicial appointment commissions or boards, which may even include a majority of lay persons, are now a common feature of domestic judicial systems. However that is not the case in the international criminal justice system. I want to address what I consider to be unsatisfactory aspects of the selection process for international judges. I also want to look at the impact the inadequacy of the selection process has on the quality and hence the effectiveness, accountability and inclusivity of the international judiciary and in turn on the effectiveness of the international criminal justice system. After all, judicial appointment is the method of judicial regulation par excellence. This is an issue that resonates particularly in this country where Arusha was home to the International Criminal Tribunal for Rwanda (ICTR), and is now home to the Mechanism for International Criminal Tribunals (MICT), and where the African Court on Human and People's Rights and the East African Court of Justice sit. It is indeed a privilege to be invited to address this subject at a gathering of this distinguished Association in a country which contributes so much to the cause of international justice.

### **Delay**

In academic articles, in court and tribunal judgments, in human rights instruments and in the statutes establishing international criminal courts and tribunals, there is regular reference to "fair and expeditious" trials or the right to "trial without undue delay". It is accepted in principle that expedition is compatible with fairness. Expedition is regarded as desirable, as long as it is not achieved at the expense of fairness.

I think I can say with confidence that there is broad agreement that international criminal trials take far too long. And by that I mean too long from the point at which it is decided there is sufficient evidence and the accused are indicted. There is no doubt that the absence of a powerful international police force does slow down investigations. So I confine my remarks to the situation where a case is live before an international court or tribunal. The problem is not confined to trials; it is widely accepted

that appeal proceedings also generally take far too long.

The trial of Jadrenko Prlic and five other Bosnian Croats, all of whom held senior posts in the armed forces, police or prison service of the Croatian Community in Bosnia-Herzegovina, began on 26 April 2006. The Trial Chamber sat on 465 days. Closing arguments in the trial were completed on 2 March 2011. The judgment was pronounced over two years later on 29 May 2013. All parties filed their appeal briefs against the judgment by 12 January 2015. The judgment in that appeal was, at the time of writing, still awaited, but was expected to be rendered in November 2017. Closure of the ICTY has been postponed to accommodate this. The whole process will have taken eleven and a half years. Not only that, but the events being addressed occurred in the first half of the 1990s. That must change. One would routinely expect 465 court days to be comfortably accommodated in a period of 3 years. Indeed the prosecution case was presented in 21 months. There are many reasons why thereafter the trial took so long. However, this is simply one of many cases which each lasted for periods of years. Members of the public and some lawyers find it difficult to understand why that should be so.

It is, I hope, not controversial to suggest that international judges are responsible for ensuring that proceedings are conducted fairly and expeditiously because they are accountable for ensuring the provision of a competent and effective judicial system. I note that “effective” is the lead word in the title of this conference. Not only is that statement a reflection of what I see as an important aspect of the principle of judicial accountability, that also reflects the reality at international courts and tribunals that the judges are personally responsible for delivering that service because they have control over all proceedings from the point of indictment. Judicial independence and the delivery of efficient justice services were recognised from the outset of discussions on the Latimer House Principles as entirely compatible aims. Although the initial choice of the number and form of the charges in an indictment lies with the prosecutor, judges have rule-making powers under which they can allocate to themselves greater control

over these and other matters. The applicable statutory provisions and rules are in that sense consistent with developments in domestic judicial systems. However, the factual reality does not match the legal norm that trials should be not only fair but also expeditious.

The recent commemorations of the 800<sup>th</sup> anniversary of Magna Carta highlighted a number of its classic features, none more so than Clause 40 – “To no one will we sell, to no one will we refuse or delay, right or justice” – today reflected in the aphorism “justice delayed is justice denied”. A modern reflection of the importance of the principle can be found in a speech made by United States Chief Justice Warren E Burger to a meeting of the American Bar Association in 1970, when he said:

“A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; that people come to believe the law – in the larger sense – cannot fulfil its primary function to protect them and their families in their homes, at their work, and on the public streets.”

All three of those things should concern those of us who have an interest in the effectiveness of the proceedings of our international criminal institutions. In his foreword to the recent work of Devlin and Dodek on “Regulating Judges” Richard Goldstone, the first Prosecutor of the ICTY, made the same point by saying that “the judiciary has to rely for its efficacy upon its fulfilling the public trust placed in it”.

There is a danger that failure to tackle the problems posed by the length of the proceedings and the delay in producing judgments will be seen as a failure in judicial accountability. Judges have to be sensitive to the pace of change in our 21<sup>st</sup> century society, and the level of public expectation that contentious business should be resolved fairly quickly. It is, in my respectful opinion, the responsibility of judges constantly to be alert to devising ways of

expediting proceedings without compromising them. The public see that as a judicial responsibility because they perceive judges to be in a position of authority over court proceedings independent of outside control. They are accountable for the quality of their administration of justice. They should be at the forefront of a debate about the development of a judicial system that is fit for the purpose of ensuring that international criminal trials are conducted fairly and expeditiously. And there are, I suggest, measures that could have a significant, immediate impact on the efficiency of international criminal proceedings.

### Qualifications of Judges

The first relates to the qualifications and qualities of the judges. Judges in tribunals for which the United Nations (UN) is responsible, such as the ICTY and now the MICT, are mostly elected by the General Assembly. Judges of the International Criminal Court (ICC) are elected by the States Parties to the Rome Treaty. In the case of both, every member state has a vote. Of course there are rules as to eligibility requiring candidates for the UN tribunals to be persons of high moral character, impartiality and integrity qualified to sit as members of the highest courts of their respective countries and to have certain relevant experience. However, that means that there is a very large pool of potential candidates, including many whose careers have been spent in non-judicial roles, such as academia and diplomacy. Article 36 of the Rome Statute provides that the judges of the ICC shall be drawn from two specified groups: the larger group consists of those with established competence in criminal law and procedure, and having the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings, and the smaller one of persons with established competence in relevant areas of public international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the court

The division is effectively between criminal law professionals on the one hand and international law academics, former civil servants and

diplomats on the other. At the ICTY there was no specific rule, but in practice the division was generally 50/50 between the same groups. The result has been that the involvement of academics and ex-diplomats in the Trial and Appeals Chambers of international criminal judicial institutions has been extensive. The international judiciary should not be viewed as a parking place for retired diplomats and civil servants or simply an aspect of the continuing study and lecturing of even the most distinguished academics.

It is not easy to identify what particular expertise it is thought that former diplomats bring to the judicial process in international criminal cases, in contrast to candidates from an academic background whose knowledge of the subject can play a role in the development of international criminal law. However, overall the balance, which resulted at times at the ICTY in fewer than 50% of the permanent judges being professional judges, is wrong. Although there is and has been scope for the academic development of substantive international criminal law, the bulk of the decisions taken by the judges relate to procedure, the admissibility of evidence and the determination of guilt based on recognised principles and rules. These are the daily diet of the professional judge. And as I hope I have already demonstrated today, at the heart of the effective conduct of domestic court proceedings today lies judicial case management, which varies according to the nature of the case and the personnel involved, and which is dependent for its success on the judicial management skills of the experienced professional judge.

### Selection of Judges

Because the nomination is for the member state, it is to a considerable extent a matter of chance just what proportion of candidates are professional judges. Which are elected is also largely a matter of chance, since voting patterns suggest that the state of origin of the candidate may be an important factor in determining the votes that will be secured. To a judicial mind that system is basically unsound. I am not alone among judges in thinking that to be the case. That has tended to be confirmed for some by their experience of the “electioneering” or “canvassing” in which states’ candidates are expected to engage. The

electorate for judges of UN Tribunals, who are the permanent representatives of member states to the UN, wish to see the candidate, but have on occasion been known to express far more interest in issues of common concern to their state and that of the candidate, even to the point of endeavouring to horse-trade support for one cause in exchange for supporting the candidate for judicial office. To be elected, a candidate must secure 50% plus one of the voting membership of the General Assembly of the UN.

I recognise that this is a democratic process which accords respect to the equal standing of all states which are members of the UN or are parties to the Rome Treaty. However you only need to describe the system to realise that it must be possible to devise a better one. Having said that, although a better scheme can be envisaged, the democratic recognition of the equality of all states and their inevitable involvement at some stage in the voting process means that not all of the unsatisfactory features of the current system can be eliminated. It is encouraging to note that in 2013 an Advisory Committee on Nomination of Judges to the ICC was formed with a mandate to facilitate that the highest qualified candidates are appointed as ICC judges, ensuring that they meet the criteria set out in the Rome Statute. Promising though that development is, in spite of being described by one commentator as “a timid affair indeed compared with the procedure in force for appointments to the European Court of Human Rights”, it is too early to judge its success.

An obvious improvement would be the establishment of a truly independent appointments commission comprising five or so members. Inevitably membership of such a commission could be a coveted post, and the unsatisfactory features of diplomatic voting might simply be moved to that election process. On the other hand, qualification to be appointed to the commission could be prescribed in a way that would ensure the election of those best-suited to the task. A group of that size would be well-placed to study the qualifications of the candidates, to carry out detailed interviews, to have regard to the need for the right blend of experience and qualifications in those appointed, and,

if appropriate, to try to secure a gender and regional representation balance. For all that I spent an intensive week of electioneering in New York, little attempt was made to explore with me my judicial experience and judicial and legal qualifications for the job, surely the most important factor.

It is my firm view that there just is no substitute for appointment of professional judges, used to dealing with the most serious of cases and all the pressures that go with such work, in whom impartiality and freedom from any form of influence (political or otherwise) has been demonstrated repeatedly and can be relied upon implicitly, to conduct international trials which are among the most demanding of cases.

### The Winds of Change

It is the responsibility of judges in any justice system to propose and to encourage improvements in the system based on their experience of that system in practice. To fail to do so risks a charge of complacency which is antithetic to proper judicial accountability. It is a fairly obvious feature of procedure at the ICTY that the adversarial system followed there was unsuited to the proceedings for a number of reasons, including the fact that it was so unfamiliar to people from the former Yugoslavia present there as accused, witnesses or public observers, and also because the volume of material involved was such that presentation of all evidence *viva voce* in court was unrealistic. As experience of the workings of the various tribunals increased, the advantages to be gained by introducing more of the practices followed in civil law jurisdictions were appreciated. The general admissibility of hearsay evidence and the widespread use of written statements in lieu of oral evidence are good examples of practices from civil law systems by which the procedures of international tribunals were enhanced. Unfortunately the potential for expediting proceedings presented by some of the changes has not been realised. On two occasions I chaired a Committee for Speeding up Trials at the ICTY, which on each occasion produced a number of recommendations, but these were no more than tinkering at the margins. To date there has been no determined, systematic attempt to try to devise a set of rules that incorporates the best features of the different

systems to be found around the world, as well as devising new, imaginative procedures for obtaining, securing and presenting the evidence of witnesses. I have suggested before, and suggest again, that there is enormous scope for a major academic project aimed at meeting that challenge. There is a danger that failure to address the delay in proceedings by means such as that will bring those proceedings and the judges associated with them into disrepute. That would be a failure in judicial accountability. It would be a failure to respond to the recognised principle that justice ought to be delivered both fairly and expeditiously. It would also mirror what is happening in domestic jurisdictions where new, speedier and better ways of conducting proceedings are being explored.

It is significant and encouraging that there are now signs of increasing dissatisfaction among judges in common law domestic jurisdictions with aspects of the adversarial system as normally applied there. In a speech in 2013 at a conference on the Future of Criminal Law and Procedure in Scotland the now Lord President questioned the emphasis on oral evidence in court. He highlighted social and technological advances since the rules of adversarial procedure were first devised and posed a number of searching questions. In particular, he asked this:

“However, one question which is worth posing by way of introduction to the substantive content of this paper is this:

which is more likely to be true:

- a record of an event as caught on camera;
- a video recorded statement made by a witness in the hours immediately following the event;
- or the testimony of a witness at a trial months and perhaps years later?

The answer to that, at least for the lawyer, may be ‘well, it depends’, and no doubt it does. Nevertheless, is it not worth considering why the Scottish courts afford so much precedence, if not quite exclusivity, in terms of value, to the testimony of a witness at a trial in the face of what might be the obvious truth as recorded digitally or in accounts given by the witnesses at the time of the incident under scrutiny?”

He went on to propose the revocation of rules that exclude evidence, such as the hearsay rule, and the adoption of an approach to evidence that is consistent with that followed in civil law systems rather than common law systems. He advocated concentration on the weight and significance of evidence presented rather than on technical rules of admissibility. And he suggested that the trial would become the stage at which all information relevant to the case gathered in the course of the investigation is presented to the judges who have to sift through it, decide which, if any, witnesses should be examined orally, and make their decisions.

This realisation that change in the application of the adversarial system of proceedings is necessary has not been confined to Scotland. Structured case management and target time limits are now a feature of complex criminal cases in the legal system of England Wales. These are but small examples. Change along these lines in domestic common law systems is seen as essential to ensure that they evolve in a way that reflects the conditions of modern life and improves the quality of justice delivered in the 21<sup>st</sup> Century.

In the context of international proceedings I have heard the suggestion mooted that investigations might be carried out by an investigative judge accompanied by a prosecutor equipped with a video camera, rather like a documentary film crew, who would be tasked with visiting the conflict area and recording the evidence of witnesses. Therein lies the germ of an idea for expediting the presentation of crime-scene evidence, without restricting the oral presentation and challenge of evidence relating to individual criminal responsibility.

These developments are clear recognition of the obligation of those to whom the administration of justice is entrusted to keep their justice system under constant review to ensure that it develops to meet the expectations of modern society; they are accountable to the public of their jurisdiction for that.

Researching ways of improving the justice system is as clear an example of positive judicial accountability as I can identify. There are many others – eg dedication to proactive

judicial case management, 100% commitment to the job in hand, aiming to engage the co-operation of the parties, displaying the core qualities of a good judge such as even temper, open mindedness, even handedness, impartiality, sense of fairness and justice, sound judgment and many more.

My task today is complete. I urge you to initiate in your jurisdictions a debate aimed at rendering our international criminal proceedings more effective by tightening the qualification requirements for judges, improving the selection process and revising and modernising the procedures adopted.

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# WHAT IS THE NEED FOR JUDICIAL EDUCATION?

**John Carey, Executive Director, Papua New Guinea Centre for Judicial Excellence, Port Moresby, Papua New Guinea.**

**Abstract:** *The view today of the Judiciary globally at least anecdotally is that there is a need for Judicial Education. In this paper, we examine what is this need and its implication for judicial development and justice. Many are intrigued by the concept of judicial education. Academics certainly have not categorized it as a special subset in education. It is generally lumped into the conceptual view of adult education. This in itself creates a wide scope for which the dynamic of pedagogy has relevance and the extent to which it can be expanded to meet the needs of the adult learner who is a Judicial Officer has not been fully examined. Having an understanding of the need for judicial education provides an opportunity for judicial officers and academics alike to gain greater appreciation for the rigours associated with practice of judging. It is indeed a noble job to adjudicate matters and provide access to justice through the position of being a judicial officer.*

**Keywords:** Judicial education – curriculum – subset of adult education – reflective learning – addressing ‘arrogance’

## What is Judicial Education?

According to Wallace (2003) judicial education is training for judges in the areas of ‘substantive law, skills, procedures and attitudes’. Judicial Education in the United States and globally was a new concept (Wallace, 2000, p.849). It was developed to promote competence among judges (Armytage, 2015). Education is seen as a significant right (Ryan, 2004). Yet historically, in the context of Judicial Education this was not considered a necessity. Martin (2011) states that judicial education play a key role in supporting the rule of law.

Not much attention is paid to judges’ role on a scholarly level in judicial education and training (Goldbach, 2016). Perhaps judicial education would have stopped the first judge of the Supreme Court of Australia (John Jeffcott) from killing an individual in a duel (Kirby, 2001, p.1). The Judiciary should ensure that it is prepared to handle the rigours

of the administration of justice (Smellie, 2003).

Judicial education involves a lot of critical reflection of its participants who are primarily Judges and Magistrates. In a wider scope involving the entire Judiciary and its support team, judicial education engages Judges, Magistrates, Registrars, Court Reporters, Bailiffs, Information Technology Employees and anyone working directly for the Judiciary. The ‘tension between judicial, scientific and democratic decisions’ contribute to the development ‘educational governance’ (Superfine, 2009. p.1). Judicial education engages these realities to promote improved competency of the judiciary. The Judiciary continues to grapple with determining what the right education for Judges and Magistrates is as there is no standardised curriculum throughout the Commonwealth.

Scholars and judicial educators may argue that the judiciary requires judicial education because court user surveys produce results which indicate gaps. However, the independence of the Judiciary is such that there should not be external factors infringing or impacting in how the courts function. Hence, the reluctance a century ago for Judges to embrace judicial education.

According to Mersel and Weinshall-Margel (2011), having empirical data to support the productivity of the judiciary is important. In developing judicial education and training programs it is highly probable that having this type of information will greatly assist. The Common law has been able to keep the good while getting rid of the ‘outdated, the irrelevant and the erroneous’ (Kirby, 2000, p.97). As the common law has evolved over the centuries, so too has the view of the judiciary on judicial education.

Rado (2015) suggests that it is very difficult to find a universal meaning of human rights. Similarly, there is no universally accepted definition of judicial education. This indicates that the scope for the development of judicial education is open to interpretation and truly

reflects a contextual approach throughout the Commonwealth. Judicial education need not be identical or similar by jurisdiction (Wallace, 2003, p. 355). However, each country should endeavour to put in place some form of judicial education and training to ensure that their judiciary remains relevant and continues to enjoy the confidence of the public. It may be argued that whether the judiciary has the support of the public it has a job to do. However, the extent to which the public has faith that the judiciary is able to deliver justice will inform on the access to justice indicator which can be qualitatively and quantitatively measured without infringing on the independence of the judiciary.

On a practical basis judicial education involves a curriculum which is applied in a jurisdiction to assist judicial officers in their ability to be better at what they do. If it is not achieving this basic objective then the question as to why engage in judicial education becomes a legitimate concern. It is necessary for those engaged in judicial education to have clear plan of action as to what the objective of a judicial education and training program intends to achieve. While this may appear elementary, throughout the Commonwealth there is tremendous interest in judicial education and the rate at which it has become a mantra in judiciaries is fascinating.

Judiciaries should not be embracing judicial education because it appears to be the right thing to do or most judiciaries are pursuing it. It has to be tailor made for the specific judiciary and applicable at a local level. Failure to do this will result in a judicial education and training program which may have good form with little substance.

According to Simon and Poritsky (1987) judges are capable of learning 'trial supervision skills' (p. 433) and it is the obligation of the judiciary to provide judicial education to judges of all experience levels. Judicial education can fill gaps as well as operate as refresher training to veteran judicial officers.

### **Judicial Education as Sub-set of Adult Education**

According to Palis and Quiros (2014) adults have a need to understand why they are

pursuing a course of study before engaging in such a program. Judges do courses and workshops because they believe there is a need to do so. Judicial education functions as a continuing professional development subject which addresses the needs of adults who are Judges and Magistrates. Adult education is a 'scientific field' (Rubenson and Elfert, 2015, p.133). It is one of the most discussed subjects in the '21<sup>st</sup> century' (Mussa, 2015, p.54). Most of the scholars at the forefront of 'academic learning facilitation' were trained in the west (p.60). In this regard, there is opportunity for contextualising judicial education and training throughout the Commonwealth as the peoples from the countries in this group are not homogenous.

The change of position of the need for judicial education in the judiciary has been remarkable (Partington,1994, p.10). According to Buhai (2011), academia has suggested that persons aspiring to be judges should be trained before they are appointed, however, there has not been much response from the judiciary in this regard. 'Experiential learning techniques' have been applied for a while (Sankoff, 2017, p.210). Using these type of techniques in delivering judicial education and training are beneficial for improving the adult education experience of judges and magistrates.

Adult learners have been described as self-directed individuals. As such, judicial officers are capable of engaging in self-directed learning to improve their knowledge, skills or social awareness. Thomas (2006) suggests that in order to widen the types of persons appointed to the judiciary (i.e. other than practicing lawyers), the demand for judicial education and training programs will continue.

As a continuing professional development category, judicial education is a subset of adult education. However, its level of sophistication and intricate mandate of its audience is such that it is unique. This author projects that within the next twenty years, academia will embrace judicial education as an academic discipline which requires specialized training to hold oneself out to be a judicial educator.

It is remarkable that in the 21<sup>st</sup> century and after over 50 years of development,

judicial education still has a considerable developmental path for academic acceptance in the Commonwealth.

### Reflective Learning

Critical thinking enables the individual to recognize what informs on the belief system (Brookfield, 1987). Judicial education facilitates critical thinking. It is this ability to critically analyse and reflect which contributes to the success of a judicial education program. According to Brookfield (1987), reflective learning is related to critical thinking. Judges and Magistrates benefit significantly in education and training programs through reflective learning. This is why in workshops having a recap or reflective learning component on a daily basis is helpful in positively contributing to the learning experience of the learner.

The Reflective learning process is an active learning concept that is not abstract or a theoretical educational exercise. Critical thinkers challenge the status quo and seek to gain more knowledge and understanding. In the realm of judicial education, a judiciary that is increasing in knowledge, skills and contextual awareness will be a more confident and successful judiciary.

Reflection plays a significant role in fostering pioneering thinking (Leering, 2017). Learning on the job by observation is not an option for 'many judges' (Dawson, 2015, p. 177). Using tools such as power point presentations, use of film, group discussions, lectures, literature and movie making are methods that are currently used in judicial education and training.

With the advances in technology the use of online learning allows dissemination of information instantly and judicial education and training programs can harness this tool. Online learning fosters active learning and promotes reflective learning and critical thinking. Judicial officers have a commitment to adjudicating matters in compliance with procedural fairness and according to the rule of law. This calls for reflective thinking and therefore the mindset of a judicial officer readily avails the concepts that would engage in the use of judicial education through a reflective thought process approach.

### Developing Judicial Officers

A Judicial officer is not an individual who was born with such a position or title. As such, people who function as Judicial Officers develop into such a role over time. Buhai (2011) argues that judicial education should be a part of the law degree programs in Universities. If it is anticipated that judicial education should be more readily accepted in academia then it makes sense to start with the foundation of the development of judicial officers which is in their training to become lawyers.

According to Brittain and Chandler (2009) diversity benefits the judiciary. Judicial education provides an avenue to expose judicial officers to the concepts of diversity and its importance in judicial making. Moreover, it positions the judiciary to facilitate mentoring which is important as judicial officers are appointed to the bench. 'Mentors are important for all judicial candidates' (p.12). Oberoi (2011) states that the judiciary as an 'institution' is different than any other profession (p.189).

Chin and Alcorn (2013) in an interview with Baroness Hale reproduces her comments that 'it is important that judges are recruited from people who have done stuff other than judging'. Hence, through judicial education a judicial officer who lacks experience as a litigator can become an exceptional performer on the bench. 'I do not even think it is necessary to be a top litigator to become a top judge' (p.223). The selection to the bench should reflect a cross section of society.

Judicial Education helps judges to develop their 'judicial identity' (Dawson, 2015, p.176). The transition from lawyer to the bench is aided by judicial education. On the other hand, whether one needs judicial education to be an effective judicial officer has not been thoroughly researched.

The process of growth take place when education occurs. To be able to measure and evaluate this growth is paramount in determining the effectiveness. As we transform judicial officers in social awareness training or enlighten on judgement writing skills, judicial education becomes more relevant and appreciated. There is no doubt that there

are some judicial officers who see no benefit to their development as a result of judicial education and training.

### Eliminating of Judicial Arrogance

Training is needed to assist Judges who have developed 'judicial arrogance' (Felter, 1997, p.96). While judicial independence has to be guarded jealously, ensuring that Judges and Magistrates are accountable is critical to engendering public confidence. 'Judicial accountability' cannot be achieved if there is judicial arrogance (p.97). Having an awareness of what can cause judicial arrogance is critical to its elimination.

Buhai (2011) suggests that 'prospective judges' need to be introduced to classes while in law school that creates an awareness 'of their own biases, myths and prejudices' (p. 178). On the other hand, judges are normally selected from the ranks of practicing lawyers and so would have had sufficient time in their career to understand these challenges and may not need formal training to identify such hurdles.

Kirby (2000) indicated that the United Kingdom's Lord Devlin 'fear' was that judicial education would infringe on judicial independence. This appeared to be a sound argument, however, when judicial arrogance supersedes judicial accountability then judicial independence is eroded due to deference to absolute power. Dickert (2005) submits that judges fight arrogance daily because of the esteem received and perceived power accorded with the role. When one examines qualities in relation to Judges and Magistrates 'humility' is not usually mentioned (Amaya, 2018, p.97).

Anti-judicial speech is an area that tests the mettle of the Judiciary to resist exercising its power while not being perceived as arrogant. Very few national courts in common law jurisdictions protect anti-judicial speech (Keck, Metroka and Price, 2018, p. 747). According to Fuentes-Hernandez (2002), when there is unhappiness with the justice services, there should be new approaches to

improve poorly performing institutions.

There is a need for leadership from the 'private bar, working with government and the judiciary' to ensure more 'access to justice' (Vermeulen, 2016, p.112). Through interaction in judicial education and training programs it is possible to bring all of these stakeholders together to discuss a myriad of complex and contentious issues related to judicial development.

### Conclusion

Judicial education is a developing discipline that requires professionalised persons to practice. Its importance to the judiciary has become more recognized and in particular, the contribution to improving access to justice.

Judicial officers throughout the commonwealth spend thousands of hours collectively engaged in training programs to promote competency in knowledge, skills and/or social awareness. Through the use of reflective learning the judicial officer is able to improve in quality of learning experience. Ensuring that judicial officers are accountable in their roles is also a part of what judicial education and training aims to accomplish. Contributing to the growth and development of democracies is part and parcel of the role of the judiciary.

Using adult education tools and embracing effective techniques which promote an efficient judiciary will continue to grow public confidence in their ability to access justice at all levels of the justice system. For judicial officers who are newly engaged or veterans with many decades of experience, judicial education helps to differentiate between good and great. It helps to uplift and build the ability of the Judge or Magistrate to impartially and with integrity administer justice to all and sundry. It may seem as cliché but it rings true to the ordinary man in the Clapham omnibus as attributed to Lord Bowen in the *Titchborne Claimant* case of 1871. It further rings true for the lady in Mt. Hagen, Papua New Guinea or the young boy in Bodden Town, Cayman Islands or the elderly lady in Tarpum Bay, Bahamas.

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# A WORKSHOP ON SENTENCING – MAURITIAN-STYLE

**His Honour Judge Ah Foon Chui Yew Cheong [1] and Professor Nicola Padfield [2].**

**[1] Retired Supreme Court Judge and Chairperson of the Institute for Judicial and Legal Studies, and [2] Professor of Criminal and Penal Justice at the University of Cambridge and Master of Fitzwilliam College, Cambridge. The two authors met previously at the CMJA Triennial Conference in Victoria Falls, Zimbabwe in 1994 – this is an example of how the CMJA facilitates useful networking.**

**Abstract** This article describes a recent workshop on sentencing held for the judiciary in Mauritius. The workshop explored inconsistency in sentencing, through lectures, but also by two different practical exercises. The magistrates had, in small groups and in advance, prepared presentations on different topics. They also discussed in groups (and without preparation) hypothetical sentencing exercises devised specifically for the workshop. The workshop proved highly successful in provoking debate and discussion of an often neglected subject.

**Keywords:** sentencing - Mauritius - judicial training - consistency

## Introduction

We write this account in the belief that it will prove useful not only as a record for Mauritius, but also as a stimulation for other jurisdictions. The workshop was a first in Mauritius and may prove to have been a vital step on the road to the development of much greater sentence guidance being developed for first instance judges (magistrates). The idea came from the first author, in her role as Chair of the Institute of Judicial and Legal Studies.

For sometime, the disparity and inconsistency in the sentences imposed by the district courts of Mauritius (10 in all) have been a cause of concern among the judiciary and the practising lawyers. In May 2018, Messrs I. Deeljoor and S. Bundhoo, two recently appointed judicial research assistants at the Supreme Court, were requested by the Institute to make a compilation of the sentences imposed by the district courts in cases of larceny and unlawful possession of drugs- the two most prevalent offences- from January to April 2018. The compilation which included the reasons given for the sentences imposed, confirmed wide disparity and clear inconsistency. It was therefore felt that a platform should be afforded to all magistrates

to examine the sentencing policy as regards the different criminal offences and to give some thought to the necessity for sentencing guidelines.

In brief, Mauritius has a legal system which would be easily recognised throughout the Commonwealth. Most of the criminal laws date back to colonial times – the Criminal Code dates back to 1838 and has been modified occasionally over the years. The Criminal Procedure Act was enacted in 1853. Whilst the substantive criminal law follows closely the French Penal Code, criminal law procedure is mainly of English inspiration. The 60 magistrates are all fully qualified lawyers and would have upon appointment at least two years' practice at the Bar. Thus, it is in effect a career judiciary. A majority of them are women, and most will sit alone in district courts around the country, shifting frequently from civil to criminal jurisdictions.

## The planning for the workshop

Having decided that a workshop on sentencing would be valued and valuable, the first author took soundings from various quarters on the precise format. She invited the second author take part, and we exchanged ideas. The Chief Justice was persuaded to release all magistrates for a day and a half. The workshop itself took place over two days, and fell into three parts: a half day on general addresses, a second which was a round-up of key issues around certain topics prepared in advance by magistrates working in small groups, and a third was on unseen sentencing exercises

## Part 1: Addresses to the whole group

The workshop was opened by the Chairperson of the IJLS, and was followed by two speeches, one by the Attorney General and the other by the Acting Chief Justice – it was encouraging to start the workshop with such obvious

support from both judicial and political legal leadership. After a short tea break (wonderful refreshments throughout – hard-working magistrates appreciated the quality!), Mr Raj Seebaluck, the Chairman of the Mauritius Magistrates’ Association chaired a panel of three speakers. Mrs Meenakshi Gayan-Jaulimsing gave a powerful and wide-ranging address exploring the importance of judicial independence and discretion at sentencing; Mr Kevin Moorghen encouraged Mauritius to look for greater uniformity in sentencing, drawing on examples which ranged from the problem of ‘magistrate fishing’ in Mauritius to the best international practice. Finally, Mrs Najiyah Jeewa-Dauharry gave a careful presentation on the current law on sentencing, especially procedural issues. It was clear that all speakers were keen to avoid “swimming in a sea of uncertainty”, welcoming more guidance, but the best way forward in Mauritius remained to be explored.

After another short break, Nicola Padfield then gave the key note address. Her talk explored theory, empirical criminology, law and practice. She asked questions: what do we actually know about sentencing practice (in England as well as Mauritius); what do we know about what works to reduce re-offending. She identified some central difficulties from her English experience: the so-called ‘custody threshold’, when to suspend a sentence, the impact of previous convictions on sentence, reductions for guilty pleas and the totality principle. She explored the history of the Sentencing Guidelines Council and now the Sentencing Council in England and Wales – its remit and its limitations. She explored the nature of consistency, including the risk of being consistently ‘wrong’. Current concerns in England include the state of prisons, the over-representation of black and other ethnic minority prisoners in the prison system, prisoners’ drug and mental health problems and the number of prisoners being recalled to prison during the licence period of their sentence (clearly parole is used very differently in Mauritius and England).

## Part 2: Sentencing Today in Mauritius

In preparation for this session, and upon the suggestion of the Chairperson of the Institute and the Master and Registrar of the

Supreme Court, the magistrates had divided themselves into groups of four or five people some two months before the workshop to prepare in advance 15 minute presentations on ten different topics. These largely followed an agreed format exploring the relevant law, relevant statistics from the Annual Report of the Judiciary 2017, an analysis of relevant case law and comments on whether one could identify any relevant trends in patterns of sentencing.

1. Drugs offences
2. Sexual offences
3. Aggravated assault, wounds and blows
4. Larceny offences
5. Domestic violence
6. Dishonesty offences
7. White collar crimes
8. Road traffic offences
9. Sentencing of children
10. Alternative to sentencing – new sentencing

Some groups had provided very useful printed summaries of larceny and drugs offences

Clearly a large amount of work had gone into presenting detailed PowerPoint presentations and it was agreed that they should be made available to all magistrates on line as a useful resource. Perhaps they could lay the foundations of a ‘Sentencing Compendium’ or Bench book for Magistrates. There was only a little time for discussion at this stage, but it was clear that this had been a useful training exercise: magistrates had fully committed to the task, and had been forced to prepare for the workshop by careful preparation and teamwork.

## Part 3: Sentencing Exercises

Next, the magistrates were divided into five groups to discuss four different sentencing scenarios. We are grateful to HHJ Rosa Dean who kindly gave the organisers several recent examples of sentencing exercises used in judicial training in England and Wales. Having read these, the four case studies, based on Mauritian scenarios were developed for the workshop by Mrs Meenakshi Gayan-Jaulimsing, Mrs Ida Dookhy- Rambarun, Ms Adeelah Hamuth and Ms Nadjiya Dauhoo. After a summary of the facts, details of plea, mitigation etc., each exercise concluded with a series of questions for the groups to consider.

As anticipated, these provoked lively debate – the groups were reluctant to break for tea. After the tea break, Nicola Padfield led the feedback session. Clearly the groups were not unanimous in their conclusions. The exercises proved very useful in two ways. First, they facilitated debate. Busy magistrates rarely have the opportunity to challenge each other on central and daily occurring sentence problems. Secondly, they allowed the groups to identify specific areas of uncertainty in which further guidance might be useful.

The workshop ended with a vote of thanks and a closing address from the Chairperson of the IJLS. The two day event had been very efficiently run, and the staff of the IJIS were exemplary in their helpfulness.

### **A postscript: a visit to prison**

One of the questions raised at the workshop concerned the implementation of sentences. Several participants showed lively interest in joining a prison visit and at the last minute the Commissioner of Prisons generously offered to welcome a group to visit the Central Prison in Beau Bassin the next day (a Saturday). As it turned out, only one serving Supreme Court judge turned up, but the party of four who met at Beau Bassin the next day were treated to an extensive visit of two women's prisons. The Commissioner of Prison was rightly proud of his open prison for 14 women, all in the final months of their sentence. The tour looked at the facilities available to women

prisoners – particularly impressive was the bakery, in part funded by the Australian Government, and the vegetable gardens. It was also very interesting to see at first hand the implications of the absence of a formal early release system, and a parole system which releases very few prisoners (largely because of the restrictive rules). The prerogative of mercy gives to the Commissioner enormous power to recommend the early release of prisoners, and they were understandably keen to lobby him as he toured the prison. Another point which was noteworthy was the fact that Boards of Visitors, whilst still required by law, no longer exist. Commissioner, judges and academic visitor all agreed that the system would benefit from more outside monitoring. And that magistrates should be encouraged to visit prisons regularly.

### **Discussion/Conclusions**

Clearly every jurisdiction faces different, but overlapping, challenges. For example, for the English commentator, the discussion of 'Involuntary homicide by imprudence' was particularly noteworthy given the tension in England concerning the 'appropriate' sentence for those who kill when driving negligently. Another driving offence of interest was driving with excess alcohol – the debate focussing around the appropriate degree of increase for second time offenders. Time prevented further discussion of many important topics – but what was clear was the thirst for debate and discussion.

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## PARAGRAPH 168: A CAUTIONARY TALE CONCERNING THE CIRCULATION OF DRAFT JUDGMENTS TO COUNSEL

**His Honour Judge Thomas S. Woods, Judge of the Provincial Court of British Columbia. This is an abridged version of an article by the same title originally published in the Oxford University Comparative Law Forum, cited to (2017) Oxford U Comparative L Forum 1. The article is reproduced here, in abridged form, with the permission of the editor of the OUCLF.**

**Abstract:** *It comes as a surprise to judges and counsel—not only in the common law provinces of Canada but elsewhere in the common law world—that, in England and Wales, courts routinely circulate their judgments in draft to counsel and thereby provide them with an opportunity to comment and suggest changes—both as to style and substance—before those drafts are made final. In some highly publicised English cases that come in for detailed discussion further on in this article, that practice led to headlines in the mainstream media such as “Appeal judge watered down Binyam Mohamed torture ruling” (The Guardian, 10 February 2010). This article considers the English practice of circulating draft judgments to counsel for comment before they are made final is one that ought to be considered for adoption in Canada and other jurisdictions in the common law world. This latter question is one to which it is anticipated judges and counsel may bring differing perspectives.*

**Keywords:** Draft judgments, circulation of – draft judgments, correction and modification of – draft judgments, perfection of – finality of judgments – Barrell jurisdiction, overruling of – Binyam Mohamed cases – open justice principle – open court principle

### **Some Preliminary Context: When English Judges Can Permissibly Change Their Minds**

The subject of circulating judgments in draft to counsel for “correction” before they are made final in England must be considered against the background of a broader subject, that being the question of when and under what circumstances a judge there may permissibly change his or her mind. The practice under scrutiny in the present article has certainly created new opportunities for judges to change their minds; indeed, after counsel have received their judgments in draft, English judges not uncommonly receive submissions urging them forcefully to do just that. But this is not the only situation in which a judge might be inclined to change his or her mind.

A judge may simply come, on reflection, to question his or her initial findings of fact or legal conclusions. Or a judge may discover that an important authority on point has been overruled or not been cited to the court, or that a binding authority has been handed down since the judge prepared the initial draft of his or her reasons. Nevertheless, in order that there be finality in legal proceedings, at some stage a judge must no longer be free to change his or her mind (absent a successful, intervening application to re-open or call fresh evidence). The answer to the question of when that stage is reached in English law is a somewhat nuanced and complex one.

### *Rule 40.7(1)*

The starting point is Rule 40.7(1) of Lord Woolf’s English Civil Procedure Rules (CPR). That Rule provides, straightforwardly, that a judgment takes effect “from the day when it is given or made, or such later date as the court may specify”. English judgments are “given or made” when they are delivered

orally or handed down in court. Thus, the *filing* of the orders embodied in the judgments, on the authority of (for example) *Holtby v. Hodgson*, (1890), LR 24 QBD 103, was generally considered an administrative act that did not affect when those judgments (and the orders they contain) begin definitively to “speak”.

Would that it were so simple.

### *The Gloss*

Rule 40.7(1), its pre-CPR predecessor Rule and the authority of decisions like *Holtby v. Hodgson* have all been effectively glossed over by a body of case law which has held that judges retain a power to make changes to their judgments up to the point where the judgments are “perfected”. In the recent case of *In re L and B (Children) (Preliminary Finding: Power to Reverse)*, [2013] UKSC 8, at 16 (hereinafter, *Re LB*), Britain’s highest court confirmed that point starkly by stating “... a judge is entitled to reverse his decision at any time before his order is drawn up and perfected”. In support of that conclusion, Baroness Hale (Lords Neuberger, Kerr, Wilson and Sumption concurring) cited, among other cases, *In re Suffield and Watts, ex p Brown*, (1888), 20 QBD 693, *Millensted v. Grosvenor House (Park Lane) Ltd.*, [1937] 1 KB 717, and *Paulin v. Paulin*, [2009] EWCA Civ 221, (which, in turn, cited *In re Harrison’s Share under a Settlement*), [1955] Ch 260.

By so holding in *Re LB*, the UK Supreme Court disapproved and overruled important, and previously binding, contrary Court of Appeal authority—namely, *In re Barrell Enterprises*, [1973] 1 WLR 19 (C.A.). (See paras. 20-27 particularly.) *In re Barrell* had purported to limit a judge’s jurisdiction to change his or her mind after the handing down but prior to the perfection of a judgment to the “most exceptional circumstances” (at pp. 23-24). That limitation, sometimes referred to as the “*Barrell* jurisdiction,” has now been wholly swept away.

In overruling *In re Barrell*, the UK Supreme Court also gave some sense of the considerations that ought to inform the exercise of a judge’s discretion as to whether to change his or her mind in an individual case. The court in *Re LB* stressed

that there is one consideration that stands above all others. That is the imperative of dealing with the case “justly”. Near in importance to that is the question of whether a party may have reasonably relied to its detriment upon a judgment in its originally released form. Referring to an earlier decision of Neuberger J (as he then was) in *In re Blenheim Leisure Restaurants Ltd. (No. 3)*, The Times, 9 November 1999. Baroness Hale also adverted in *Re LB* at p. 25 to other, subsidiary considerations, including “a plain mistake by the court, the parties’ failure to draw to the court’s attention a plainly relevant fact or point of law and the discovery of new facts after judgment was given” as considerations that might justify a judge in changing his or her mind. Her Ladyship was careful however to acknowledge that the list is not a closed one and that the determination is necessarily fact-dependent:

This court is not bound by *Barrell* or by any of the previous cases to hold that there is any such limitation upon the acknowledged jurisdiction of the judge to revisit his own decision at any time up until his resulting order is perfected. I would agree with Clarke LJ in *Stewart v. Engel* [2000] 1 W.L.R. 2268, 2282 that his overriding objective must be to deal with the case justly. A relevant factor must be whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up ... A carefully considered change of mind can be sufficient. Every case is going to depend upon its particular circumstances. [at 27]

### *When is an English Judgment “Perfected”?*

As has been noted, there remains a hard limit to the timeframe within which a judge in England can revisit his or her reasoning and conclusions and that is the stage where the subject judgment has been “perfected”. At that point, the judge becomes *functus officio*. (This is subject, of course, to manifest errors of judicial inadvertence and slips that are remediable by recourse to a slip rule.)

Under the modern CPR, perfection means sealing: Rule 40.2(2)(b). Thus, judgments in England must be regarded as being necessarily provisional until the orders they embody and express have been perfected. In this latter regard, see *Chandra and Anor v. Brooke North*

*and Anor (Rev 3)*, [2013] EWHC 417 (QB), where Thornton J stated the following:

... [T]he Supreme Court has overruled the *Barrell* jurisdiction in *In the matter of L and B (Children)*. This decision holds that a judge (including any appeal or first instance judge of whatever status) retains a jurisdiction to change his or her mind after he or she has made an order until the order is sealed. The order that was made takes effect immediately on being made but the power to revisit the order and confirm, vary or replace it with a different order must now be exercised on broad principles. [at 31]

The focus of the present article falls, as noted, upon one particular factor that can trigger changes to provisional judgments. That is a factor of the English courts' own making, namely, the aforementioned practice of circulating judgments to counsel in draft for "correction" before they have been put in final form and then "perfected". Such judgments are, according to current court practice, expressly marked as being subject to correction. This reservation will exclude any reasonable, detrimental reliance upon them as being apparently, but not truly, definitive. Nevertheless, the practice of circulating judgments in draft to counsel for comment does inevitably elicit suggestions for change and, while the practice carries certain benefits, it has also sometimes led to unintended consequences together with some very public and unwelcome controversy.

### **Circulating Draft Judgments: How it All Got Started**

As is evident from a review of the original Practice Direction issued in 1995 ([1995] 1 WLR 1055) and two Practice Statements issued subsequently that speak to the subject ([1998] 1 WLR 825 and [1999] 1 W.L.R. 1), the custom of circulating draft judgments to counsel for their review grew out of a desire on the part of the English courts to "enable [counsel] to consider ... judgment[s] and decide what consequential orders they should seek" so that those orders could be settled at the time judgment is given. This led in turn to the need for a mechanism for identifying the definitive versions of judgments, given the mischief that had sometimes resulted from draft and final

versions having both been released.

As the first Practice Statement acknowledges, in past, delays often occurred in getting clearly definitive versions of judgments out to the parties and others with an interest in the outcomes of cases, including accredited representatives of the media and law reporters. This was attributable to the time required to incorporate minor revisions that were often suggested by counsel following the oral delivery of reasons in open court. Similarly, when in the past written reasons were simply handed down without being delivered orally, a need to modify them to incorporate subsequently suggested minor revisions often arose. This sometimes resulted in two or more differing, written versions being brought into existence, compounding the problem of delay with unnecessary and avoidable confusion and uncertainty.

To overcome these problems, a decision was taken to institute a formal court policy, as expressed in 1998 by the Lord Chief Justice in the first Practice Statement, to permit judges to issue to counsel, on a confidential basis, draft reasons. These drafts were required to be clearly marked on each page, "Unapproved judgment: No permission is granted to copy or use in court". In the 1998 Practice Statement, the Lord Chief Justice introduced this policy upon the following rationale:

... copies of the judgment are being made available to the parties' legal advisers ... in order to enable them to submit any written suggestions to the judge about typing errors, wrong references and other minor corrections of that kind in good time, so that, if the judge thinks fit, the judgment can be corrected before it is handed down formally in court ...

Lawyers are not being asked to carry out proof-reading for the judiciary, but a significant cause of the present delays is the fact that minor corrections of this type are being mentioned to the judge for the first time in court, when there is no time to make any necessary corrections to the text.

Actual practice was quickly fine-tuned by the second Practice Statement, issued later in 1998, given that difficulties persisted in having final and definitive versions of judgments issued with the necessary dispatch. That refinement allowed

for a middle ground type of written judgment that was definitive, *in a sense*, and could be freely disseminated as such, but which remained expressly “subject to editorial corrections.”

Arguably—in the interest in getting judgments out more quickly—the second Practice Statement restored a measure of the uncertainty that the first Practice Statement sought to remove. Handed-down and publicly circulated judgments under that refinement of court policy could still not have been the last word, given the possibility of future editorial corrections going beyond the merely cosmetic.

Current practice has been governed, since 2013, by Practice Direction 40E which offers a rather more detailed and comprehensive regime for the issuance and revision of draft judgments. Practice Direction 40E introduced further refinements, including labeling stipulations, to make the provisional status of draft judgments even more clear. However, despite its more elaborate prescriptions regarding dissemination and confidentiality, it does not—just as its predecessor Practice Direction and Practice Statements did not—expressly provide that counsel’s correspondence with the court concerning recommended changes to draft judgments must be kept confidential.

English case law confirms the usual requirement that counsel who communicate directly with the court about a matter before the court must simultaneously inform all other counsel of the fact and content of such communications. Furthermore, that case law makes it distressingly plain that when counsel engage with the court for the purpose of persuading it to change a draft judgment cosmetically or substantively (or persuading the court to resist opposing counsel’s entreaties to do so), it is indeed a requirement of the law that those communications be strictly confidential. In this regard, see the statement by Lord Judge LCJ in *Mohamed, R (On the Application of) v. Secretary of State for Foreign Affairs (Rev 1)*, [2010] EWCA Civ 158 (hereinafter, *Mohamed Appeal No. 2*):

Draft judgments are necessarily circulated in confidence. It follows that all communications in response are covered by the same principle ... The observations on the draft by any of the parties continue to be covered by the same

confidentiality principles which govern the circulation of judgments in draft. [at 12]

It was foreseeable that the English courts’ adoption of a policy and practice of confidentially circulating draft judgments to parties’ counsel for “correction” would lead, eventually, to controversy surrounding the extent to which counsel receiving draft judgments could transcend the merely cosmetic and seek, confidentially, to have revisions made to those judgments that go to substance.

Equally foreseeable, in the author’s view, was the larger risk that by embarking upon a process whereby confidential, court-sanctioned communications were to be undertaken between counsel and courts after trials and hearings in open court had ended—confidential communications about draft judgments that could change provisional outcomes substantively, that is—the English courts were vulnerable to being perceived to have unjustifiably compromised the open justice (or open court) principle.

### Some Case Law on the Practice of Circulating Draft Judgments

As it was initially conceived, the practice of circulating judgments to counsel in draft was aimed at catching typographical errors and minor flaws. This was so that the delay caused by the need to correct such flaws after a judgment had been handed down or given orally could be avoided. This is plain on the face of the first Practice Statement with its references to “typing errors, wrong references and other minor corrections of that kind”. While counsel have certainly recommended more substantive changes to draft judgments, courts continue to emphasise that the practice is aimed mainly at intercepting and correcting errors that are cosmetic and technical so that the parties might be spared unnecessary delays and expense. For example, in *Robinson v. Fernsby and Anor*, [2003] EWCA Civ 1820, May LJ stated:

The practice of providing the parties’ legal representatives with a draft of written reserved judgments a day or two before the date appointed for handing them down is intended to promote efficiency and economy. Typographical corrections may be made so

that the judgment is available in its final form for publication on the day that it is handed down. The parties are enabled to agree the form of any order and consequential order, for instance as to costs... [at 95]

However, in the author's view the *Robinson v. Fernsby* reasoning must now be approached with some caution in the wake of the UK Supreme Court's decision in *Re LB* and the overruling of *In re Barrell* by that decision. The Court of Appeal in *Robinson v. Fernsby* considered itself bound by *In re Barrell* and its reasoning accepted, on the authority of that case, that judges could only permissibly change their minds and alter their decisions substantively before perfection in "exceptional circumstances" or where there are "strong reasons" to do so. That limitation has now been eliminated and so references to the promotion of "efficiency and economy" as the chief or primary rationale for circulating drafts of judgments to counsel for comment will not, arguably, be given the same emphasis, post-*Re LB*. The promotion of efficiency and economy remain one rationale for the practice, to be sure, but the creation of opportunities for the detection and correction of substantive errors in fact finding and the application of the law is another, and the arguably dominant, rationale in the wake of the *Re LB* decision.

The correction of typographical errors and others of largely cosmetic significance does remain the mainstay of what results from the circulation of draft judgments in England up to the present. Getting those sorted before judgments issue in final form is a laudable objective and changes of that kind have not provoked any meaningful controversy. Rather, it is the less common—but nevertheless persistent—cohort of cases where, upon reviewing judgments in draft, counsel have sought to have courts make substantive changes to their reasoning and conclusions that have proven more vexing.

Before turning to some of those cases, however, it is useful to reflect again upon the implications of the recent UK Supreme Court's 2013 decision in *Re LB* and its overruling of *In re Barrell*. The effect of that decision has been to lower the threshold for substantive reconsideration, by judges, of their own decisions before they are perfected. This effect has been brought about by removing the requirement that

such reconsideration be permitted only in "extraordinary circumstances". Arguably, the door to invitations by counsel for substantive reconsideration of draft judgments has been opened wider by *Re LB*. Pre *Re LB* case law must, for this reason, be treated with some caution inasmuch as the threshold for permissible reconsideration was, then, higher and more unyielding.

That said, there is still something to be taken from some of the earlier case law for present purposes. One key example will serve to illustrate. In *Royal Brompton Hospital NHS Trust v. Hammond and Ors*, [2001] EWCA Civ 778, the Court of Appeal released the draft judgments of its three-member panel to the parties in accordance with the practice outlined in the earlier (pre-40E) Practice Direction and Practice Statements introduced in the 1990s. Beyond the expected suggestions for change dealing with typographical and other such errors, certain parties also supplied skeleton arguments "suggesting that some of the conclusions reached were wrong" (at 3). Counsel submitted that even under the strict limits imposed by the *Barrell* jurisdiction, reconsideration was permissible.

Members of the court delayed release of their judgments in final form and directed that skeleton arguments were to be filed "to assist the Court to decide whether it should reconsider the judgments and, if so, what the results should be" (at 3).

Guidance was taken in *Royal Brompton Hospital* from the court's earlier decision in *Stewart v. Engel*, [2000] 1 WLR 2268 (CA). *Stewart* stands for the proposition that, among other considerations, the overriding objectives of the then newly constituted CPR (reflecting Lord Woolf's wide-ranging reforms) must govern the exercise of a court's discretion to substantively reconsider a decision, when invited by counsel to do so, after counsel have reviewed it in draft. That overriding objective was summarised as follows in *Royal Brompton Hospital*:

It is an overriding objective of the CPR that cases should be dealt with expeditiously and fairly with an appropriate share of the court's resources being allotted to the case. [at 11]

*Per curiam* it was determined in *Royal*

*Brompton Hospital* that counsel’s request that the court revisit its reasoning and conclusions in all but one small area should be denied. This was in part on the basis that to allow a wholesale reopening, for further argument, of large areas of the court’s previously articulated reasoning would violate the overriding objectives of CPR. Citing particular concerns about finality and expense, the court noted pointedly that:

If such submissions were to be entertained, we can see no end to this appeal as even a revised judgment would, if past experience is a guide, lead to another application to reconsider the revised judgment. [at 19]

At the time of writing, *Royal Brompton Hospital* has not been considered since *Re LB* was decided. It is the author’s view that the overriding objective of CPR will continue to number among the somewhat coextensive factors acknowledged in *Re LB* that govern when it will be appropriate for judges to accede to counsel’s suggestions that they revisit substantive aspects of their decisions, and when to do so would not be appropriate.

*Veolia E.S. Landfill Limited Anor v. The Commissioners for HM Revenue and Customs*, [2016] EWHC 1880 (Admin), is a very recent (July 25, 2016), post-*Re LB* decision in which Nugee J provided, at 220-227, a cogent summary of the applicable authorities before declining a request to hold a further hearing to deal with an issue raised with him after his draft judgment in that case was circulated. Among the points addressed in *Veolia* was the growing jurisprudence that emphasises that while the practice of circulating draft judgments does open the door to substantive reconsideration, it is not meant to afford parties “a second bite at the cherry”:

... [T]he circulation of a draft judgment is not however intended to provide an opportunity for the unsuccessful party to re-open or re-argue the case, or to repeat submissions made at the hearing, or to deploy fresh ones: *Mohamed* at 4. *A fortiori*, the circulation of a draft judgment is not intended to provide an opportunity for the unsuccessful party to change his case, or adduce new evidence. It is not in the interests of efficient case management for a litigant, having seen from a

draft judgment in detail why he has lost (or is about to lose), to be permitted to try and make good any gaps that the judge has found in his case by new evidence or argument. The trial is the opportunity for a litigant to put forward his case and the evidence he relies on; trial is not, and should not be allowed to become, an iterative process ... [at 226]

With respect, the counsel of restraint that is reflected in that passage appears to attempt to restore some of what was lost with the abolition of the *Barrell* jurisdiction limiting substantive reconsideration to “extraordinary circumstances”. Could it perhaps be argued that, seeing an increasing pattern of requests for reconsideration of substantive points coming before the English courts, Nugee J was trying to force the genie back into the bottle that, as one could argue, the UK Supreme Court opened in *Re LB*?

Lastly, *GSTS Pathology LLP and Ors v. Commissioners for Revenue and Customs*, [2013] EWHC 1823 (Admin)—also a post-*Re LB* decision—arose out of a tax dispute. The claimants (collectively, “GSTS”) were faced with a potentially injurious change to the tax treatment given to the supplies they used in their business. They applied for an interim injunction to restrain the taxing authority from implementing the change pending a full hearing into its legality. The interim injunction was granted with oral reasons by Leggatt J. After reviewing the injunction ruling in draft, GSTS’s counsel then asked his Lordship to exclude from mention in the final version of his transcribed oral judgment two types of sensitive information. The present discussion of the case will focus upon only one type—that being commercially sensitive information regarding the deleterious effects that GSTS submitted the implementation of the changed tax regime would likely have on its commercial viability. GSTS were concerned that if competitors and customers came to know of those anticipated deleterious effects, GSTS’s business interests would suffer greatly if the new tax regime were ultimately to be implemented.

The taxing authority took no position on GSTS’s application to have the information—which the company considered to be commercially sensitive—excised from the written version of the decision granting the interim injunction. After careful consideration, Leggatt J declined

GSTS's request, noting (at 15) that the entire premise of the injunction application, and the decision to enjoin that it yielded, was that the potential change in tax treatment would cause "serious damage to the business of GSTS". He went on in that paragraph to state that "I think it important in the interests of open justice to explain the facts which justify the conclusion".

The decision on GSTS's failed application to exclude commercially sensitive information from the written reasons on the injunction application adverts to the "principle of open justice" and, furthermore (at 3), to the requirement that "the public should be able to scrutinise the workings of the court system and to know the basis on which the court has reached its judgment in any given case". Counsel for GSTS acknowledged the existence of that principle but argued, unsuccessfully, that the court's inherent jurisdiction to determine how the principle is applied survived the granting of the oral decision, and should be exercised in favour of removing the sensitive material from the written version of the decision.

The judgment of Leggatt J in *GSTS* stands as a strong affirmation of the open court principle. It presents a clear demonstration of how that principle can serve as a check upon excessive, confidential entreaties from counsel requesting that judges exercise their otherwise rather broad discretion to revisit and revise their draft decisions.

## The Binyam Mohamed Cases in the Divisional Court

We come now to the litigation that brought the English practice of circulating judgments in draft for "correction" out of barristers' chambers, solicitors' offices and courtrooms fully into view in a firestorm of very public controversy. Once a matter of professional interest mainly to judges and lawyers, this court practice was vaulted into the public consciousness of Britons in early 2010 via headlines like "Binyam Mohamed: Timeline of a torture case and the fight to keep it secret" (*The Guardian*, 10 February 2010) and "Paragraph on Guantanamo detainee Binyam Mohamed becomes focus of torture row" (*The Independent*, 26 February 2010).

Binyam Mohamed pursued protracted legal

battles with the British government over his treatment while detained by, and on behalf of, the US military in Pakistan, Afghanistan, Morocco and, ultimately Guantánamo Bay. Those battles produced numerous court decisions in England between 2008 and 2010. Commenting in the course of giving judgment in one of the two appellate decisions that are the subject of discussion below, namely *Mohamed, R (On the Application of) v. Secretary of State for Foreign Affairs (Rev 1)*, [2010] EWCA Civ 65 (hereinafter, *Mohamed Appeal No. 1*), Lord Neuberger MR (as he then was) observed that to that point:

The open judgments extend to over 500 paragraphs, themselves in many cases then divided into sub-paragraphs. They cover nearly 150 closely typed pages of the Weekly Law Reports. [at 7].

It is beyond the scope of this article to canvass the entirety of that litigation in detail and so a brief summary of the background must suffice.

### *Who is Binyam Mohamed?*

Binyam Mohamed, though born in Ethiopia, was at all material times a resident of the UK. Interestingly, he has a connection to Canada insofar as he emigrated from Ethiopia to this country in 1995 seeking asylum and remained there for seven years. However, he left without gaining permanent resident status and ultimately became, as noted, a resident of the UK.

There was some reason to believe that, soon after the 9-11 incident, Mr. Mohamed may have become involved with Al-Qaeda in terrorist activity in Afghanistan. Accordingly, he was arrested in Pakistan in 2004, then moved from one country to another (sometimes pursuant to alleged "extraordinary rendition" practices) and ultimately transferred by the US military to Guantánamo Bay in 2004.

During his five-year stay at Guantánamo he participated in hunger strikes and was required to spend some of his time in the facility's highest security section, the notorious "Camp 5." Mr. Mohamed contends that he was subject to various forms of torture both before and during his stay at Guantánamo, all of which were aimed at obtaining intelligence and confessions from him. Importantly, he

further contends that the British government was aware of, and complicit in, the torture and mistreatment inflicted upon him by and on behalf of the US military. He remained at Guantánomo until 2009 when, after the US suddenly dropped all of its charges against him, he was released and returned to the UK.

### *Mr. Mohamed's UK Litigation Generally*

While detained at Guantánomo, Mr. Mohamed correctly anticipated that he would eventually face charges at the instance of the US government in relation to his alleged terrorist activities based, in part, upon what he alleges were false confessions. Accordingly, as a UK resident, through his British and American lawyers he requested that the UK government provide him with documents on a confidential basis to assist him in defending those charges. The UK government declined to comply with his request, citing grounds of national security. It is also clear that the UK government was under heavy pressure from the US government not to supply the information and documents Mr. Mohamed was seeking. Thus, on May 6, 2008, he filed proceedings in the UK. Terrorism charges were indeed brought against him in the US shortly thereafter on May 28, 2008. Those charges carried the potential for the imposition of the death penalty.

The charges against Mr. Mohamed were based, in part, upon confessions he had given to his US interrogators and their agents. Mr. Mohamed denied involvement in any terrorist activities and alleged that his confessions were false and had been induced through the use of torture and other inhumane treatment. He and his legal team believed that the documents and information he sought from the UK government would help him prove this. The jurisdiction invoked by Mr. Mohamed in his UK application seeking documents and information—sometimes referred to as the *Norwich Pharmacal* jurisdiction—was described by Lord Neuberger MR as follows in his judgment in *Mohamed Appeal No. 1*:

Mr. Mohamed's application was based on the court's jurisdiction to order a third party who has become involved in wrongdoing to give the victim of the wrongdoing any documentation in the custody of the third party to assist the victim in identifying and pursuing the

wrongdoer—see *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133, 175 and *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 1 WLR 2033, paragraphs 30 and 35. As the Divisional Court pointed out in paragraph 72 of the first judgment, it was “not necessary for Mr Mohamed to establish anything more [on the part of the UK Government] than innocent participation and certainly not knowledge of the alleged wrongdoing. However, if a degree of knowledge were to be established, then the involvement or participation is the clearer”. [at 63]

At the first of Mr. Mohamed's hearings the Divisional Court had to consider as a threshold issue whether there had been any “wrongdoing” with respect to his treatment by US authorities and their agents. It quickly concluded, on the evidence, that he had established an arguable case that he had been mistreated and, indeed, that that wrongdoing arguably involved certain crimes against humanity and war crimes recognised by the UK International Criminal Court Act 2001.

Next, the court had to consider whether the UK government was involved, however innocently, in any such alleged wrongdoing. In the course of making that determination, the Divisional Court found *inter alia* that the British Security Service (the SyS) and the British Secret Intelligence Service (the SIS) had supplied questions and background information for use in the “interviews” of Mr. Mohamed. These were conducted by US and other authorities while he was detained. Moreover, the court determined that SyS and SIS became involved in that manner after US authorities supplied them particulars of Mr. Mohamed's detention and his treatment during detention. Lord Neuberger MR notes in *Mohamed Appeal No. 1* that the Divisional Court thus had little difficulty in concluding, in Mr. Mohamed's favour, that the role of the UK government in the US authorities' dealings with him went “far beyond that of a bystander or witness to the alleged wrongdoing” [at 70].

On the third and fourth matters it had to consider—that is, were the information and documents sought by Mr. Mohamed “reasonably necessary” and “within the scope of available relief”?—the court also held for

Mr. Mohamed. On the fifth and final point however—that being whether the court should exercise its *Norwich Pharmacal* jurisdiction in favour of granting the relief Mr. Mohamed was seeking—the Divisional Court demurred, saying that the Foreign Secretary ought to:

... have the opportunity to consider whether in all the circumstances he will invoke public interest immunity in respect of the disclosure of the information which would otherwise follow from the decision” (*Mohamed Appeal No. 1* at para. 71, quoting from the Divisional Court’s first decision).

Some of the skirmishing that followed took place in closed sessions of the Divisional Court. Thus, that skirmishing generated both open and closed judgments. The litigation at that stage centred upon, *inter alia*, the Foreign Secretary’s (a) continuing resistance to release documents and information sought by Mr. Mohamed on national security grounds; and (b) submissions that certain paragraphs in circulated drafts of various judgments of the Divisional Court be redacted. Mr. Mohamed pressed hard against the Foreign Secretary’s initiatives in both areas. Because the subject matter of his litigation—namely, the alleged acquiescence (if not complicity) of British security and intelligence operatives in the torture of a British resident by US military investigators and their agents—soon became the subject of intense public interest, multiple intervenors joined the proceedings, both at the Divisional Court and later in the Court of Appeal. Among them were human rights advocacy groups—for example, Liberty, Justice and Index on Censorship—and media organisations. Some of the media entities were based in the UK (for example, *The Guardian*, BBC, *The Independent* and *The Times*) and some were based in the US (such as, the *New York Times*, *Los Angeles Times*, *Washington Post*, *Associated Press* and *Vanity Fair*).

### *Paragraphs Redacted from the Divisional Court’s First Judgment*

The Divisional Court’s first open judgment was handed down on 21 August, 2008, styled *Mohamed, R (On the Application of) v. Secretary of State for Foreign and Commonwealth Affairs*, [2008] EWHC 2048

(Admin), (hereinafter, the *First Divisional Court Decision*). Upon reviewing that judgment in draft, counsel for the Foreign Secretary urged the Divisional Court to redact seven paragraphs (the Redacted Paragraphs) from it on national security grounds. The Divisional Court did so, over Mr. Mohamed’s objections, but agreed that there should be a further, follow-up hearing to determine whether the Redacted Paragraphs should be restored in a revised version.

The Redacted Paragraphs were eventually restored and they are reproduced in Appendix A to this article. As the Divisional Court described them in its follow-up decision, *Mohamed, R (On the Application of) v. Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin) (hereinafter, the *Divisional Court Follow-up Decision*), they set out the:

... gist of reports made by the [US] Government to the [UK] Government in relation to the detention and treatment of [Mr. Mohamed] whilst in custody by or on behalf of the [US] Government in the period 2002-2004. [at 1]

The Redacted Paragraphs, as can be seen in Appendix A, cast UK security and intelligence operatives in a negative light and suggest culpable acquiescence, if not active complicity, on their part, in the torture and inhumane treatment of Mr. Mohamed.

Mr. Mohamed’s arguments in favour of restoring the Redacted Paragraphs during the follow-up hearing were focused upon “the requirements of open justice, the rule of law and democratic accountability” (at 54). The Foreign Secretary contended that national security and international relations imperatives constituted a competing and paramount public interest that could only be properly served by keeping the Redacted Paragraphs “out of the public domain” (at 16). In the end the Divisional Court accepted the Foreign Secretary’s arguments over those of Mr. Mohamed noting, *inter alia*, that there was:

... powerful evidence that intelligence is shared on the basis of a reciprocal understanding that the confidence in and control over it will always be retained by the State that provides it. It is a fundamental part of that trust and

confidentiality which lies at the heart of the relationship with foreign intelligence agencies. [*First Divisional Court Decision*, at 74]

The above-described reciprocal understanding is often referred to in general discourse on the topic, in shorthand, as the “control principle”. (See the discussion of the control principle in *Mohamed Appeal No. 1* at 276 et seq.)

In the background of these proceedings significant changes were unfolding in the US that were affecting British/American relations generally and, ultimately, came to affect Mr. Mohamed directly. Barack Obama succeeded George W. Bush and took office as the new President of the US. It was apparent that Mr. Obama’s new administration would approach foreign policy and issues of terrorism from a markedly different perspective than did the Bush administration. President Obama in particular had a very different view of the proper role and use of non-court military tribunals and other trappings of Guantánamo as part of the US approach to dealing with terrorism and its national security generally. Indeed, Mr. Mohamed was released from Guantánamo by the Obama administration and sent back to the UK only a couple of weeks after the Divisional Court rejected his argument that the Redacted Paragraphs should be restored. Even more importantly, the US government dropped all charges against Mr. Mohamed and provided to his American lawyers many of the documents he had been seeking from the UK government in his UK litigation. (Mr. Mohamed believed, correctly, that copies of them were in both US and UK hands.)

The landscape appeared, Mr. Mohamed thought, to be changing in his favour and so he applied for leave to argue for a reconsideration of the Divisional Court’s earlier rejection of his efforts to have the Redacted Paragraphs restored. Leave was granted. At the hearing of the reconsideration application, the Foreign Secretary—assisted by new evidence from US sources—continued to oppose the restoration of the Redacted Paragraphs, saying that the change in the US administration did not alter any of the fundamentals governing relations between the two countries. Included in the evidence tendered by the Foreign Secretary in support of that proposition was a letter from the CIA to which Lord Neuberger MR made

reference in *Mohamed Appeal No. 1*:

The CIA letter ended by saying that if the SyS were “unable to protect information we provide to you even if that inability is caused by your judicial system, we will necessarily have to review with the greatest care the sensitivity of information we can provide in the future.” [at 95]

In a dramatic reversal, the Divisional Court in *Mohamed, R (On the Application of) v. Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 2549 (hereinafter, the *Divisional Court Reconsideration Decision*), handed down a decision in favour of Mr. Mohamed’s request for reconsideration. The court was clearly less persuaded by the Foreign Secretary’s arguments than it had been previously and ordered the Redacted Paragraphs to be restored. In coming to that conclusion, the Divisional Court first noted, at 71 et seq., that in what was clearly an exceptional case, the “control principle” could not be taken to be absolute. The court also expressly noted, at 73, that the findings recorded in the Redacted Paragraphs were “necessary and justifiable” because the UK government and SyS not only knew of but facilitated the wrongdoing that had caused Mr. Mohamed’s suffering.

The Divisional Court held still further that the governments of both the US and the UK must have appreciated that the operation of the control principle could, in some circumstances, be qualified by court-ordered disclosure. Beyond that, the court did not consider that restoration and publication of the Redacted Paragraphs would, in fact, put information that was sensitive from a security perspective into the public domain. The court added that the release of documents in the US and statements made by the newly elected American President about a change of course in American policy surrounding Guantánamo and intelligence gathering generally had made the subject matter of the Redacted Paragraphs a matter of even greater public interest. For all of these reasons, the Divisional Court decided that the Redacted Paragraphs must be restored.

It is an interesting sidelight that the decision of the Divisional Court just described—in which it concluded that the Redacted Paragraphs

must be restored—was itself initially circulated to counsel in draft form in the ordinary course. The Foreign Secretary, citing national security concerns, sought through his counsel to have some passages from *it* redacted. Upon hearing further submissions, the Divisional Court accepted some, but not all, of the proposed redactions to its judgment authorising publication of the Redacted Paragraphs in the *First Divisional Court Decision*: see *Mohamed, R (On the Application of) v. Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 2973.

## The Binyam Mohamed Cases in the Court of Appeal

With leave, the Foreign Secretary appealed the Divisional Court's decision to restore the Redacted Paragraphs in the *First Divisional Court Decision*. In three concurring judgments in the Court of Appeal, displaying somewhat different reasoning, Lord Judge LCJ, Lord Neuberger MR and Sir Anthony May PQBD dismissed the Foreign Secretary's appeal and no further appeal was taken to the UK Supreme Court. As a result, the Redacted Paragraphs have been restored and published in, *inter alia*, an appendix to *Mohamed Appeal No. 1*. (See Appendix A.) For present purposes, there is little need to summarise all of their Lordships' reasoning on the appeal. The three concurring judgments in *Mohamed Appeal No. 1* run, in total, to 296 paragraphs. Suffice it to say that the arguments that ultimately availed Mr. Mohamed when he brought the Divisional Court to the conclusion that the Redacted Paragraphs should be restored, and some others, found favour with the Court of Appeal.

### Paragraph 168

Of greater interest for the purposes of this article is the fact that, after a draft of the court's decision in *Mohamed Appeal No. 1* was circulated in confidence to counsel for correction and comments, the Foreign Secretary took great exception to the content of paragraph 168 in the judgment of Lord Neuberger. Jonathan Sumption, QC—as he then was—wrote a stern letter to the court urging it in the most forceful terms to remove from the paragraph what the Foreign Secretary considered offensive. A transcribed copy of Mr. Sumption's letter appears as Appendix B

to this article. It is, in the author's opinion, a most extraordinary document and it deserves a close, thoughtful and critical reading.

As can be seen upon a review of Mr. Sumption's letter, the objections taken by the Foreign Secretary to the Master of the Rolls' judgment in *Mohamed Appeal No. 1* mainly turned not on issues of national security but rather on the characterisation of the culture within the British national security and intelligence establishment in the draft judgment. Among other concerns conveyed on page 1 of his letter, Mr. Sumption objected that the Master of the Rolls' observations in paragraph 168 were “likely to receive more public attention than any other part of the judgments”. These observations would, according to Mr. Sumption, “be read as statements by the Court that [*inter alia*] ... the Security Service does not in fact operate a culture that respects human rights or abjures participation in coercive interrogation techniques” and that there existed “... a culture of suppression in its dealings with the Committee, the Foreign Secretary and indirectly the Court, which penetrates the service to such a degree as to undermine any UK government assurances based on the Service's information and advice”.

Mr. Sumption went on to say, *inter alia*, on page 2 of his letter that:

More generally, the Master of the Rolls' observations, which go well beyond anything found by the Divisional Court, constitute an exceptionally damaging criticism of the good faith of the Security Service as a whole ...

While Mr. Sumption had copied his letter to counsel for Mr. Mohamed—Dinah Rose, QC—and Ms. Rose had received it, copies did not reach counsel for all of the intervenors in the case. In this respect, the conventions associated with the practice of circulating draft judgments to counsel for correction and comment, for some apparently innocent reason, were not followed perfectly. This slip-up did not come to the attention of the Court of Appeal until later; the court assumed meanwhile that all counsel had received copies and that all who had corrections or comments of any kind would provide them swiftly in the ordinary course. Thus, as is noted at para. 7 of *Mohamed Appeal No. 2*:

In the absence of any intimation from any other party of the wish to respond or object to the observations contained in Mr Sumption's letter, the Master of the Rolls [Lord Neuberger] decided substantially to amend the draft of paragraph 168, with minor consequential amendments to paragraphs 169 and 170 ...

The court's assumption—namely, that the suggestions made as to how the draft might be changed to take account of the Foreign Secretary's concerns were unobjectionable to other parties—proved to be badly mistaken. The court continues at para. 7:

This second draft (and it remained a draft) of these paragraphs was circulated on Tuesday around lunchtime. During the course of the afternoon it gradually became apparent that something may have gone awry with the arrangements for the delivery of Mr Sumption's letter, and in any event, that there were indeed objections both to the course taken by Mr Sumption and to his proposals for possible reconsideration of the original draft of para 168.

The Court of Appeal concluded that it was a priority that it give Mr. Mohamed the fruits of his long-awaited success in the Divisional Court below and release the second draft of its judgment on the appeal, to which the Redacted Paragraphs from the *First Divisional Court Decision* are annexed. It concluded, at 8-9 of the decision that has been previously referred to in this article as *Mohamed Appeal No. 2*, that it must do so even though, as regards paragraph 168, its judgment was still a work in progress. Moreover, the Court of Appeal concluded that since the second draft of its decision was to be released, the first version would have to be as well. Without the first draft being public, and with the discovery that Mr. Sumption's letter had been, or was likely to be, released publicly—see *Mohamed Appeal No. 2* (15-16)—the court reasoned there would be no way for citizens at large to make sense of the changes to paragraph 168 in the second draft.

The unhappy consequence of all of this was that before anything was received from the many counsel who, as it happens, *did* oppose Mr. Sumption's recommendations for change to paragraph 168, both draft versions of the court's decision entered the public domain,

neither of which was definitive. The first included paragraph 168 as originally presented. The second contained paragraph 168 as amended by Lord Neuberger MR, having seen only the suggestions of Mr. Sumption and not the views of other counsel who wished their views to be considered.

The fact that Mr. Sumption's letter had been circulated beyond the parties to the litigation and was ultimately released to the press drew condemnation from the Court of Appeal in *Mohamed Appeal No. 2*. It was Dinah Rose, QC—Mr. Mohamed's counsel—who released it. The court commented, at 12, that that was done in breach of the confidentiality requirement that forms an essential part of the court's longstanding practice of circulating judgments to counsel in draft. Arguments advanced by Ms. Rose that the wider dissemination of Mr. Sumption's letter was permissible under Part 31.22 of the CPR—which makes allowance for the use of disclosed documents for purposes other than for the proceedings in narrow circumstances—were rejected. Ms. Rose quickly offered an apology to the court. (See *The Lawyer*, 11 February 2010.)

As can be seen in the account of events given in the judgment of Lord Neuberger MR in *Mohamed Appeal No. 2*, particularly at 26-27, his Lordship first considered—upon receiving Mr. Sumption's letter—that extensive revisions to his original paragraph 168 were justified. He made those revisions and they too became public when the second draft was released. However, by then it had become known to Lord Neuberger MR that not all voices *had* been heard and so the court emphasised that the second version, though handed down and made public, was still a draft subject to further changes after all counsel's views had been considered. Once Lord Neuberger MR had received and considered the input of other counsel—who, to say the least, were differently minded than Mr. Sumption regarding the proposed changes to paragraph 168—he concluded that much of what he had taken out of his first draft of the paragraph, based only on Mr. Sumption's objections, now needed to be put back and that some other changes were needed as well. The final and definitive version of paragraph 168, prepared with the benefit of all required feedback from all counsel who had

a view, is thus presented at 29 in *Mohamed Appeal No. 2*. It is not greatly different from the version that the Master of the Rolls drafted before hearing from Mr. Sumption on behalf of the Foreign Secretary.

Paragraph 168, in all three of its iterations, is reproduced in Appendix C to this article.

### *Damage Control*

The Court of Appeal recognised that it was essential that the full story of how paragraph 168 had gone through its various changes needed to be told publicly and transparently—hence the detailed chronology of events that is given in *Mohamed Appeal No. 2*. The court was alive to the controversy that the widespread dissemination of Mr. Sumption’s letter, and the substantially softened version of paragraph 168 in the second draft of *Mohamed Appeal No. 1*, had set loose and it wished to ensure that the full sequence of events was part of the public record. In an article dated 10 February 2010 entitled “How 400 years of legal history were cast aside in the Binyam Mohamed case,” Afua Hirsch—the legal affairs correspondent for *The Guardian*—quoted Shami (now Baroness) Chakrabarti, then director of Liberty (an intervenor and thus a party to the case) as follows:

“In all the years – I was first a government lawyer and then a liberty lawyer – I have never known the draft judgment process abused in this way,” said Shami Chakrabarti, director of Liberty, the human rights organisation which was a party to the case. “The purpose of using drafts is for typographical and factual corrections – minor matters such as names and dates.

“It is not to allow one party to re-run substantive arguments and tempt a court to tone down or change its judgments.” She added: “I can’t believe that the Foreign Office thought they could get away with this. It shows the kind of contempt for the law that this case has always been about.”

Thus, in his judgment Lord Judge LCJ was moved to state, at para 17:

Ever since the publication of the seven redacted paragraphs [as an Appendix to *Mohamed Appeal No. 1* when it was released as a

draft], part at least of the discussion has understandably focussed on the events narrated in this judgment and the amendment to para. 168 following receipt of Mr Sumption’s letter. That discussion will continue, and unless it is fully informed, a damaging myth may develop to the effect that in this case a Minister of the Crown, or counsel acting for him, was somehow permitted to interfere with the judicial process. This did not happen, and it is critical to the integrity of the administration of justice that if any such misconception may be taking root it should be eradicated.

These efforts at damage control were important, given the firestorm of public controversy that the changes to paragraph 168 had caused, including—even in the conventional, non-tabloid print media—headlines like “Binyam Mohamed case: Devil in the details around paragraph 168” and “Appeal judge watered down Binyam Mohamed torture ruling”.

### **Do the Benefits of Circulating Draft Judgments Outweigh the Costs?**

The aforementioned—and calamitous—events that unfolded in the course of the Binyam Mohamed litigation invite a cost/benefit assessment of the English practice of circulating draft judgment to counsel for comment before they are made final.

### *Illusory Benefits?*

One might venture that the formally acknowledged benefits of circulating draft judgments to counsel before they are finalised appear rather meagre when considered in context of the remarkable difficulties that the practice has created. Recall that the main focus in the Practice Direction and two Practice Statements that formally gave the court’s blessing to the practice to begin with in the mid-to-late 1990s, fall upon essentially cosmetic concerns: “typing errors, wrong references and other minor corrections of that kind”, to quote the first Practice Statement. A companion priority was timing—a desire to hasten the release of judgments and to remove delays and confusion resulting from counsel’s suggestions for correction made shortly after judgments were first handed down or delivered orally.

Yet, are these truly significant benefits and advantages? And, are they not attainable in other ways?

While it was asserted expressly in the first Practice Statement that “[l]awyers are not being asked to carry out proof-reading for the judiciary,” is that, with respect, not precisely what counsel are being called upon to do when they are invited to scrutinise draft judgments for “typing errors, wrong references and other minor corrections of that kind”? Surely it is not unreasonable to expect judges, with the assistance of judicial clerks functioning as copyeditors, to catch such errors in their own judgments before they are released.

It should surprise no one that when counsel discover, in draft judgments, factual findings and legal conclusions that are uncongenial to their clients’ interests, they will strive mightily, one last time, to persuade courts to arrive at more palatable findings and conclusions. To expect counsel in these circumstances to limit themselves to typographical and stylistic feedback is, in this author’s respectful view, to expect too much. Indeed, it could perhaps be argued that counsel, who are offered one last chance to persuade the court to a favourable outcome, may fail in their duties to the parties they represent if they allow that opportunity to pass them by.

Experience has shown, in keeping with the foregoing, that counsel’s suggestions for revisions of draft judgments regularly transcend the cosmetic and enter into the realm of the substantive. This has prompted judges, in turn, to attempt to force the genie back into the bottle by incorporating into their judgments statements like:

... the circulation of a draft judgment is not however intended to provide an opportunity for the unsuccessful party to re-open or re-argue the case, or to repeat submissions made at the hearing, or to deploy fresh ones”. [*Veolia* at 226]

This appears to be a losing battle. It is quite common, now, to find references in English court decisions to further submissions received from counsel seeking substantive changes after judgments have been circulated in draft. In addition to everything else they must cover in their decisions, judges now routinely must

also provide the reasons why counsel’s further submissions regarding possible substantive changes to draft judgments were rejected or accepted, either wholly or in part. Having to consider, and respond, to late-received and confidential submissions must often negate any benefits in reducing delays that were intended to result from the practice of circulating judgments in draft.

Moreover, there is the abolition of the *Barrell* jurisdiction by the UK Supreme Court in 2013 to ponder. *Re LB* has opened the door to substantive reconsideration by judges of their findings and conclusions, even in non-extraordinary circumstances. Now, such reconsideration can occur any time before decisions are perfected: in other words, anytime before orders are sealed. Because the exercise, by judges, of their power to reconsider has been made so much more liberal with the elimination of the *Barrell* jurisdiction, it is reasonable to expect that counsel will, in the coming years, appeal more frequently and more forcefully to that power when they are given draft judgments to review whose reasoning and results their clients do not like.

To the extent that avoidance of delay is raised as an argument in favour of circulating draft judgments for comment prior to finalisation, actual experience with the practice reveals unintended consequences that have taken matters in quite the opposite direction. A great proportion of the jurisprudence generated by the Binyam Mohamed litigation, for example, was the direct result of that practice—starting with the Foreign Secretary’s ultimately unsuccessful effort to have certain paragraphs redacted from the first decision of the Divisional Court and concluding with the Foreign Secretary’s ultimately unsuccessful effort to have para. 168 of the judgment of Lord Neuberger MR almost wholly rewritten to remove criticisms of the practices of British security operatives and of the culture within the British security and intelligence establishment.

One is reminded of the *Royal Brompton Hospital* decision in which the Court of Appeal, at para. 19, stated “... we can see no end to this appeal as even a revised judgment would, if past experience is a guide, lead to another application to reconsider the revised judgment”. One is also reminded of the words of Nugee J in

*Veolia*: “[T]rial is not and should not be allowed to become an iterative process” (at 226).

The Binyam Mohamed cases show that the practice of circulating draft judgments has demonstrably introduced a multiplier effect into the litigation equation in England. In some cases that has, far from reducing delays, led to increases in costs and delays. That multiplier effect could be removed if there were to be a return to the practice under which all parties, through their counsel, formerly put their best foot forward at their hearings and then allowed courts to come to final decisions without further debate or argument. Under that approach, cosmetic errors that survive internal, rigorous copyediting and require correction can be addressed by way of *corrigenda* and substantive ones can be addressed by way of appeals.

### *Intolerably High Costs?*

Looking past what might be only illusory benefits of circulating decisions in draft for comment before finalisation, one can see that there is, potentially, a much more serious casualty. The practice necessarily erodes some of the societal benefits that accrue to what is referred to in Canada as “the open court principle” and in the UK the “open justice principle”. It does so by inviting *in camera* exchanges between counsel and the court, sometimes going to important matters of substance, all after the public phase of court proceedings has ended.

Recall that while it is not prescribed expressly in the CPR or any associated practice materials, the case law that has grown up around the circulation of draft judgments to counsel has left no doubt: counsel’s exchanges with the court regarding suggested changes are to be kept strictly confidential. In the words of Lord Judge LCJ in *Mohamed Appeal No. 2*, at para. 12:

Draft judgments are necessarily circulated in confidence. It follows that all communications in response are covered by the same principle.

This insistence upon maintaining the confidentiality of exchanges between counsel and judges in England regarding draft judgments puts those exchanges beyond the reach of the public or the accredited media and

renders an important aspect of English court proceedings wholly opaque. The potential that embarrassment, if not injury to the repute of the administration of justice, will result from the continued insistence upon confidentiality in this regard is writ large on the face of the troubled Binyam Mohamed litigation. In that litigation, the Court of Appeal found it necessary to go to extraordinary lengths to overcome a public perception, namely: that judicial independence had been compromised by *in camera* direct dealings between counsel for the Foreign Secretary and the Court of Appeal while its decision was on reserve. The Court of Appeal found it necessary to issue its judgment in *Mohamed Appeal No. 2* to answer and rebut the suggestion that the Foreign Secretary, through his counsel’s private communications with the court, had succeeded in improperly influencing the court’s conclusions regarding the impugnable conduct of British security and intelligence service operatives and the institutional culture within which they were operating at the relevant time.

Keeping exchanges between counsel and the courts regarding draft judgments confidential is all the more difficult to justify in England in the wake of the ruling of the Court of Appeal in *R. (Guardian News and Media Limited) v. City of Westminster Magistrates’ Court*, [2012] EWCA Civ 420, citing in its analysis, *GIO Personal Investment Services Limited v Liverpool and London Steamship P & I Association Limited* [1998] EWCA Civ. 3538. In *Guardian News and Media*, Toulson LJ,—as he then was—with Hooper LJ and Lord Neuberger MR concurring, affirmed *inter alia* that, in the interests of preserving open justice, counsel’s written submissions should be and are accessible to the public and accredited media representatives. The judgment of Toulson LJ commences with these stirring words:

Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age-old question. *Quis custodiet ipsos custodes* - who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and

allows the public to scrutinise the workings of the law, for better or for worse. Jeremy Bentham said in a well-known passage quoted by Lord Shaw of Dunfermline in *Scott v Scott* [1913] AC 407, 477:

“Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.”

Toulson LJ referred in *Guardian News and Media* to arguments he received to the effect that “[...]Judges increasingly receive and read written material which in previous years would have been given orally in open court. This makes it more difficult for journalists to follow the details unless one of the parties chooses to provide the press with copies of the documents” (at para. 15). His Lordship accepted those arguments and he was aided in doing so in part by Canadian authorities cited to him that relate to public access to court exhibits. Those authorities include: *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726 and *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 SCR 175.

In the author’s view, Lord Justice Toulson’s reasoning with regard to permitting public and media access to the written submissions of counsel applies *a fortiori* to correspondence directed by counsel to English courts inviting judges to change their minds following the circulation of provisional, draft judgments. It is difficult to see a reason, in principle, why the same imperative for transparency would not mandate making the submissions that counsel tender in response to draft judgments public, barring some “need to protect social values of superordinate importance ... [such as] the protection of the innocent” (*Guardian News and Media*, at 187).

As is the case in the UK, the separation of powers, judicial independence and the open court principle enjoy high prominence in the constitutional jurisprudence of Canada: see, for example, the decisions of the Supreme Court of Canada in *Beauregard v. Canada*, [1986] 2 SCR 56 (on judicial independence and the separation of powers) and also in *R. v. Dagenais*, [1994] 3 SCR 835, *R. v. Mentuck*, [2001] SCJ No. 73 and *Re Vancouver Sun*, [2004] SCJ No. 41 (all on the open court principle). As was held by the

Supreme Court of Canada more recently in *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, at 11, the open court principle “requires that court proceedings presumptively be open and accessible to the public and to the media” and open, accessible and transparent court processes are a “hallmark of a democratic society”. Part of the rationale for that openness is that transparency will contribute to the prevention of real or apparent interference with judicial independence by either state or private actors.

The court practice under discussion in this article enables, if not encourages, counsel to attempt to persuade judges to change their provisional conclusions on facts and law as expressed in draft judgments. Moreover, it does so by condoning confidential exchanges between counsel and judges. The adoption of such a practice would, in the author’s respectful opinion, be wholly incompatible with constitutionally entrenched notions of judicial independence, separation of powers and open courts as they are understood and repeatedly affirmed in Canada.

The unedifying spectacle created by the Binyam Mohamed litigation in the UK—in which the Court of Appeal was driven, after the fact, to place before the public all three versions of the notorious paragraph 168 of the Master of the Rolls’ judgment in *Mohamed Appeal No. 2*—amply illustrates the risks that attach to the draft judgment circulation process. The Court of Appeal had to bring those three versions out into the open and explain them out of a very real concern that, otherwise, public confidence in the court’s impartiality and the legitimacy of its processes might be damaged. Future situations of that kind would best be avoided.

## Concluding Comments

The developing law in England often provides Canadian courts with examples—beacons even—that can point the way forward. Occasionally, however, English legal practices will leave Canadian jurists, lawyers and legal scholars scratching their heads in wonderment and perplexity. The current practice under which English judges routinely circulate their judgments in draft for comment by counsel fits into the latter category. Viewed through this author’s Canadian eyes, it appears to be a practice that has brought few, and perhaps,

illusory advantages. Those advantages appear, in turn, to have been largely offset by damage to the open justice/open court principle and damage to public perceptions of the integrity of the administration of justice in England. The circulation of court judgments in draft for comment before their finalisation and release is not, therefore, a practice that this author, at least, can recommend be imported to Canada.

## APPENDIX A

### The Redacted Paragraphs

“(iv) It was reported that a new series of interviews was conducted by the United States authorities prior to 17 May 2002 as part of a new strategy designed by an expert interviewer.

(v) It was reported that at some stage during that further interview process by the United States authorities, BM had been intentionally subjected to continuous sleep deprivation. The effects of the sleep deprivation were carefully observed.

(vi) It was reported that combined with the sleep deprivation, threats and inducements were made to him. His fears of being removed from United States custody and “disappearing” were played upon.

(vii) It was reported that the stress brought about by these deliberate tactics was increased by him being shackled during his interviews.

(viii) It was clear not only from the reports of the content of the interviews but also from the report that he was being kept under self-harm observation, that the interviews were having a marked effect upon him and causing him significant mental stress and suffering.

(ix) We regret to have to conclude that the reports provided to the SyS made clear to anyone reading them that BM was being subjected to the treatment that we have described and the effect upon him of that intentional treatment.

(x) The treatment reported, if had been administered on behalf of the United Kingdom, would clearly have been in breach of the undertakings given by the United Kingdom in 1972. Although it is not necessary for us to categorise the treatment reported, it could easily be contended to be at the very least cruel, inhuman and degrading treatment of BM by the United States authorities.”

### Mr. Sumption’s Letter (Transcribed)

“8 February 2010

Dear Sirs,

Case No.: TI/2009/2331/QBACF: R (Binyam Mohammed) v. Secretary of State for Foreign and Commonwealth Affairs

Judgment is due to be delivered in this case on Wednesday 10 February 2010. The Court will be receiving a separate letter about typing corrections and other obvious errors. The purpose of this present letter is to deal with an important matter of substance, which I would invite the Court to consider before handing down their judgment in final form. I would be grateful if you would lay it before them.

At paragraph 168 of his Judgment, the Master of the Rolls makes some observations about the previous ‘form’ of SyS. I assume from the context that he is referring to the Security Service, although in paragraph 64 the Master of the Rolls defines SyS as including the Secret Intelligence Service as well, and a reader less familiar with the context might assume that he was referring to both.

The Master of the Rolls’s observations, to whichever service they relate, are likely to receive more public attention than any other part of the judgments. They will be read as statements by the Court (i) that the Security Service does not in fact operate a culture that respects human rights or abjures participation in coercive interrogation techniques; (ii) that this was in particular true of Witness B whose conduct was in this respect characteristic of the service as a whole (‘it appears likely that there were others’); (iii) that officials of the Service deliberately misled the Intelligence and Security Committee on this point; (iv) that this reflects a culture of suppression in its dealings with the Committee, the Foreign Secretary and indirectly the Court, which penetrates the service to such a degree as to undermine any UK government assurances based on the Service’s information and advice; and (v) that the Service has an interest in suppressing information which is shared, not by the Foreign Secretary himself (whose good

faith is accepted), but by the Foreign Office for which he is responsible.

The first point that I would make about this is that the conduct of Witness B, was referred by the Attorney-General to the Crown Prosecution Service and is currently under investigation by the police. If the observations in the draft Judgment appear in the final version, the publicity likely to be given to them would be highly prejudicial to any criminal proceedings that might subsequently be brought, as well as to the current civil proceedings brought against the United Kingdom Government by Binyam Mohammed among others.

More generally, the Master of the Rolls' observations, which go well beyond anything found by the Divisional Court, constitute an exceptionally damaging criticism of the good faith of the Security Service as a whole. In particular, the suggestion that the Court should distrust any UK government assurance based on the Service's advice and information will unquestionably be cited in other cases and, if applied more widely, would mark an unprecedented breakdown in relations between the Courts and the executive in the area of public interest immunity. The statements of ministers in this area, although embodying their own judgements, are often necessarily based on the information and advice of the Security Service. I am bound to suggest, which I do with genuine and not just forensic respect, that such grave criticisms of a public service and those who work in it should be made only if the issue is fairly raised in advance and the Court has an exact knowledge of the relevant circumstances. To categorise a problem as systemic is rarely a straightforward matter. In this case, it would be necessary at the very least to examine the methods and procedures of the Security Service in relation to the interviewing of detainees as well as the giving of information and advice to ministers; the basis on which the statement to the Intelligence and Security Committee was made, and what further information was provided to them, in particular about the treatment of detainees; what (if any) other instances there are of the Service's knowledge of ill-treatment of detainees interviewed by them, how information of this kind is stored, on what occasions it is retrieved, how widely

it is disseminated within the Service and what the Service's response was. The Court has not been in a position to do any of this. It simply does not have the material. Even if it had, ordinary considerations of natural justice would suggest that those responsible for the management of the Security Service should have had a proper opportunity to respond. No submission as extreme as this was made during the hearing, let alone supported by evidence. The Service has received no notice whatever of the Court's intention to make such sweeping criticisms.

As to the statement that the Foreign Office has an interest in suppressing information, in its present form this reads like an accusation of bad faith against those Foreign Office officials who have advised the Foreign Secretary. It may be that this was not intended. Certainly I am not aware of any material before the Court which suggests that such an interest exists, or that any Foreign Office official has allowed it to influence advice given in the public interest to the Foreign Secretary, in this or any other case.

I respectfully invite the Court to reconsider whether paragraph 168 is necessary to its decision, and whether it really does justice to those involved.

Yours faithfully,

Jonathan SUMPTION Q.C.  
cc. Nicola Smith, Treasury Solicitor  
Dinah Rose QC"

## APPENDIX C

### The Three Iterations of Paragraph 168

#### First Iteration

168. Fourthly, it is also germane that the SyS were making it clear in March 2005, through a report from the Intelligence and Security Committee that "they operated a culture that respected human rights and that coercive interrogation techniques were alien to the Services' general ethics, methodology and training" (paragraph 9 of the first judgment), indeed they "denied that [they] knew of any ill-treatment of detainees interviewed by them whilst detained by or on behalf of the [US]

Government” (paragraph 44(ii) of the fourth judgment). Yet that does not seem to be true: as the evidence in this case showed, at least some SyS officials appear to have a dubious record when it comes to human rights and coercive techniques, and indeed when it comes to frankness about the UK’s involvement with the mistreatment of Mr Mohammed by US officials. I have in mind in particular witness B, but it appears likely that there were others. The good faith of the Foreign Secretary is not in question, but he prepared the certificates partly, possibly largely, on the basis of information and advice provided by SyS personnel. Regrettably, but inevitably, this must raise the question whether any statement in the certificates on an issue concerning such mistreatment can be relied on, especially when the issue is whether contemporaneous communications to the SyS about such mistreatment should be revealed publicly. Not only is there an obvious reason for distrusting any UK Government assurance, based on SyS advice and information, because of previous “form”, but the Foreign Office and the SyS have an interest in the suppression of such information.

### Second Iteration

168. Fourthly, the Foreign Secretary must have prepared the certificates on the basis of advice from members of the SIS and the SyS, whose involvement in the mistreatment of Mr Mohamed has been the subject of findings by the Divisional Court. Having said that, witness B is currently under investigation by the police; and it is impossible, at any rate at this stage, to form a clear or full view as to precisely what his involvement was in the mistreatment of Mr Mohamed.

### Third (and Final) Iteration

168. Fourthly, it is also germane that the Security Services had made it clear in March 2005, through a report from the Intelligence and Security Committee, that “they operated a culture that respected human rights and that coercive interrogation techniques were alien to the Services’ general ethics, methodology and training” (paragraph 9 of the first judgment), indeed they “denied that [they] knew of any ill-treatment of detainees interviewed by them whilst detained by or on behalf of the [US] Government” (paragraph 44(ii) of the fourth judgment). Yet, in this case, that does not seem to have been true: as the evidence showed, some Security Services officials appear to have a dubious record relating to actual involvement, and frankness about any such involvement, with the mistreatment of Mr Mohamed when he was held at the behest of US officials. I have in mind in particular witness B, but the evidence in this case suggests that it is likely that there were others. The good faith of the Foreign Secretary is not in question, but he prepared the certificates partly, possibly largely, on the basis of information and advice provided by Security Services personnel. Regrettably, but inevitably, this must raise the question whether any statement in the certificates on an issue concerning the mistreatment of Mr Mohamed can be relied on, especially when the issue is whether contemporaneous communications to the Security Services about such mistreatment should be revealed publicly. Not only is there some reason for distrusting such a statement, given that it is based on Security Services’ advice and information, because of previous, albeit general, assurances in 2005, but also the Security Services have an interest in the suppression of such information.

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# A PRIVILEGE TO SERVE THE NATION – FIGHTING CORRUPTION AND MALADMINISTRATION

**His Honour Judge B. Rajendran, former Madras High Court Judge and Real Estate Appellate Tribunal Chairman. This article is based on a paper presented at the CMJA Triennial Conference, Brisbane, September 2018**

**Abstract:** *An independent judiciary is essential to protect the citizen from the excesses of legislative and executive power. The judiciary has time and again protected and zealously shielded fundamental rights such as equality before the law from the brute numbers of the majority. The Courts have continually evolved their jurisprudence to tackle the new and multifarious problems of corruption. Treating corruption as a violation of Fundamental Rights is not likely to curb it in practice. Instead, perhaps the best approach is to treat it as a problem of bad governance. This article addresses the question of: How should a judge, armed with the power of judicial review, seek to vindicate the constitutional right to a corruption free government? with particular reference to India. It finds that the judiciary has significantly contributed to strengthening the jurisprudence against corruption and maladministration.*

**Keywords:** Corruption – fundamental rights – judicial review – governance

## Opening Remarks

I am delighted to speak at this panel session titled “A privilege to serve the nation. Fighting corruption and maladministration”. Corruption is now a worldwide disease. Its tentacles have travelled far and wide. In the words of the former UN Secretary General Kofi Annan “*corruption is an insidious plague that has a corrosive effect on society by eroding the quality of life and allows crime and other threats to human society to flourish. This evil phenomenon is found in all countries, big and small, rich and poor but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key element in economic under-performance, and a major obstacle to*

*poverty alleviation and development.”*

There exists a clear and present danger that the spectre of corruption will permeate and destroy our commonly cherished constitutional value of the rule of law. There can be no gainsaying that the unholy trinity of corruption, unaccountable and arbitrary state action constitutes an antithesis to the rule of law.

We as judges are blessed with the responsibility of upholding the rule of law by administering justice without fear or favour, affection or ill will. I have consciously used the word “blessed” as I have always believed that dispensing justice is a divine function. An independent judiciary is essential to protect the citizen from the excesses of legislative and executive power. The sublime nature of our functions is vividly captured in memorable passage in a decision of the Supreme Court of India in *High Court of Judicature of Bombay v. Shirishkumar Rangrao Patil*, in the following words:

*“Independent judiciary, therefore, is most essential to protect the liberty of citizens. In times of grave danger, it is the constitutional duty of the judiciary to poise the scales of justice unmoved by the powers (actual or perceived), undisturbed by the clamour of the multitude. The heart of judicial independence is judicial individualism. The judiciary is not a disembodied abstraction. It is composed of individual men and women who work primarily on their own.*

*The Judges do not do an easy job. They repeatedly do what the rest of us seek to avoid, i.e., make decisions. Judges, though are mortals, they are called upon to perform a function that is utterly divine in character. The trial Judge is the kingpin in the hierarchical system of administration of justice. He directly comes in contact with the litigant during the day-to-day proceedings in the court. On*

him lies the responsibility to build a solemn atmosphere in the dispensation of justice. The personality, knowledge, judicial restraint, capacity to maintain dignity, character, conduct, official as well as personal and integrity are the additional aspects which make the functioning of the court successful and acceptable. Law is a means to an end and justice is that end. But in actuality, law and justice are distant neighbours; sometimes even strangely hostile. If law shoots down justice, the people shoot down the law and lawlessness paralyzes development, disrupts order and retards progress.”

As far back as in 1742, in the *St. James's Evening Post* case, the Lord Chancellor Lord Hardwicke held that there cannot be anything of greater consequence than to keep the streams of justice clear and pure, so that parties may proceed with safety both to themselves and their characters.

The fruits of a more “detached” though not literally “separated” judiciary can be most salutary. As one writer puts it “*values which are more enduring can be better preserved: individuals and groups that would be otherwise emarginated or oppressed can be better protected; and more generally the fairness and the permanent representativeness of the political process itself can be better assured.*” In our democratic system everyone has a voice in the political process, and it is perfectly possible for minority of today to become majority of tomorrow. If an example is needed, all it requires is to look at Indian Judiciary. The judiciary has time and again protected and zealously shielded fundamental rights such as equality before the law, before freedom of speech etc from the brute numbers of the majority. Thus, constitutional justice through Courts, far from being inherently anti-democratic and anti-majoritarian emerges as a pivotal instrument for shielding the democratic and majoritarian principles from the risk of corruption. The Courts afford, in the words of Mr. Justice Stone, the “*opportunity of a sober second thought*”!!

In a memorable passage in *R v Horseferry Road Magistrate's Court Ex Parte Bennett*, Lord Griffiths, pithily explains the nature of Courts as institutions to uphold the rule of law and to check maladministration in the

following words

“*If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.*”

My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. *The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended.*”

In this backdrop, our Courts have continually evolved their jurisprudence to tackle the new and multifarious problems of corruption. A global impetus in the form of the UN Convention against Corruption in 2003 has proved to be a game changer. 186 countries across the globe are signatories to this Convention and have pledged their institutional resources to the prevention, investigation and prosecution of corruption. Significantly, corruption is not explicitly referred to in the text of the Constitution of India. However, in *Vineet Narain's case* [(1998) 1 SCC 226] the Supreme Court recognized the constitutional right to a corruption free government as an integral facet of Article 21. Moving forward, the jurisprudence of the Court evolved to relax the rigid and technical rules of locus standi in cases involving corruption. At the same time, finding that honest and efficient officers of the professional executive were being harassed by filing of false cases, the judiciary yet again came to their rescue. This has been done through a route discovered by the supreme court in 1984, called the public interest litigations. the central vigilance commission was empowered through the judgment of the Supreme Court in *Vineet Narain's case*. By ensuring that only officials of unimpeachable and unsullied reputation are appointed as Central Vigilance Commissioners, the judiciary has ensured that its fight against corruption is taken into the executive fold also:

(ii) In a significant development the Supreme

Court drew upon the fundamental right of access to justice to interpret Article 21 to include a fundamental right to approach the Court for redress against corruption. Thence forward, a citizen could, as a matter of right, petition the Court to prosecute corrupt public servants.

A classic example of this new development can be seen in the case of Subramanian Swamy v Dr. Manmohan Singh (2012), where Mr. Justice Ganguly, in a felicitous passage held as under

*“The right of private citizen to file a complaint against a corrupt public servant must be equated with his right to access the Court in order to set the criminal law in motion against a corrupt public official. This right of access, a Constitutional right should not be burdened with unreasonable fetters. When a private citizen approaches a court of law against a corrupt public servant who is highly placed, what is at stake is not only a vindication of personal grievance of that citizen but also the question of bringing orderliness in society and maintaining equal balance in the rule of law.”*

It has been argued previously that treating corruption as a violation of Fundamental Rights is not likely to curb it in practice. Instead, perhaps the best approach is to treat it as a problem of bad governance. Semantic variations aside, it cannot be gainsaid that the magnitude of corruption in our public life is incompatible with the concept a liberal democracy founded on the rule of law. It cannot be disputed that where corruption begins all rights end. It is for this reason that the Supreme Court in Subramanian Swamy had evolved a principle of construction holding that the duty of the Court is that any anti-corruption law has to be interpreted and worked out in such a fashion as to strengthen the fight against corruption. That is to say in a situation where two constructions are eminently reasonable, the Court has to accept the one that seeks to eradicate corruption to the one which seeks to perpetuate it.

This brings me to the next point. How should a judge, armed with the power of judicial review, seek to vindicate the constitutional right to a corruption free government? I am free to confess that the question does not admit

of a single answer. William O Douglas of the United States Supreme Court rightly observed, *“The problems before the Supreme Court require at times the economist’s understanding, the poet’s insight, the executive’s experience, the politician’s scientific understanding, the historian’s perspectives.”* But a free-standing application of these qualities may land the judge with the epithet of a judicial activist. Recently *Swaraj Abhiyan v. Union of India*, (2016) 7 SCC 498, the Supreme Court said *“Public interest litigation presents the Court with an issue based problem concerning society and solutions need to be found to that problem within the legal framework. Sometimes, the cause of the problem is bureaucratic inactivity and apathy; sometimes executive excesses that cause the problem and sometimes the problem is caused by the ostrich-like reaction of the executive. These situations represent the broad contours of public interest issues brought to the notice of the Court, and these are the kind of issues for which we need to search for solutions. The successful pursuit of appropriate solutions and consequent conclusions and directions are often pejoratively and unfortunately described as judicial activism.”*

The Court then drew inspiration from a lecture by Justice Michael Kirby, a former Judge of the High Court of Australia who in his Hamlyn Lecture titled *“Judicial Activism — Authority, Principle and Policy in the Judicial Method”* described the Indian approach in the following words

*“The acute needs of the developing countries of the Commonwealth have sometimes produced an approach to constitutional interpretation that is unashamedly described as “activist”, including by Judges themselves. Thus, in India, at least in most legal circles, the phrase “judicial activism” is not viewed as one of condemnation. So urgent and numerous are the needs of that society that anything else would be regarded by many—including many Judges and lawyers—as an abdication of the final court’s essential constitutional role.”*

In India the primary legislation dealing with corruption is the prevention of corruption act. This not only ensures that a person is brought to justice but also quickly. The statute itself ensures that trials relating to corruption cases are not unnecessarily hindered by judicial

process of stay orders. the judiciary has ensured that statistics relating to all cases are available on a centralised database. An analysis conducted a couple of years ago has shown that trials in around 55.26% of the cases registered have been concluded. the credit goes to the state of Haryana which has completed about 86.10% of its cases and a former chief minister / the top political executive, has been convicted. Of course, there is room for improvement and it is constantly being done. In fact, when an amendment was brought about to permit those convicted of corruption to continue to stand for elections, the supreme court struck it down quickly and ensured that the elections do not throw up tainted leaders and thereby affecting the morale of the society. Let me add here – free and fair elections is also a part of the basic structure.

In India, another road block in the fight against corruption was removed recently. The accused used to take shelter under an old principle, of colonial vintage, that the judiciary should not interfere in matter relating to investigation. Recognising that fighting corruption is a fight for establishing human rights, the judiciary while accepting this principle, has gone on to hold that not only fair investigation and fair trial are part of constitutional rights, if by non-interference by the courts, if it would result in failure of justice, then the judiciary will discard the principle and order reinvestigation and if necessary, retrial by an independent agency.

Today, several accused have been brought to book because the judiciary exercised its powers to transfer investigation to the central bureau of investigation and also ensured that the special courts are manned by judicial officers of impeccable judicial track record. This is because the tenet of the constitution is “be you ever so high, the law is above you”.

There can, therefore, be no two opinions that it has fallen to the lot of us, the judges, to apply and enforce the norm of ensuring a corruption free administration thereby strengthening the rule of law. In this connection Mr. Justice Madon, a former judge of the Supreme Court of India, writes as under

*“The collective will of the society today wants that if the rich sleep in luxury apartments, the poor should sleep at least with a roof over their head, that if the rich can eat both bread and cakes, the poor should at least eat bread, that if the rich can live in opulence, the poor should at least be able to afford basic comforts of life. If the law is to operate today, so as to secure social justice to all, who else can do it but Judges whose constitutional task is to interpret and apply the law.”*

The judiciary thus works to bring about a silent revolution for the purpose of securing socio-economic justice to all. This is the basic premise underlying the our constitutional ethos. Will the judiciary be able to achieve this single headedly? This is poser, once again, does not admit of a clear cut answer. One thing is, however, clear. The judiciary has significantly contributed to strengthening the jurisprudence against corruption and maladministration. The jurisprudence of the Indian Supreme Court in the past decade in corruption cases only reinforces this point. The judicial attitude has been one of zero tolerance. Agreed that mere judicial activism cannot furnish a one stop solution to the ills of a corrupt bureaucracy. We must, however, remind ourselves with the golden words of Professor Julius Stone, when he famously quipped

*“It is not given to any generation of men to complete the task of human improvement and redemption but no generation is free to desist from them.”*

# ECONOMIC FREEDOM FIGHTERS AND OTHERS V SPEAKER OF THE NATIONAL ASSEMBLY AND ANOTHER (NO 2)

5 September, 29 December 2017

Constitutional Court of South Africa [2017] ZACC 47

Mogoeng CJ, Zondo DCJ, Cameron, Froneman, Jafta JJ, Kathree-Setiloane, Kollapen AJJ, Madlanga, Mhlantla, Theron JJ And Zondi AJ

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After an investigation into the construction of improvements at the second respondent President Jacob Zuma's private residence in Nkandla, the Public Protector issued a report making adverse findings against the President and setting out remedial action that he was required to carry out. The President failed to comply but instructed the Minister of Police to investigate. The Minister produced a report that exonerated the President. The National Assembly set up two ad hoc committees to examine the reports. Those committees preferred the Minister's report and presented their own report to the Assembly. The Assembly endorsed the committees' report and absolved the President of all liability. Unhappy with that result, the Economic Freedom Fighters ('EFF') applied to the Constitutional Court seeking declaratory relief. The court concluded that the Assembly, in exonerating the President, and the President, in failing to comply with the remedial action required by the Public Protector, had acted in a manner that was inconsistent with the Constitution of the Republic of South Africa 1996 (see *Economic Freedom Fighters v Speaker of the National Assembly, Democratic Alliance v Speaker of the National Assembly* [2016] 3 LRC 713 ('EFF 1')). Following the judgment in *EFF 1*, the Leader of the Opposition in the National Assembly, supported by other opposition parties, moved a motion for the President's removal from office in terms of s 89<sup>a</sup> of the Constitution on the ground that he had committed a serious violation of the Constitution in failing to implement the Public Protector's remedial action. The motion was defeated. Following the motion, the National Assembly conducted question and answer sessions in which the President answered questions concerning his failure to implement the remedial actions. Subsequently, two motions of no confidence in the President moved under s 102 of the Constitution were defeated. The applicant opposition parties applied to the

Constitutional Court seeking declarations that the National Assembly had failed to hold the President to account for his failure to implement remedial action contained in the Public Protector's report and directing the Assembly to put requisite processes and mechanisms in place to hold the President accountable, and to convene a committee or other appropriate independent mechanism to conduct an investigation into the conduct of the President and whether he had made himself guilty of an offence or inability which would warrant the exercise of the power of Parliament in terms of s 89(1). The first respondent, the Speaker of the National Assembly, argued, mistakenly, that a process in terms of r 85<sup>b</sup> of the Rules of the National Assembly (which allowed for a motion bringing 'improper or unethical conduct ... to the attention of the House') was sufficient to regulate an impeachment process. The Speaker further submitted that the process could be dealt with in terms of r 253<sup>c</sup> (which provided for the establishment of ad hoc committees). The key issues before the court were (i) whether the National Assembly had failed to put all appropriate mechanisms and processes in place to hold the President accountable for violating the Constitution by failing to implement the report of the Public Protector; (ii) whether the National Assembly had failed in its duty to scrutinise the violations of the Constitution by the President in the course of his failure to implement the report of the Public Protector; (iii) whether, if the Court determined the issue in (i) and (ii) in the applicants' favour, it should make the directions sought. The Court further considered the remedies available to it under s 172(1) of the Constitution

**HELD:** (By a majority) Application allowed.

(1) Section 89 empowered the National Assembly alone to remove the President from office. However, consistent with the role played by the President in the democratic order and the

obligation imposed on him or her to uphold, defend and respect the Constitution as the supreme law, the drafters of the Constitution had sought to limit the power given to the Assembly to impeach and remove a President from office. The power was available only if one of the listed grounds was established: (i) a serious violation of the Constitution or the ordinary law—what qualified that ground was the word ‘serious’; (ii) serious misconduct; and (iii) inability to perform the functions of the office. None of those grounds was defined in the Constitution. The drafters had left the details relating to those grounds to the Assembly to spell out. But the drafters could not have contemplated that members of the Assembly would individually have to determine what constituted a serious violation of the law or the Constitution and conduct on the part of the President which amounted to misconduct and whether such conduct might be characterised as serious misconduct. If that were to have been the position, then it would have resulted in divergent views on what was a serious violation of the Constitution or the law and what amounted to serious misconduct. Since the determination of those matters fell within the exclusive jurisdiction of the Assembly, it alone was entitled to determine them. That meant that there had to be an institutional pre-determination of what a serious violation of the Constitution or the law, serious misconduct or inability to perform the functions of the office were. For the impeachment process to commence, the Assembly had to have determined that one of the listed grounds existed. Therefore, any process for removing the President from office had to be preceded by a preliminary inquiry, the form of which depended upon the Assembly. It was also up to the Assembly to decide whether the President should be afforded a hearing at the preliminary stage. Since the power to remove was institutional, the Assembly had to decide and facilitate the initiation of the preliminary stage. It might well be that each member of the Assembly had a right to initiate the preliminary process. Even so, the Assembly had to facilitate steps to be taken in that regard and a process to be followed, not only at a preliminary stage but also at the stage of actual impeachment up to the final stage of voting on whether the President should be removed from office, so as to determine whether the removal was supported by the necessary two-thirds majority. Without rules defining the entire

process, it was impossible to implement s 89. The proposition that the existing rules regulated the s 89(1) proceedings was based on the Speaker’s mistaken belief that r 85(2) of the Rules of the National Assembly applied. In opposing the application, the Speaker had also called in aid r 253 which governed the establishment of ad hoc committees, saying that a member of the Assembly might request that an impeachment matter be referred to an ad hoc committee established in terms of the rule. Significantly, the Speaker did not state the meaning assigned to ‘serious’ by the Assembly or what would happen if each member of the ad hoc committee attached a meaning to that crucial word which was different from the interpretation of other members. All that he said was that the committee’s recommendation would have to state whether the breach had been serious enough to warrant the President’s removal. On that approach, it was the initiator of the process who determined whether the President had committed a serious misconduct or a serious violation of the Constitution or the law. If the initiator held that opinion, he or she might request that an ad hoc committee be established to investigate and recommend to the Assembly that the President be removed from office. That process lacked a sifting mechanism which would determine whether there was a case for the President to answer. Over and above that, the ad hoc committee process did not have a set procedure for the committee to follow when carrying out its task. The rules relevant to the establishment of ad hoc committees did not determine the size of a committee or require that all parties be represented. If more than one party was represented, the representation mirrored their representation in the Assembly and the majority party would have majority representation. That raised the risk of an impeachment complaint not reaching the Assembly. A decision by members of the majority party in the ad hoc committee might prevent an impeachment process from proceeding beyond the committee in order to shield a President who was their party leader. Accordingly, the committee system was not suitable. The ad hoc committees did not constitute a mechanism contemplated in s 89(1). The grounds for impeachment had to be established before the motion to remove the President from office was debated and voted on. Section 89(1) implicitly imposed an obligation on the Assembly to make rules specially tailored

for an impeachment process. The Assembly had, in breach of s 89(1), failed to make rules regulating the impeachment process and consequently the application on that ground would be allowed.

(2) While it was not accurate to say that the Assembly had done nothing to hold the President accountable since the delivery of the court's judgment in *EFF 1*, the crucial question was whether appropriate action has been taken against the President by the Assembly. It was true that questions had been answered by the President in the Assembly and that a motion of no confidence in terms of s 102(2) of the Constitution had been tabled against him. That motion had been deliberated and voted upon. But those steps had not been actions taken in terms of s 89(1). That section did not require the question and answer sessions or authorise the tabling of a motion of no confidence against the President. A motion for the President's removal in terms of s 89(1) and based on the judgment in *EFF 1* had been tabled by the Leader of the Opposition. The motion had been debated and voted on. What needed to be decided was whether the processing of that motion had complied with the requirements of s 89(1). If it had, that would be the end of the matter because s 89(1) did not oblige the Assembly to remove the President from office, even where one or more of the listed grounds were established. On the contrary, the Assembly retained a discretionary power to remove the President. But the process envisaged in s 89(1) involved necessarily an antecedent determination by the Assembly to the effect that one of the listed grounds existed because those were grounds for the President's removal: that had not been done. The motion had simply been tabled, debated and voted on. The Assembly had not approached the processing of the motion on the footing that the President had indeed committed a serious violation of the Constitution, which was a necessary condition for commencing a s 89 process. Without accepting that one of the listed grounds existed, the Assembly could not have authorised the commencement of a process which could have resulted in the removal of the President from office. Moreover, it did not appear from the papers that the President had been afforded the opportunity to defend himself. Without knowing whether the Assembly held the view that the President had committed a serious violation of

the Constitution, it would have been difficult for him to mount an effective defence. The procedure followed by the Assembly did not accord with s 89. If that motion had succeeded, it would not have constituted impeachment and removal of the President, as contemplated in s 89(1). Instead, it would have been an unconstitutional removal of the President from office and would have been liable to be set aside on review. Accordingly, the Assembly had failed to hold the President to account following delivery of the court's judgment in *EFF 1*, as had been required by s 89(1) and the application on that ground would be allowed.

(3) The Assembly had failed to fulfil its obligations under the Constitution; those failures were inconsistent with s 172(1) of the Constitution. Section 172(1)(b) empowered courts to make any order that was just and equitable. In the instant case, it was just and equitable to direct the Assembly to perform its constitutional obligation within a fixed period of time. An impeachment complaint had to be accorded priority over other normal business of the Assembly. Once lodged, the Assembly had to take steps to ensure that it was addressed without delay. The special office the President occupied warranted that those matters had to be promptly addressed and resolved so that the President might continue to perform his or her duties without a dark cloud hanging over him or her. The proposed order did not usurp the Assembly's powers, it merely directed that the Assembly had to exercise its powers without delay and therefore could not be described as trenching upon the separation of powers.

Per Zondo DCJ (dissenting) (Mogoeng CJ, Madlanga J, Zondi AJ concurring). There had been a number of accountability and oversight mechanisms available for use by the National Assembly to hold the Executive, including the President, accountable. Even if the only oversight mechanism that could have been used to hold the President accountable for failing to implement the Public Protector's report had been the motion of no confidence that would have been enough. Further, although the Assembly had not put in place a mechanism that was specially tailored for s 89, it had put in place a mechanism that could be used effectively for the removal of a President in terms of s 89. That mechanism was the ad hoc committee. It was clear, therefore, that the Assembly had put in

place mechanisms and processes that could have been used to hold the President accountable. The fact that a motion for the removal of the President and motions of no confidence in the President had been moved, deliberated and voted upon but had been defeated proved that the Assembly had acted upon the President's conduct and held him accountable. That those motions were defeated did not detract from the fact that the National Assembly had held the President accountable.

Per Mogoeng CJ. The majority judgment is a textbook case of judicial overreach—a constitutionally impermissible intrusion by the

judiciary into the exclusive domain of Parliament.

Per Froneman J (Cameron, Jafta JJ, Kathree-Setiloane, Kollapen AJJ, Mhlantla and Theron JJ concurring). It is part of constitutional adjudication that, as in this matter, there may be reasonable disagreement among judges as to the proper interpretation and application of the Constitution. The respective merits of opposing viewpoints should be assessed on the basis of the substantive reasons advanced for them. There is nothing wrong in that substantive debate being robust, but to attach a label to the opposing view does nothing to further the debate.

## FERGUSON V ATTORNEY GENERAL; OUTBERMUDA AND OTHERS V ATTORNEY GENERAL

21–24 May, 6 June 2018

Supreme Court of Bermuda [2018] SC (Bda) 45 Civ

Kawaley CJ

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In *Godwin v Registrar General (Human Rights Commission intervening)* [2017] 3 LRC 596 it was held that the Bermudian Human Rights Act 1981, which as amended prohibited discrimination on the grounds of sexual orientation, guaranteed same-sex couples the right to marry. The legal basis for that conclusion was that the 1981 Act provided that it had primacy over inconsistent provisions of statutory and common law, and the then prevailing definition of marriage limited to opposite-sex couples discriminated against same-sex couples on the grounds of their sexual orientation. The Domestic Partnership Act 2018, inter alia, revoked the effect of *Godwin*; it provided that the 1981 Act would not take precedence over the provisions of the 2018 Act, which facilitated recognition only for a marriage between a man and a woman. The 2018 Act also introduced a scheme of 'domestic partnerships' into which same-sex couples could enter. The applicants sought declarations that Parliament could not validly reverse the court's decision that same-sex marriage was a right guaranteed by Bermudian law. In particular it was argued, first, that Bermuda had a secular Constitution and s 8<sup>a</sup> of the Constitution of Bermuda 1968 prohibited Parliament from passing laws of general application for a religious purpose; the restoration of traditional marriage was primarily a response to religious lobbying and so the relevant provisions of the 2018 Act were invalid

because they were enacted for an impermissible religious purpose. Secondly, denying and/or depriving each person who believed in same-sex marriage (whether on religious or non-religious grounds) of the right to manifest their beliefs through legally recognised marriage ceremonies interfered with the constitutionally protected freedom 'either alone or in community with others, and both in public or in private, to manifest and propagate [their] religion or belief in worship, teaching, practice and observance' under s 8(1). Thirdly, maintaining or restoring a definition of marriage that favoured those who believed in opposite-sex marriage and disadvantaged those who believed in same-sex marriage discriminated against the latter group on the grounds of their 'creed' contrary to s 12<sup>D</sup> of the Constitution. The applicants included both those who claimed that the revocation provisions deprived them of the opportunity to enter into same-sex marriages, and those who complained that they impaired their ability to manifest their beliefs by celebrating same-sex marriages.

**HELD:** Applications allowed.

(1) The decision in *Godwin* was permissible. The court had applied an express power conferred by Parliament to declare that provisions of law inconsistent with the 1981 Act's prohibition on discrimination on the grounds of sexual

orientation did not have legal effect.

(2) As regards the correct approach to considering whether an application for constitutional redress established an answerable case of interference with a fundamental right, the court had to define the legal scope of the relevant right as broadly as possible and set the evidential bar for establishing an interference as low as possible with a view to ensuring that the importance of the right in question was vindicated rather than disappointed. The court should not rifle through its deck of legal cards with a view to finding a ‘get out of jail free’ card for the executive. Every judge was in that regard required to be a fundamental rights and freedoms activist. Respect for the importance of fundamental rights as a check on the executive and legislative branches of governments required the court to be careful to avoid according too much deference to what could fairly be characterised as frivolous or vexatious complaints. Where an applicant established a prima facie case in relation to an interference that could potentially be justified, the court was required to balance more evenly the interests of the state with the rights of the aggrieved citizen who had established a legally recognisable interference with a fundamental right. It was at that stage that there was greater room for differing legal policy approaches, depending on how much importance individual judges place upon individual liberty as opposed to executive or legislative authority and/or collective, community rights.

(3) The Bermudian Constitution required a secular approach to government, pursuant to which Parliament could not validly promulgate laws that were motivated by a religious purpose. The relevant time for scrutinising purpose was the date of enactment of the impugned statutory provisions. The revocation provisions in the 2018 Act were not invalid on the basis that they were made solely or even substantially for a religious purpose. In that regard, it did not matter that the traditional definition of marriage prior to *Godwin* was a religious definition, that the revocation provisions were derived from a Bill that had been promoted for religious purposes, and that the revocation provisions were proposed in response to religious lobbying. The revocation provisions had been made for a mixed purpose, which included: fulfilling an election promise to revoke

same-sex marriage; introducing a comprehensive scheme for same-sex relationships; satisfying the religious demands of opponents of same-sex marriage; meeting the expectations of the LGBT community; and mitigating the adverse publicity for Bermuda flowing from what would be a controversial reversal of *Godwin*. It would be against the weight of the evidence to find that the revocation provisions were enacted solely or substantially for religious purposes. Clearer evidence would be required to justify such a finding where the court was being asked to intrude into the privileged sphere of parliamentary debates. Moreover, any such finding could have the unintended effect of making religious lobbyists anxious about the legality of exercising their own constitutionally protected rights of freedom of conscience and freedom of expression. As far as government-sponsored legislation was concerned, the secularity principle constrained the way in which a Bill was promoted by the proposer of the legislation and also the conduct of public office-holders acting in their official capacity. The secularity principle was not intended to restrict the political freedoms of the ordinary citizen or organised lobbyists.

(4) It was self-evident that beliefs in relation to same-sex marriage qualified for protection under s 8(1) of the Constitution. A law that prevented same-sex couples from marrying interfered with (or hindered) the ability of those who believed in a legally recognised marriage as an important institution to manifest that belief by participating in a legally recognised marriage ceremony. Those adversely affected included not simply LGBT persons, but their families, friends and/or their religious ministers as well. The hindrance was not dependent upon the right to marry having been granted in *Godwin*. The hindrance was merely aggravated by the fact that a hard-won right was sought to be taken away by the revocation provisions of the 2018 Act. The effect of the revocation provisions was to force persons wishing to achieve legal recognition for their same-sex relationships to enter into a ‘domestic partnership’, irrespective of whether or not such an institution was consistent with their beliefs, whereas prior to the coming into force of the 2018 Act, same-sex couples who believed in the institution of marriage could manifest their beliefs by participating in legally recognised marriage ceremonies. The suggestion that legal recognition

of marriage could be wholly detached from the religious or secular concept of marriage for the purposes of the analysis was simply untenable. The campaign to preserve marriage as a heterosexual-only institution was primarily about persuading the state not to extend legal protection to marriages that contravened those lobbyists' beliefs. Just as the religious lobbyists believed that same-sex marriages should not be recognised, the applicants and many others held equally sincere opposing beliefs. It was not for secular institutions of government, without constitutionally valid justification, to direct the way in which a citizen manifested their beliefs. The applicants did not seek the right to compel persons of opposing beliefs to celebrate or enter into same-sex marriages. They merely sought to enforce the rights of those who shared their beliefs freely to manifest them in practice. Persons who passionately believed that same-sex marriages should not take place for religious or cultural reasons were entitled to have those beliefs respected and protected by law. But, in return for the law protecting their own beliefs, they could not require the law to deprive persons who believed in same-sex marriage of respect and legal protection for their opposing beliefs. There was no fundamental legal objection to a complaint of a breach of s 8(1) rights being made in relation to a failure of the state to provide legal protection for same-sex marriage and/or a decision of the

legislature to remove legal protections granted by the court. It followed that the revocation provisions contravened the applicants' rights of freedom of conscience protected by s 8(1) of the Constitution by depriving them of the opportunity to participate in legally recognised same-sex marriages.

(5) 'Creed' in s 12 of the Constitution did not appear to be limited to religious-based beliefs, but in any event the applicants' case was largely concerned with an interference with a religious belief in marriage. There was a distinction between those applicants whose main complaint was that the revocation provisions denied them the opportunity to enter into same-sex marriages and those who complained solely about the impairment of their ability to manifest their beliefs by celebrating same-sex marriages. The discrimination of which the latter category complained was wholly or mainly attributable to their creed within the meaning of s 12. The former were hindered in their ability to manifest their beliefs in relation to s 8, but the discrimination that they experienced was mainly because of their sexual orientation. The Constitution did not give the state *carte blanche* to define marriage without regard to the freedom of conscience rights. The latter category of applicant had had their s 12 rights interfered with in a legally impermissible way, contrary to the Constitution.

## **HYLES V DIRECTOR OF PUBLIC PROSECUTIONS; WILLIAMS V DIRECTOR OF PUBLIC PROSECUTIONS**

11 May 2018

Caribbean Court of Justice [2018] CCJ 12 (AJ)

Byron P, Saunders, Wit, Hayton AND Rajnauth-Lee JJCCJ

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In January 2008, in a village in Guyana, gunmen went from house to house with high powered rifles on a shooting rampage. Eleven innocent persons, five of whom were children, were murdered in cold blood as they slept in their homes. The appellants, H and W, were indicted in July 2013 on 11 counts of murder. They pleaded not guilty to the charges and a trial by jury proceeded. The jury returned unanimous verdicts of not guilty on all 11 counts. The respondent Director of Public Prosecutions ('DPP') appealed against the acquittals under s 33B<sup>A</sup> of the Court of Appeal Act on the basis that there had been material irregularities in the trial which

had resulted in the not guilty verdicts, despite, according to the DPP, strong and compelling evidence. The Court of Appeal Act had been amended in 2010 and, under what became Pt IIIA of the Act, ss 33A–33M set out the legal framework for appeals by the DPP. The Court of Appeal allowed the DPP's appeal, holding that there had been several procedural issues which it considered to be material irregularities. In particular, the Court of Appeal held that the trial judge had erred in law in allowing prospective jurors to be questioned to determine whether they had a bias. The Court of Appeal further found that the relationship between H's

counsel and the foreman of the jury, whom H's counsel had previously represented in a civil matter, should have been disclosed. The Court of Appeal also held that the trial judge should have investigated an allegation by prosecuting counsel that there was a relationship between a juror and a man alleged to be H's father. Furthermore, the Court of Appeal ruled that the trial judge had erred in excluding photographs sought to be adduced by the prosecution and had failed adequately and accurately to direct the jury on the law relating to joint enterprise. In conclusion, the Court of Appeal held that the material irregularities had resulted in there not being a fair hearing and it ordered a retrial in the interests of justice. The appellants sought special leave to appeal to the Caribbean Court of Justice ('CCJ') against that decision. The appellants' first argument before the CCJ concerned the constitutionality of the Court of Appeal Act as amended, namely: (i) whether s 33B of the Act breached the appellants' right to protection of the law under art 144(5)<sup>b</sup> of the Constitution of the Co-operative Republic of Guyana 1980 ('the Constitution'), which protected against double jeopardy, (ii) whether s 33B of the Act was applicable to the appellants as the charges against the appellants had been made before the Court of Appeal Act was amended to introduce s 33B, and (iii) whether s 33B offended the principle of separation of powers as, on the appellants' contention, the DPP, a member of the Executive, had the power to decide the consequences which flowed from an acquittal by procuring a retrial. In its analysis of the constitutional issues, the CCJ considered art 144(1) of the Constitution, which provided that all criminal cases had to be 'afforded a fair hearing within a reasonable time frame by an independent and impartial court established by law', as well as art 14(7) of the International Covenant on Civil and Political Rights ('ICCPR'), to which Guyana was a signatory, which stated: 'No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'. The appeal also raised procedural issues including, at a general level, (i) the proper test to be applied on a prosecution appeal in Guyana, (ii) when judicial errors of procedural flaws enumerated in s 33B were to be considered sufficiently serious to set aside an acquittal and justify a second proceeding, and, specifically in relation to the instant case, (iii) whether the Court of Appeal

had erred in finding that there had been material irregularities which had resulted in the not guilty verdicts, and in setting aside the acquittals.

**HELD:** Appeal allowed.

(1)(i) There was no support for the appellants' argument that s 33B of the Court of Appeal Act breached the right to protection of the law in art 144(5) of the Constitution. First, the very wording of the law in art 144(5) contemplated the possibility of an appeal against acquittal. Second, art 144(5) had to be understood against the background of art 14(7) of the ICCPR which embodied the rule against double jeopardy. While that was not an absolute rule—it mainly protected a person who had been acquitted at first instance and whose acquittal, after having been affirmed by an appeal court, had become final in accordance with the law and penal procedure of the country where he or she was tried—the appellants in the instant case obviously did not fall into that category. Although the appellants were acquitted in the High Court, they were not finally acquitted as the DPP appealed that decision in accordance with the relevant sections of the Court of Appeal Act. Moreover, the principle of fundamental fairness in art 144(1) of the Constitution required the protection of the rights of other stakeholders in the criminal justice process and demanded a fair balance between the interests of an individual and the need to ensure the effectiveness of the system of criminal justice. That did not mean that the legislature had a free hand in designing any legal framework it wished. The rule of law and the right to the protection of the law required adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power. However, such safeguards were present in the amendment to, what became, Pt IIIA of the Court of Appeal Act. First, where the DPP elected to appeal against an acquittal or sentence, it had to be done within a limited time which created legal certainty for the acquitted person. Second, the right of appeal conferred on the DPP was limited to certain serious offences, murder being one of them. Third, the grounds of appeal for the DPP were mainly limited to procedural errors and flaws enumerated in s 33B. Fourth, on an appeal from an acquittal, the Court of Appeal could decline to order a retrial if, for example, there had been a long delay between the event giving rise to the offence and the date of a possible retrial, and in the circumstances of the case, a retrial would greatly risk the result of an

inaccurate verdict being reached or would violate the right to a fair trial.

(ii) Section 33B of the Court of Appeal Act was applicable to the appellants. In respect of indictable offences, there had to first be a preliminary enquiry in the magistrates' court to determine if the case should go for trial by jury in the High Court. Thus, it was only after the preliminary enquiry that the DPP decided whether or not to proceed with the indictable charge and cause an indictment to be filed. It was only when that indictment was filed that an indictable trial in the High Court was initiated. The appellants had been indicted in July 2013 and the new provisions which give the DPP a right of appeal had taken effect in 2010 (see [50], below). *Re Matter of an Application by Norris Williams and Cecil Salisbury, Re an Application under Articles 2, 10, 19, 47 and 73 of the Constitution of Guyana* (1978) 26 WIR 133 and *Kewley v A-G* 2015 HC 32 considered.

(iii) Concerning the separation of powers, the appellants' argument was plainly flawed. The DPP had been given the right to seek a certain determination from the court. The outcome of that endeavour was perfectly uncertain and entirely beyond the DPP's competence. The right to appeal could not be construed as including even slightly the ability to determine the outcome of the appeal against acquittal. The power to make that determination remained wholly with the judiciary. The principle of separation of powers remained intact.

It followed that none of the constitutional arguments raised by the appellants were available and the right of the DPP to appeal the acquittals had been properly exercised in the present case.

(2) As regards the proper test to be applied on a prosecution appeal in Guyana against an acquittal in proceedings by indictment in the High Court, the prosecution had to satisfy the court that, given, on the one hand, the nature and weight of the evidence as a whole and, on the other hand, the seriousness of the judicial error(s) or procedural flaw(s), it could with a substantial degree of certainty be inferred that had the error(s) or flaw(s) not occurred, the trial would not have resulted in an acquittal of the accused. If that inference could not be made with the required degree, the acquittal had to stand, even if the error(s) or flaw(s) were substantial. Section 33B(1)(v)

of the Court of Appeal Act identified as one of the procedural flaws which could lead to overturning an acquittal 'a material irregularity' in the trial but gave no guidance on what such a material irregularity entailed. Usually, but not necessarily, the irregularity would be a mistake made by the trial judge and in order for it to be a *material* irregularity, it ought to be a significant one. A material irregularity also had to go to the root of the case. In the case of an appeal against an acquittal where there had been a significant material irregularity going to the root of the case, the question was not whether that irregularity resulted in a miscarriage of justice, but whether it could be inferred that it resulted in the acquittal of the accused.

(3) Material irregularities had occurred in the trial of the appellants. There had been significant irregularities in the selection of the jury and the failure of the trial judge to order an investigation into an allegation of improper communication with a juror also constituted a material irregularity. Moreover, there had been a substantial misdirection in the summation to the jury to the extent that the trial judge had failed to properly counterbalance allegations of police impropriety launched by the accused from the safety of the dock with a direction pointing out to the jury the fact that that allegation was not supported by evidence and that the accused was not able to be cross-examined, meaning that those allegations had to be considered with great caution. Taken together, those errors and flaws were of a sufficiently serious nature and in a conviction appeal the material irregularities might well have led to allowing the appeal and overturning the verdicts. However, that was not the test. The court had to be able to infer that had the material irregularities and the substantial misdirection not occurred, the trial would not have resulted in an acquittal of the accused. In the instant case, it could not be concluded with the required degree of certainty that if the jury had not been selected in the manner it was, it would have reached a different verdict. Nor was it sure or even likely that had the other mistakes not been made, the accused would have been convicted. It was quite possible that the jury acquitted the appellants because they simply did not believe, beyond reasonable doubt, the evidence presented by the State. The decision of the Court of Appeal to set aside the acquittals and to order a retrial, therefore, could not stand.

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## BOOK REVIEWS

### Corruption and Misuse of Public Office

Colin Nicholls QC, Tim Daniel, Alan Bacarese, James Maton and Professor John Hatchard  
*Third Edition*

Oxford University Press, 2017  
lxxviii + pp 934.

The well-documented rise in corruption at national and international levels has demanded increasing attention from governments, civil society and the legal profession across the globe. Thus, this volume has doubled in size since the first edition in 2005. As Lord Phillips explains in his foreword, 'This is not because corruption is necessarily on the increase, although the latest report from Transparency International records a perception that this is indeed the case. It is because of an increase in the measures that are being taken both in this country and around the world to root out and stamp out corruption.' The scope of the volume is impressively wide in both its jurisdictional coverage and in the variety and complexity of the topics addressed. Thus, we find a detailed treatment of the relevant domestic law, both civil and criminal, of the United Kingdom, of international and regional anti-corruption initiatives and of corruption laws of selected common law, civil law and other jurisdictions.

The primary focus of the work is on developments in the United Kingdom, which, to quote Lord Phillips again, 'has established itself as second only to the United States in its efforts to combat domestic corruption and to encourage international cooperation in this field'.

Part I of the volume contains a detailed analysis of the Bribery Act, which came into force in 2011. For the tortuous process leading to the reform of the UK's bribery law, the authors refer the reader back to the earlier editions which should be retained for this purpose. One of the most problematic areas of the new legislation relates to the creation of a separate offence of bribery of a foreign public official. The Act does not provide a defence in such circumstances of, for example, duress. UK travellers to Africa are familiar with the police roadblock which can only be passed

by payment of a small 'facilitation' payment. Such payment would constitute an offence under UK law, mitigated by the exercise of prosecutorial discretion in accordance with Guidelines which militate against prosecution in such circumstances. The authors stress that the Act, which is quite short, can only be understood and applied in the context of the extensive Guidance published by the Ministry of Justice and that produced by the Director of the Serious Fraud Office (SFO) and the Director of Public Prosecutions (DPP). Helpfully, these documents are reproduced as appendices to the volume. A novel feature of the law introduced subsequent to the Bribery Act is the 'Deferred Prosecution Agreement' (DPA) introduced by the Crime and Courts Act 2013. DPAs provide a mechanism whereby an organisation can avoid prosecution for certain economic or financial offences (including those involving corrupt practices) by entering into a court-supervised agreement on negotiated terms with the prosecutor. The authors emphasise the importance of judicial oversight of this novel process and they provide useful summaries of recent cases of which the most spectacular and controversial involved payments by Rolls Royce to the SFO of £500 million in respect of the company's egregious criminality over decades,

Part I of the volume also contains a full treatment of the common law offence of misconduct in public office and the tort of misfeasance in a public office. Public concern in the UK over evidence of misconduct by police officers led to the creation of a corruption offence specific to the police by the Criminal Justice and Courts Act 2015. Whether this measure reflects a decline in standards of police conduct or rather the uncovering of malpractice which has always existed maybe a matter for debate.

Part II deals with a vital element in combating

corruption - effective measures for the recovery of the proceeds of crime. The authors provide a chapter of international case studies relating to both criminal and civil proceedings in the UK and elsewhere. These provide a sorry record of the large-scale robbery of state assets by such notorious ruling families as those of General Abacha in Nigeria, of President Chiluba of Zambia and of President Suharto of Indonesia.

The authors feel justified in including in Part III a chapter on the regulation of conduct in public life generally, while admitting that 'twenty years ago it would have appeared strange that a book on the law of corruption and misuse of public office should include a chapter on integrity in public life'. However, since the 1990s, allegations of 'sleaze', particularly in respect of the conduct of members of parliament (expenses and cash for questions) have led to serious public concern about standards of public life in the UK. The authors trace the various measures that have been taken to regulate the conduct of parliamentarians, ministers, civil servants and judges. It is worth noting in a comparative Commonwealth context that the enactment of the Recall of Members of Parliament Act in 2015 follows a precedent from 'new' Commonwealth jurisdictions such as Kenya and Uganda.

The treatment of the Judiciary in Part III in terms of the regulation of conduct is relatively brief and confined to the United Kingdom, where judicial corruption is said not to be a problem in modern times. The authors give an account of twenty first century UK judicial reforms and statutory measures to preserve judicial independence. However, criticism is recorded of the apparent failure of the Lord Chancellor (no longer required to be a lawyer and reduced to the status of a middle-ranking government minister) to provide an effective defence for judges when subject to vitriolic press abuse after a decision in litigation arising out of the referendum decision to withdraw from the European Union. There is acknowledgement of Commonwealth influence on the *Guide to Judicial Conduct* first published in 2004, another example of UK practice following behind developments in other Commonwealth jurisdictions.

The authors also address the issue of standard

setting in the private sector. The purpose is to provide information as to existing standard setting in initiatives, both international and national, without attempting, as the authors admit, 'to evaluate their effectiveness'. Perhaps inevitably in a work of this kind, attempting to cover so much ground, information tends to take precedence over analysis. Perhaps in a future edition the authors might manage to condense some of the detail and thereby provide room for a concluding chapter which might attempt the formidable task of evaluation of the effectiveness of the measures described. However, the authors' response would no doubt be that in what is primarily a practitioners' text, there is no room for 'academic' analysis.

This edition contains in Part III a new chapter on combating corruption in sport, which has been a source of frequent scandals in recent times. Such corruption can take a number of different forms –corruption within international sporting bodies such as FIFA and IAAF, match-fixing and illegal gambling, doping and other sporting corrupt practices. Dealing with such issues has required the creation of a complex regulatory framework based on a variety of international initiatives. Again, useful case-studies are provided. Those who lament the scale of corruption in sport in recent years may take comfort from evidence that it has existed for at least 2,800 years. Statues to the gods outside the ruins of the ancient Olympic stadium in Greece were paid for by athletes and coaches who were caught cheating.

Part IV is devoted to a detailed account of international and regional anti-corruption initiatives including the United Nations Convention against Corruption and regional measures such as the African Union Convention on Preventing and Combating Corruption. Those who regard the Commonwealth as playing a significant role in world affairs will be gratified by the inclusion of a section on Commonwealth initiatives in combating corruption, in particular the provision of technical assistance to the small and developing states that make up the majority of the organisation's membership.

Part V displays the broad scope of the work by describing the corruption laws of jurisdictions

other than the UK, It is appropriate that most detailed treatment is accorded to US law, since the Foreign Corrupt Practices Act has just passed its fortieth anniversary and has proved to be ‘the most significant anti-corruption law that applies to international business’. A representative selection of common law jurisdictions includes some of the most and some of the least corrupt countries in the world. The civil and other jurisdictions included have a comparable range –Brazil, China, France, Russia, South Africa and the United Arab Emirates. In relation to each of the jurisdictions, the legal framework is described, with key cases on enforcement. The latter expose the extent of corruption, often involving serving or former heads of state, in, for example, Nigeria and Brazil. Part V also contains an examination of off-shore financial centres, so often the repository of the fruits of the corrupt practices described in this volume.

The concluding Part VI acknowledges the role of civil society organizations (CSOs), operating at international, regional and national levels, in making an invaluable contribution to supporting good governance and the fight against corruption. In

emphasising the constructive role of CSOs in partnering governments and the private sector, in particular by providing information, research capacity and publicity to support anti-corruption measures, the authors may help to defuse the suspicion of CSO activity often manifest in governmental and business circles.

Apart from the appendices of UK instruments already referred to, the volume benefits from a comprehensive index which greatly enhances the utility of the work for the busy practitioner. No lawyer today can afford to be without knowledge of the issues covered by this book in such an impressive fashion. This suggests that the law students of today need a good grounding in corruption issues as part of professional training. If the authors are looking for another project, they might consider producing a slimmed down (and cheaper!) volume which would provide a basis for teaching courses on corruption as part of the academic or practical stage of legal training.

Dr Peter Slinn  
*Chair of the CJJ Editorial Board*

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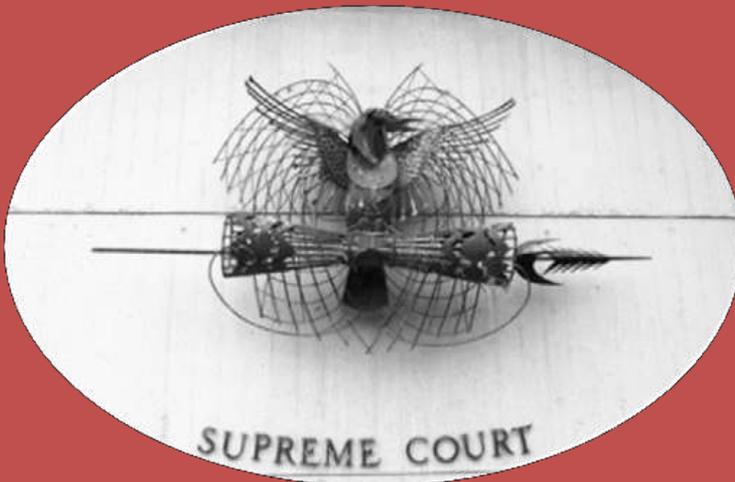


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