

Commonwealth

# Judicial Journal



Journal of the  
Commonwealth Magistrates'  
and  
Judges' Association

Vol 20 No 1 June 2012

Bloomsbury  
Professional

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This journal is generously funded by Bloomsbury Professional

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## EDITORIAL

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*“Language, Learning and Law; these are the most precious heritage of the Commonwealth; but the greatest of these is Law.”*

At the Commonwealth Legal Forum Lecture in 2009 (18 CJJ (2010) 3 at 3), Shirdath (Sonny) Ramphal posited Law at the very heart of the modern Commonwealth of Nations. While today this result may appear evident, it was by no means inevitable. In his foreword to the hundredth volume of the Law Reports of the Commonwealth (LRC), Michael Kirby described the defining moment, in the 1980s, when the process of colonial independence had largely run its course, when the idea of the Privy Council had largely lost its attractiveness and when large numbers of judicial decisions were being produced throughout the Commonwealth, potentially with little utility and relevance to a readership beyond the national boundaries affected by the rulings of such courts. Kirby observed that “[a]t this moment, it was possible that the law of Commonwealth countries would just go its own way, with no more than occasional, esoteric and academic interest in what was happening in courts of other Commonwealth countries at about the same time” ([2009] 2 LRC at iii).

Five considerations combined, according to Kirby, to save the Commonwealth of Nations from a totally destructive force of complete legal centrifugation. Amongst these were the new initiatives which were taken “to share legal information amongst the worldwide family of independent courts and legal professionals.” The Commonwealth Judicial Journal (CJJ), which in 2013 will be celebrating its 40<sup>th</sup> anniversary, falls squarely within this category in view of its role in sharing information amongst magistrates and judges in the Commonwealth. Indeed, the journal has been able to make a significant contribution in this area thanks to the hard work of a small number of people. Notable amongst them is my predecessor, Professor David McClean, whom I first met when I joined the Commonwealth Secretariat in 2007, whose dedication and incisiveness I have admired ever since and from whom I have learnt a lot. Another person I would truly like to thank is Judge David Pearl, who will soon be retiring from the Editorial Board.

As the new editor of the CJJ, I intend to sharpen our focus on the changing needs and expectations of magistrates and judges across the

Commonwealth. It is undoubted that the context has changed dramatically from when the publication first came to light. Particularly with the advent of the Internet, the journal today co-exists, and competes, in an ever more crowded information marketplace. Nevertheless, the journal’s core mission remains as important today as it was when it was established.

Regular readers of the CJJ will have noticed that we introduced some new features, including abstracts and keywords for all articles which, we hope, will be found helpful. In order to continue to encourage submissions of articles, book reviews and letters from readers, we will be including a standing “Call for Papers” and submission guidelines at the back of each issue. Manuscripts for publication in the CJJ should be sent, preferably by email, as a Word document, to: [info@cmja.org](mailto:info@cmja.org). In this context, contributions are particularly encouraged for the 40<sup>th</sup> Anniversary issue of the journal in 2013. Please refer to the submissions guidelines in this volume for more information.

The 16<sup>th</sup> Triennial Conference of the Commonwealth Magistrates’ and Judges’ Association (CMJA) will be held on the 10-15 September 2012 at the Speke Resort and Conference Centre, Munyonyo, Kampala, Uganda, with the theme “Justice for Everyone: Myth or Reality?” The programme is rich and varied, covering a vast array of topics, including judicial independence, Latimer House principles, improving the efficiency and quality of justice, technology in the court, tackling atrocity crimes and the legacy of corruption. In this context, readers are invited to read the article on ‘Legal Pluralism: The Ugandan Experience’, by the Chief Justice of Uganda, Benjamin J. Odoki (19 CJJ (2011) 2 at 14). A link to the conference details and registration information is available on the CMJA website at: <http://www.cmja.org/cmja2012>

In this issue of the CJJ, Michael Todd writes on Ethics and the Rule of Law and addresses some questions related to ethical standards and advocates’ immunity. Amos Adeoye Idowu draws on the experience of the United Kingdom, Nigeria and the United States to discuss modern approaches to Constitutional interpretation. Thomas S. Woods provides a fascinating account of Vita Sackville-West’s little known life as a justice of the peace and a magistrate. And Benjamin J. Odoki writes on

the role of the Chief Justice in promoting and protecting the independence of the Judiciary.

The CJJ has once again collaborated with the LRC to publish the following two law reports: (1) a decision of the High Court of Kenya which dismissed a petition brought by the Federation of Women Lawyers Kenya and Others relating to the appointment of a greater proportion of female judges to the Supreme Court; and (2) a decision of the High Court of Australia relating to the apprehension of bias on the part of a judge in form of prejudgment.

In this respect, I would like to thank Dr Peter Slinn both in his capacity as chairperson of the Editorial Board of this journal and as general

editor, together with James S. Read, of the LRC for allowing us to publish these law reports. I would also like to express my appreciation to Karen Brewer, the Secretary General of the CMJA, for her continued support of the journal.

Finally, I would like to thank all those who, through the years, have supported the CJJ. As the new editor of this journal, I look forward to interacting with our readers and contributors through the pages of the CJJ. I would urge you to have a look at the Call for Papers at the back of this issue and to submit your articles and letters for publication.

## SAD NEWS

It is with deep regret that we have to inform you that our Regional Vice President for West Africa, His Hon. Justice Paul Evande Mwambo of Cameroon, passed away in mid-May. Paul Evande was first elected to Council in 2000 and was elected Regional Vice President in 2006. He was a great supporter of the CMJA, its objectives and activities and one of the founders of the Cameroon Association of Anglophone Judges. Conference delegates will recall his flamboyant character, dress sense and his contributions during session discussions. He will be deeply missed by Council and CMJA members alike. We send our condolences to his family and his colleagues in Cameroon.

The views expressed in the Journal are not necessarily the views of the Editorial Board or the CMJA but reflect the views of individual contributors.

## CALL FOR CONTRIBUTIONS

Have you dealt with an issue/ a case which other members of the CMJA might find of interest?

Have you ever thought of writing a piece for the Journal on a topic close to your heart?

Have you spoken at a seminar/meeting recently and would like to share your presentations with others in the CMJA?

Why not send us an article? The Editorial Board is seeking articles on issues affecting judicial officers across the Commonwealth.

Contributions, ideally no more than 6,000 words should be sent to the Editor c/o the CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX or by email: [info@cmja.org](mailto:info@cmja.org).

## LETTERS TO THE EDITOR

Have you an opinion about the articles we are publishing? Why not send us your feedback in the form of a letter to the Editor?

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## PROFILE

*ALDO ZAMMIT BORDA*

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### **Editor, Commonwealth Judicial Journal**

Aldo completed his Doctorat of Law at the University of Malta in 2003 on “The Threat and Use of Chemical and Biological Weapons under International Law”. He became a Maltese Advocate in 2004 and requalified as an English solicitor in 2010. Aldo also holds a Masters in Economic Science in European Economic and Public Affairs from University College, Dublin and completed a Postgraduate Diploma in Contemporary Diplomacy at the University of Malta in 2007. His first job was in the Ministry of Foreign Affairs of Malta, as First Secretary where he worked until 2007. In 2007 he joined the Commonwealth Secretariat’s Legal and Constitutional Affairs Division as the Legal Editor of the Commonwealth Law Bulletin where he worked until November 2010. He left the Commonwealth Secretariat to continue to pursue his second Doctorat at Trinity College Dublin. This time his topic is: “Judicial Decisions as Subsidiary Means for the Determination of International Criminal Law” which he hopes to complete by September 2012.

Aldo has also been a guest lecturer for Trinity College, Dublin, China University of Political Science and Law, and at the Paris University of International Affairs, Sciences- Po. He had written a number of articles on the ICC (in relation to decision making patterns and the treatment of victims) and on the Ecological considerations relating to the Destruction of Chemical Weapons. He edited two books, one on Legislative Drafting and the second on International Humanitarian Law and the International Red Cross and Red Crescent Movement in the Commonwealth. He is also a Member of the Editorial Review and Selection



Committee for the University of Dublin Journal of Postgraduate Studies and a Member of the Irish Society of International Law and European Society of International Law. He is also a Member of the Programmes Committee of the Royal Commonwealth Society. During his tenure at the Commonwealth Secretariat, he was Treasurer and Vice Chairman of the Young Diplomats in London Association.

Aldo has also attended and participated in a number of conferences at the Commonwealth and International level and spoken on a variety of topics from Teaching Law in the Modern Global Business Environment (CLEA Conference Hong Kong) to Ireland and the International Court of Justice (Irish Society of International and Comparative Law).

He has been a member of the Editorial Board of the Commonwealth Judicial Journal since 2010.

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# ETHICS AND THE RULE OF LAW

Michael Todd QC, Chairman, Bar Council of England & Wales.

This article was extracted from a presentation originally delivered in Grand Court No. 1, Cayman Islands, March 2012.

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**Abstract:** *This article addresses some of the worrying trends, derived from both economic and political expediency, which lawyers must guard against. It takes note of the soaring costs of dispute resolution and the associated challenges. It addresses the questions of ethical standards and advocates' immunity. It provides examples, drawn mainly from the jurisdictions of England and Wales, of regulatory frameworks put in place to address some of these concerns.*

**Keywords:** *Administration of justice – advocates' duty to the Court – ethical standards – cab-rank rule – advocate's immunity – public confidence in the legal system – regulatory frameworks*

The modern exposition of the Rule of Law is generally attributed to Professor AV Dicey, Vinerian Professor of English Law at Oxford, in his work "An introduction to the study of the Law of the Constitution" published in 1885.

- (1) No man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land
- (2) Not only is no man above the law, but every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals, and
- (3) In England, the general principles of the constitution (e.g. liberty, public meeting) are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.

Whilst Dicey's exposition of the Rule of Law has been variously, and in some quarters, roundly, criticised, the core elements identified by Dicey have remained and are readily identifiable in later iterations of the Rule.

Thus, in his work "The Rule of Law", published in 2010, the late Tom Bingham, former Master of the Rolls, Lord Chief Justice of England & Wales and, latterly, Senior Law

Lord, expressed the Rule of Law in the following way:

*"The core of the existing principle is that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."*

He identified the following facets or elements of that principle:

- (1) The law must be accessible, intelligible, clear and predictable
- (2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion
- (3) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation
- (4) The law must afford adequate protection of fundamental human rights
- (5) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve, and
- (6) Adjudicative procedures provided by the state should be fair.

In many, if not all, of all of those matters the advocate has an essential role to play. But before discussing the role of the advocate, let me consider the last of those elements, namely the requirement that "adjudicative procedures provided by the state should be fair", because, in a sense, that is the framework within which the Rule of Law, if it is to do so at all, must operate.

I will, of course, have to come back to the role of the advocate in ensuring fairness as between the parties. But that can amount to nought unless the independence of the judicial decision makers is constitutionally guaranteed.

The independence of the Judiciary from Ministers and of Government, from vested interests of any kind, from public and parliamentary opinion, from the media, from political parties and from pressure groups, is fundamental to the Rule of Law. That is to say,

Judges must be independent of anybody or anything which might lead them to decide issues coming before them on anything other than the legal and factual merits of the case.

Inevitably that must extend beyond the influence which may be brought to bear by matters such as tenure of office, promotion, and remuneration. It extends also beyond the decision making process itself. It extends to acceptance of, support for, and implementation of decisions made by that independent Judiciary.

Too often these days, decisions made by the Courts are held up to political or public obloquy. Often undue criticism is made by lawyers outside of the Judicial process; decisions that is, involving a determination of legal right and liability by application of the law, that is, according to the Rule of Law. The Rule of Law and the effective administration of Justice require, and demand, that support and respect be given to the Judiciary and to the Judicial Process, and that effect be given to them.

Only the other day, Lord Neuberger MR, is reported, in the Daily Telegraph newspaper, dated 17 March 2012, to have said:

*“It is quite inappropriate for politicians publicly to criticise decisions of Judges or, even worse, Judges themselves in connection with the performance of the Judicial function.”*

He continued:

*“If they slag each other off in public, members of the Judiciary and members of the other two branches of Government will undermine each other, and, inevitably, the constitution of which they are all a fundamental part, and on which democracy, the Rule of Law, and our whole society rests.”*

The Rule of Law cannot survive, let alone thrive, if the Judiciary, the Judicial decision making process, or the decisions themselves are undermined.

By the same token we must ensure that the decision maker is impartial. Whilst a decision maker who is truly independent of all influences extraneous to the case to be decided is likely to be impartial, he may nonetheless be subject to personal predilections or prejudices which may pervert his judgment.

It was those sorts of concerns which lead to the establishment in England & Wales of the Judicial Appointments Commission (JAC).

Appointments are now made on the basis of recommendations made by the JAC, which was established to replace the “Tap on the Shoulder” system of Judicial appointments. Inevitably it came under fire, as any change would; “After all what was wrong with the old system?” The JAC, now has its second Chairman, and the system of Judicial appointments is now bedding down, and has become the accepted mode of making Judicial Appointments.

Similarly, the Queen’s Counsel Appointments (QCA) Panel was established to advise and make recommendations in relation to the appointment of Queen’s Counsel. Initially, that met with the same reaction as the JAC. But it too has become an accepted, if not particularly well liked, system for appointments.

In both cases, such transparency in the selection process, albeit that it is long and laborious, has served the legal system well. “Cronyism” is becoming, if has not already become, a thing of the past.

As Tom Bingham observed, in his seminal work, “Scarcely less important than an independent Judiciary is an independent legal profession, fearless in its representation of those who cannot represent themselves, however unpopular or distasteful their case may be.”

Thus we have the “cab rank rule”. In its present form it provides, amongst other things:

**“Acceptance of instructions and the ‘Cab-rank rule’**

601. A barrister who supplies advocacy services must not withhold those services:

- (a) On the ground that the nature of the case is objectionable to him or to any section of the public
- (b) On the ground that the conduct opinions or beliefs of the prospective client are unacceptable to him or to any section of the public, and
- (c) On any ground relating to the source of any financial support which may properly be given to the prospective client for the proceedings in question (for example, on the ground that such support will be available as part of the Community Legal Service or Criminal Defence Service).

602. A self-employed barrister must comply with the ‘Cab-rank rule’ and accordingly except only as otherwise provided in paragraphs 603, 604, 605 and 606 he must in any field in which he professes to practise in relation to work appropriate to his experience



and seniority and irrespective of whether his client is paying privately or is publicly funded:

- (a) Accept any brief to appear before a Court in which he professes to practise
- (b) Accept any instructions, and
- (c) Act for any person on whose behalf he is instructed;

*and do so irrespective of (i) the party on whose behalf he is instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character reputation cause conduct guilt or innocence of that person.”*

Those words of Tom Bingham, to which I have just referred, bring to mind the judgment of another former Master of the Rolls, Lord Denning MR, in *Rondel v Worsley* [1967] 1 QB 443. I hope you may excuse me for repeating them. He said:

*“[The barrister] must accept the brief and do all he honourably can on behalf of his client. I say ‘all he honourably can’ because his duty is not only to his client. He has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do as he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously misstate the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fated to his case. He must disregard the most specific instructions of his client if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honour.”*

Moving stuff! They don’t write them like that these days! Well, it is easy to scoff, but I would ask you to pause for a moment, and look at what Lord Denning was saying.

- (1) The barrister must accept the brief – the cab rank rule
- (2) He has a duty to his client
- (3) But his paramount duty is to the Court
- (4) He is not simply the mouthpiece for his Client, indeed he must disregard his Client’s specific instructions if they conflict with his duty to the Court
- (5) He owes his allegiance to the cause of truth and justice; thus he may not knowingly misstate the facts or conceal the truth

- (6) He must not without sufficient evidence to enable him to do so, make a charge of fraud
- (7) He must bring to the Court’s attention all relevant authorities, both for and against him, and
- (8) He must ensure that all documents are disclosed so the Court has a full, and not merely a partial picture.

As I have said, moving stuff from the former Master of the Rolls; but who amongst this audience would dare gainsay that those are the duties of the advocate? I apprehend that no-one would.

Indeed those duties are now enshrined in the Code of Conduct of the Bar of England and Wales, which provides, amongst other things:

#### “Applicable to all barristers

301. A barrister must have regard to paragraph 104 and must not:

- (a) Engage in conduct whether in pursuit of his profession or otherwise which is:
  - (i) Dishonest or otherwise discreditable to a barrister
  - (ii) Prejudicial to the administration of justice, or
  - (iii) Likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.
- (b) Engage directly or indirectly in any occupation if his association with that occupation may adversely affect the reputation of the Bar or in the case of a practising barrister prejudice his ability to attend properly to his practice.

#### Applicable to practising barristers

302. A barrister has an overriding duty to the Court to act with independence in the interests of justice: he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court.

303. A barrister:

- (a) Must promote and protect fearlessly and by all proper and lawful means the lay client’s best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including any colleague, professional client or other intermediary or another barrister, the barrister’s employer or any Authorised Body of which the barrister may be an owner or manager)
- (b) Owes his primary duty as between the lay client and any other person to the lay client

and must not permit any other person to limit his discretion as to how the interests of the lay client can best be served, and

(c) When supplying legal services funded by the Legal Services Commission as part of the Community Legal Service or the Criminal Defence Service owes his primary duty to the lay client subject only to compliance with paragraph 304.”

Rondel v Worsley, as this audience will know, involved the issue of a barrister’s immunity from suit in relation to advocacy. 13 years later, a barrister’s immunity in relation to advice tendered outside of Court proceedings was removed by the House of Lords, in Saif Ali v Sydney Mitchell & Co [1980] AC 198.

Some 20 years after that, in Arthur J S Hall v Simons [2002] 1 AC 615, the House of Lords had to consider, once again, the question of an advocate’s immunity from suit in relation to his conduct in Court. The Judge at first instance had struck out the proceedings. The Court of Appeal, the President of which was one Lord Bingham of Cornhill LCJ, overturned that decision. In the House of Lords, a number of matters were relied upon in support of continuing the immunity, including the existence of the advocate’s primary and paramount duty to the Court (the case in fact involved solicitors firms not barristers.) In giving the leading speech, removing the immunity, whilst in no way, undermining, questioning or doubting the existence of this paramount duty, Lord Steyn posed the critical issue as being whether or not immunity was required to ensure that nothing would undermine the advocate’s overriding duty to the Court. He concluded that the legal profession did not need that immunity. He explained:

*“Most importantly, public confidence in the legal system is not enhanced by the existence of the immunity. The appearance is created that the law singles out its own for protection no matter how flagrant the breach of the barrister. The world has changed since 1967. The practice of law has become more commercialised: barristers may now advertise. They may now enter into contracts for legal services with their professional clients. They are now obliged to carry insurance. On the other hand, today we live in a consumerist society in which people have a much greater awareness of their rights. If they have suffered a wrong as a result of the provision of negligent professional services, they expect to have the right to*

*claim redress. It tends to erode confidence in the legal system if advocates, alone among professional men, are immune from liability for negligence.”*

Most aptly, for the purposes of this address at least, it is noteworthy that Lord Steyn’s principal concern was “public confidence in the legal system”. And it is in maintaining that confidence that the advocate has a primary role.

I have talked, by reference to Rondel v Worsley, about the duty of the advocate in relation, amongst other things, to disclosure of documents. That same duty is owed by a solicitor.

In Myers v Elman [1940] AC 282, the House of Lords was concerned with the duty of a solicitor who learnt that his client had perjured himself in an affidavit relating to discovery. Upon learning of the falsity of the affidavit, the solicitor is under a duty to inform the other side’s solicitor of the falsity, and if his Client declines to permit him to do so, he must cease to act. If the false affidavit has already been deployed in the proceedings, the solicitor must ensure that the matter has been put right by means of a corrective affidavit and that the other side is informed, or, again, he must cease to act. As Viscount Maugham succinctly put it:

*“A solicitor who has innocently put on the file an affidavit by his client which he has subsequently discovered to be certainly false owes it to the Court to put the matter right at the earliest date if he continues to act as solicitor upon the record. The duty of the client is equally plain.”*

The integrity of Judges, it hardly needs to be said, is essential in maintaining confidence in the Judicial system. But so too is the integrity of practitioners before the Courts. That, as we have seen is reflected in the extracts from the Code of Conduct of the Bar of England & Wales to which I have already referred.

An advocate’s role in our common law system, whether or not set out in a written Code of Conduct, is to support the Judicial process, because it is through that process that the Rule of Law is maintained. Such a Code must, where necessary be vigorously, and rigorously, enforced.

Fearlessly, advocates will defend a person’s human rights, however egregious the crime of which he is charged, however unpopular the cause, however distasteful the client, or his views.

However, their ability to do so necessarily depends on “accessibility”.

Commentators speak of “accessibility” in many contexts:

- (1) Accessibility, that is, to the profession (an enormously important subject in England & Wales in terms of diversity (gender, ethnicity and social mobility)); a subject upon which I would welcome further discussion with different jurisdictions, but it is not really the subject matter of this address
- (2) Accessibility in terms of intelligibility, clarity and predictability of the law
  - a. As Tom Bingham pointed out, this is absolutely essential. The successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations
  - b. As long ago as the 18<sup>th</sup> Century, Lord Mansfield (considered by many to be the father of English commercial law) recognised this when he said, in *Vallejo v Wheeler* (1774) 1 Cowp 143, 153: “In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because (investors and businessmen) then know what ground to go upon”
  - c. Indeed, no one would choose to do business, perhaps involving large sums of money, in a country in which the parties’ rights and obligations are vague or undecided. A testament to that is the litigation, conducted in the newly opened Rolls Building in London, between the Russian Oligarchs. The dispute has really no connection with London, but the reputation for integrity, fairness and certainty of the English legal system, its adherence to the Rule of Law, its accessibility are such that those Oligarchs chose to have their dispute determined in London
  - d. As Tom Bingham said, the Rule of Law not only “embodies and encourages a just society, but also is a cause of other good things, notably growth”
  - e. Thus, certainty and accessibility serve not only a “higher” purpose, but also a commercial purpose, and
  - f. This is the subject matter of a talk on its own.
- (3) Thirdly, accessibility is spoken about in terms of access to Justice; and it is here that the advocate’s role is again indispensable.

When parties are otherwise unable to resolve their disputes by some alternative dispute resolution procedure, such as mediation or arbitration, then the Rule of Law requires that there should be access to a Court. The means to resolve disputes must be provided for, without prohibitive cost or inordinate delay.

Expense and delay are often two obstacles to such access to Justice. Whilst our concerns about these two issues may endure relentlessly, attempts to remedy the expense of litigation appear to be almost cyclical.

In 2000 Lord Woolf introduced his reforms to make more accessible Court procedures. We moved from the Rules of the Supreme Court 1965 (RSC) to the Civil Procedure Rules (CPR), almost seamlessly, overnight. But it was not long before the volume and density of the CPR exceeded, and trumped, those of the RSC. Well intentioned though they may have been, the Woolf Reforms increased the costs of litigation, by, amongst other things, “front loading” those costs, as Lord Neuberger observed, in his recent speech on “docketing”, which he gave to the Solicitors’ Costs Conference last month.

More recently, in England & Wales, in a yet further attempt to improve access to Justice, Jackson LJ reviewed and reported on the Costs of Civil Litigation. He is presently responsible for the implementation of the reforms he proposed.

Following a speech given, last year at the offices of Clifford Chance in London, by the Lord Chancellor, Ken Clarke MP, in which he sang the praises of the Commercial and Chancery Bars of England and Wales, a panel of financial experts, bankers, analysts accountants, and the like, were asked what they wanted from a legal system. To a man (and woman) they all replied: first cost effective dispute resolution; and second speedy dispute resolution.

That should provide a commercial imperative. And indeed, I have set up a working group of the Bar Council to look at means of improving the speed of delivery of dispute resolution. In that endeavor, I have discussed those matters with, and gained the support of, the senior Judiciary in England.

Unsurprising perhaps; after all, it is often said that “justice delayed, is justice denied.”

As recently as 19 March 2012, it was reported in the London Press that the litigation between Baron Thyssen and his son had settled, with legal fees amounting to some US\$100m. You

may remember that in 2000 the case, in the Bermuda Courts, had, somewhat notoriously, been opened for 66 days.

Clearly the sums involved, and I do not mean just the lawyer's fees, were enormous (US\$ 2.7bn). But what does this say about access to justice?

What price justice? What price access to justice? Is this a justice system we want?

We all, Government, the Judiciary and legal practitioners, have a duty to ensure effective access to justice, in the legal system we provide and in our management of litigation before our Courts.

It is one thing to talk about these principles, of our ethical standards, of access to justice, of the Rule of Law, but what do they mean in practice.

Let me give you just two issues with which we are currently wrestling in England.

First, as you probably all know, in England and Wales, the regulatory landscape under which we now practise has changed fundamentally as a result of the Legal Services Act 2007. Anticipating the change, whilst still acting as the Approved Regulator, the Bar Council devolved its regulatory responsibilities to the independent Bar Standards Board (BSB). It is now the BSB which oversees and enforces the Code of Conduct, handling complaints against barristers and taking primary responsibility for education and training, alongside the important role played, of course, by the Inns of Court. In turn, the BSB is scrutinised by the Legal Services Board, the oversight regulator. There is also a Legal Ombudsman, who deals with consumer complaints.

You will therefore readily appreciate that, in England and Wales we are operating in an environment where clients have become consumers, and, it would seem, "the consumer is king."

Indeed, speaking at the Bar Council's Annual Conference in 2010, the Master of the Rolls, Lord Neuberger, warned that whilst an important factor, consumerism was not the only, or indeed the most important factor. "It is of fundamental importance", he said "that, particularly when it comes to the professions, above all to the legal profession, society does not adopt what might be called a form of unreflective consumer fundamentalism."

Second, our new regulators are planning to assess the advocacy services we provide. They are proposing to introduce a system of Quality

Assurance for Advocates (QASA). It was proposed that such a scheme be rolled out for criminal advocates from 1 April of this year. However, disagreements as to the scope and rigour of such a scheme have resulted in delays. The concerns are that the system will not demand the standards of excellence which the justice system require if proper and effective access to justice is to be afforded but will be content with some lowest common denominator of competence. Our justice systems, access to justice, the Rule of Law, demand, and require, excellence from our advocates.

It is true that we face some difficult challenges, but that simply means we should be more rigorous about the observance of our professional and ethical standards.

For example, consider those English barristers who appear before courts and tribunals all around the world. They are, in truth, ambassadors for our profession and for the English Bar. They must adhere to our Code of Conduct. But they must do more. They must also observe the ethical and professional standards of the Bar to which they must be Called in order to enable them to practise in that other jurisdiction. The Bar Council has recently issued further guidance in relation to this. It is not a question of picking and choosing. It is not a free for all. We have to ensure that we maintain the highest standards. We cannot afford to compromise.

When I delivered my inaugural address to Bar Council last December I had one (I hope) clear and prevailing message; invest in the future. By that I was not referring to spending money we simply do not have, mortgaging our future for today's expedients. I was talking of marshalling our resources; to invest our available resources wisely to produce the greatest returns; to invest more strategically, more intelligently and more transparently.

Recently, in England, we celebrated the opening of Rolls Building, the new business and property court complex, housing the Judicial expertise of the Chancery Division, the Commercial and Admiralty Courts, and the Technology and Construction Court. In that respect, we have been investing in our future. But it is not just about operating from modern, purpose-built courts. It is about investment in the justice system, and in the services provided. It is also about investment in those who provide those services.

If we want justice systems which are the envy of the world, which attract inward investment

and instil confidence in those looking to do business in our respective jurisdictions, and which command respect, we must make that investment in access to justice, in the Rule of Law. A jurisdiction which does not exude its

support for the Rule of Law, its investment in the quality and integrity of its Judicial system, of its Judiciary, and of its legal practitioners, cannot, and will not, prosper.

## DOROTHY WINTON TRAVEL BURSARIES FUND

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This fund was set up in the name of the first Secretary of the Association who died in October 2003. Dorothy's time as the first Secretary of the Association was a very happy one and she was very concerned that justice (and support for justices) should be available to poor and rich nations alike.

*"She had considerable knowledge of the Commonwealth, a genuine interest in its people and she was prepared to travel extensively to promote the Association, being especially concerned that people from the less well developed countries should be able to play a full part."*  
Stated Brenda Hindley, former Editor of the CJJ.

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# CONSTITUTIONAL INTERPRETATION

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**Abstract:** This article examines some of the approaches to Constitutional interpretation applied by judges and magistrates across the Commonwealth. It first explores the application of the literal rule of interpretation. It proceeds to examine liberal approaches to the construction of the Constitution, especially as propounded by US courts as well as Commonwealth courts, such as the Supreme Court of Nigeria. It observes that clauses intended to protect fundamental rights are to be accorded a liberal construction. It concludes by offering some guidance to Constitutional interpretation for Commonwealth judges and magistrates.

**Keywords:** Interpretation – construction – literal rule – absurdity – liberal approaches – superfluous words – intent of the drafters

## Introduction

The main objective of this article is to examine certain principles which have been recognized as providing guidance to judges and magistrates of the Commonwealth in their duties of ensuring effective constitutional interpretation, with a view to further advancing justice, equity and fairness.

## British/Commonwealth Judicial Tradition

In his article, 'The Interpretation of Codes in British India', *Madras Law Journal* (1935) 67 at 69, V. Fitzgerald asserted that the literal rule is an offshoot of Parliamentary sovereignty and classical doctrine of separation of powers. The courts are not to tinker with what the Parliament has said, as the Parliament is concerned with *jus dare* (law-making), and not *jus dicere* (saying what the law is or interpreting the law). According to J. Kilgour, since the courts are often unable to pierce the veil of Parliament, to discover the history of legislation, the traditional approach is to stick to the words, to which in any event, they had to ascribe meaning (see 'The Rule Against the Use of Legislative History: Canon of Construction or Counsel of Caution', *Canadian Bar Review* (1952) vol. 30 at 782). While emphasizing the literal tradition of the English judges to statutory interpretation, another British author, P. J. Langan, in his

*Maxwell on Interpretation of Statutes* (1968), at 28 stated:

*"The court is not to enter into any enquiry whether the ordinary meaning would be productive of hardship or injustice. The legislature has said what it means and means what it has said... where the language is clear and unequivocal, it must be enforced however harsh or absurd or contrary to common sense that result may be."*

In fact, the learned writer of *Craies on Statute Law* (1951), S. G. D. Edger; regarded literal construction of statutes as the cardinal rule of interpretation.

There are litanies of cases in British archives and in law reports of other Commonwealth nations where judges have affirmed literal approach to statutory and constitutional interpretations. A classical application of literal approach was demonstrated in *Liversidge v. Anderson* (1942) 6, A. C at 206, where the phrase "if the Secretary of States, has reasonable cause to believe" caused a division in the House of Lords. The majority were of the opinion that the phrase was ambiguous because it could mean either that the Secretary of State had reasonable cause to believe or that the Secretary of State thought that he had reasonable cause to believe. The minority held that the phrase was plain enough and it could only mean "if the Secretary of State has reasonable cause to believe".

In *Hill v. East and West India Government* (1984) 9 A. C. at 448, Lord Bramwell was inclined towards the literal approach when he held that:

*"It is infinitely better to adhere to the words of an act of Parliament and leave legislature to set it right than to alter those words according to one's notion of an absurdity..."*

Lord Bramwell was only agreeing with his learned brother, Jervis, C.J., who had earlier decided in *Abley .v. Dole* (1851) 11 Q.B 378 at 391 that:

*"If the precise words used are plain and unambiguous in our judgement, we are bound to construe them in their ordinary*

*sense, even though it does lead, in our view of the case, to an absurdity or manifest injustice...”*

In *Kenyon v. Eastwood* (1988) 571 J.Q. B at 455, an English court had also given a literal interpretation of the phrase “order made in open court” not to include an order made in the room next to it, which was also open to the public. Owing to the importance attached to the literal approach, courts in England and their counterparts in other Commonwealth nations are not inclined to sympathize with the legislature even where there is an omission in a statute. Doing so, according to Lord Guest in *L. R. C. v. Rennel* (1964) 18 AC at 173, would amount to a “judicial paraphrase”. In Nigeria, a classical illustration of the literal approach was demonstrated by the Supreme Court in *Obafemi Awolowo v. Shehu Shagari* (1979) 6 - 9 S. C at 51, where the phrase “Two thirds of nineteen States of the Federation” was interpreted to be exactly “twelve and two-thirds” instead of rounding it up to thirteen States. Commenting on the decision of the Supreme Court of Nigeria in ‘Judicial Activism or Passivity in Interpreting the Nigerian Constitution’, *International Law Quarterly* (1987), vol. 36 at 803, B. O. Okeke said:

*“Awolowo v. Shagari is a remarkable, if unusual, example of literalism or mechanistic interpretation serving the needs of political expediency”.*

Even in the United States of America, where courts have been noted for their liberal interpretation, literalism or strict interpretation of laws has not been completely discarded. According to F. Frankfurter, J., in ‘Some Reflections in the Reading of Statutes’, *Columbia Law Review* (1974) vol. 47 at 530, the role of the judge is to ascertain the meaning of the word and he is neither to rewrite it nor to enlarge it. The court is simply a translator of the legislative command. In the same vein, Cardozo, J. ‘*The Nature of Judicial Process*’ (1973), New York, at 28 observed:

*“We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reasons. We take this statute as we find it”.*

As the above cited cases illustrate, the literal approach has been firmly embedded in the Commonwealth judicial culture. However, there has also been a growing desire for new approaches, which extend the frontiers of literal interpretation to liberalism, rationalism,

activism, logicalism, aestheticism and interpretivism in constitutional adjudication.

## Modern Ideas to Judicial Interpretation of the Constitution

This article will discuss, in particular, two modern ideas relating to judicial approaches to the interpretation of the Constitution. In his book entitled *Constitutional Construction* (1982), at 66 and 236, C. J., Antieau propounded one of these ideas, namely, that a Constitution should be interpreted in the same way as an ordinary statute. The decision in the case of *United States v. Classic* (1941) 313 US 299, propounded the other, opposite idea, namely, that a Constitution is a unique document which deserved a liberal judicial approach and so, should not be interpreted in the same way as ordinary statutes.

C. J. Antieau however, eventually came to the conclusion that a Constitution is indeed a unique document which, unlike ordinary statutes, should be placed on a higher pedestal and so, deserved a liberal approach. This position is now recognized as a feature of American jurisprudence. On several occasions, American judges have repudiated a narrow construction of constitutional terms and clauses, preferring instead a broad and liberal construction. For instance, in *United States v. Smith* (DDC 1946) 68 at 739, a Columbia District Court held:

*“As the Constitution is a permanent and enduring document, it must be broadly construed in order to be adjustable to changing conditions”.*

Judges who believe that a Constitution should not be interpreted like ordinary statutes further argued that the interpretation of a Constitution should be more a matter of *construction*, rather than mere interpretation. In cases like *State v. O’Brien* (DDC 1967) 272 at 716 and *Charron v. Gert of the USA* [2000] 1 WLR 1793, the courts decided that adjudication requires “construction” of the fundamental law. The term “construction” is of broader scope than “interpretation”. Construction embraces “interpretation”. In one of his books, *Statutory Construction* (1972), at 15, M. Sutherland expressed the view that countries having written Constitutions must, because of the breath of language customarily used in the documents, concern themselves with construction rather than interpretation. According to him, the term “construction” is used to embrace both the task of ascertaining the meaning of words employed by those responsible for the

Constitutions, and the far larger and more important duty of assigning the appropriate legal significance to clauses and words used in the basic law.

A retired justice of the Supreme Court of Nigeria, Hon. Kayode Eso (CON) affirmed in his book, *Thoughts on Law and Jurisprudence* (1991), at 32, that the idea of a liberal interpretation is based on the following principles or canons of constitutional construction:

1. In Constitutions, words are ordinarily given their normal and ordinary senses, and are not usually construed in technical senses. In looking for the common and ordinary meaning of words used in a Constitution, courts have at times, referred to the definition of the words in dictionaries circulating when the provision was adopted, as happened in cases such as *State ex rel Sandforth v. Cason* (MO 1974) 507; R. V. Street Magistrate [2000] 1 AC 119; A. V. Home Secretary [2005] 3 All ER 169 etc.

In judicial pronouncements in cases like *Epping v. City of Columbus* (1913) 117 G.A., at 263, and *Higgins v. Cardinal Mig. Co.* (1961) 188 Kan. 11, the courts have indicated that, the literal, dictionary meanings of words had to remain subordinated to the clearly evident intent of the people in adopting a Constitution. Therefore, non-technical words are not ordinarily to be given technical constructions. The Constitution is not to be construed in a technical manner and, before the words can be given a purely technical meaning, different from their popular meaning, the intention that they should be so understood must have been plainly manifest.

2. Constitutional language is to be given a reasonable construction and absurd consequences are to be avoided. Virtually, since the adoption of the United States Constitution, courts and judges have always agreed to this approach. In *Martin v. Hunter's Lessee* (1816) 14 US 1 Wheat at 304, on Justice Story said:

*"This instrument...is to have a reasonable construction... the words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged"*.

In the same vein, Justice Strong had held in *Woodson v. Murdock* (1824) 89 US (229 Wall) at 361: "Every clause in every Constitution must have a reasonable interpretation".

Another dimension to the issue of adopting a reasonable interpretation to constitutional provisions could be gathered from John Ely in

his book, *Democracy and Distrust* (1980), at 60, that, if a constitutional provision is susceptible to two constructions, one of which is workable and fair, and another unworkable and unjust, courts must assume that the people responsible for the language intended the workable and fair construction.

3. A Constitution is to be read, if possible, so that every word, phrase, clause and sentence is given effect, and none of these is to be rendered surplus, superfluous, meaningless or nugatory. See *Hamillon v. Autauga County* (1972) 289 ALR 419.

Similarly, in *Williams v. United States* (1933) 289 US 553, the American Supreme Court had once held that it is the elementary canon of construction that every word in the Constitution is to be given effect.

4. Judges had held in cases such as *Gorpalan v. State of Madras* (1950) AIR 27 at 35 and *State v. Leong* (1970) 51 Hawaii at 581, that clauses intended to protect fundamental rights are especially to be accorded a liberal construction. This approach means that courts will give especially broad, liberal construction to those constitutional provisions designed to safeguard fundamental rights such as the rights to life, liberty and property.

As far back as 1946, in the case of *United States v. Commanding Sonny* (1946) 69, F Supp. at 665, a Federal Court in America also characterized as the most pressing rule for constitutional construction: "that the provisions for the protection of life, liberty and property are to be largely and liberally construed in favour of the citizen".

In 1885, in a case involving construction of the Fourth and Fifth Amendments, Justice Bradley, speaking for the United States Supreme Court, pronounced that in general, the High Court should adhere to the rule that Constitutional provisions for the security of person and property should be liberally construed, since a close and literal construction would deprive them of their efficacy and would lead to the gradual depreciation of fundamental rights.

5. Exceptions are to be narrowly construed and ordinarily limited to their immediate antecedents. The word "exceptions" here refers to the exclusory provisions of the constitution which subject, for example, the exercise of a citizen's right to some kind of restriction. Exceptions are common in the Constitutions of many Commonwealth nations, like section 45 of the Constitution of the Federal Republic of Nigeria 1999, which subjects the exercise of some rights to any law that is reasonably



justifiable in a democratic society. Such exclusory provisions are to be interpreted in a way to confine them to the immediate circumstances prevailing before they were put in the Constitution. (See in *re-Opinion of the Justices* (1934) 286 Mass at 661).

6. In construing a particular provision, the general purpose and objects of the Constitution are to be kept in mind. This means that a court is to be guided by the great purposes of the Constitutional scheme of government. In *Virginia v. Tennessee* (1893) 148 US 503, the United States Supreme Court had said that it is beyond question that when investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view, the objects for which those powers were granted. The court added:

*“If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose so as to subserve it. In no other way can the intent of the framers of the instrument be discovered...”*

7. One other fundamental guide to the interpretation of the Constitution, which had been laid down over the years by Marshall CJ in *Ogden. V. Saunders* (1827) 25 US 12, at 213, is that courts must interpret any provision according to the intent of the drafters.

However, opinions are divided on this approach to Constitutional interpretation. Some jurists have argued that, as in the Law of Evidence, where intention is difficult to prove and is likened to the state of a man’s digestion which even the devil does not know, drafters’ intention can only be inferred. They maintained that the search for intention is elusive and reference to the term “drafters” intent is superfluous. For instance, a Judge of the Supreme Court of Nigeria, Akunne Oputa, said in one of his Public lectures entitled, “The Law, the Potency and Majesty words” at Ogun State University, Abeokuta, Nigeria (1989), that: “Nobody had ever seen intention on a walk. Nobody knows the latitude or longitude of an intention”.

The preponderance of opinion then is that for the purposes of interpretation, the intention of the drafters does not signify what the drafters meant to say, but what the meaning of the words employed by the drafters is. A law court must find out the expressed intention of the drafters from the words of the Constitution itself. This rule also applies to statutory interpretation. (See *Salomon v. Salomon*, (1879) AC 22 at 381).

## Conclusion – Observations and Recommendations

Arising from the foregoing ideas and principles concerning Constitutional interpretation, the following deductions may be arrived at, as a possible guide for Commonwealth Judges and Magistrates, in constitutional adjudication:

1. Constitutional theory must respect the plain meaning of explicit Constitutional language.
2. Semantics does not exhaust interpretation; interpretation must appeal to the underlying purpose of the Constitution.
3. Beliefs about the meaning and references of constitutional language must be justified by appeal to the best available conceptions and theories about the real nature of the relative institutions which the language talks about.
4. Constitutional interpretation must respect the specific intention of the framers. The problem here is how to determine the intention of framers who are no longer alive. Can framers be said to have an intention with respect to a situation which they did not foresee or could not have envisaged? How do we deal with conflicting intentions?
5. Constitutional interpretation must reckon with moral and political theories whose inclusions the framers would not have endorsed. This principle sees Constitutional interpretation as wider than a semantic exercise. The court can, and must, rely on substantive moral and political theories in interpreting and applying the Constitution.

Above all, effective interpretation of the provisions of the Constitution in general by courts of law depends, to a large extent, on the willingness of all citizens to allow the Constitution to work and flourish. As Gunther rightly observed, in ‘The Constitution of Ghana: An American’s Impressions and Comparisons’, 2 *Legon Journal* (1971), at 11:

*“...making a Constitution work is a difficult, subtle, complex process which cannot be achieved by courts alone; nor can the mere existence of a written Constitution make it succeed... The constitutional language and judicial actions, and perhaps most importantly, the behaviour of political leaders and all participants in the political process are all necessary...”*

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# VITA SACKVILLE-WEST: POET, NOVELIST... AND MAGISTRATE

Judge Thomas S. Woods, of the Provincial Court of British Columbia, Canada.  
Presented at The 20 Club, Vancouver, British Columbia, Canada, February 2012.

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**Abstract:** *Vita Sackville-West died in 1962. She was then well known and highly regarded as a poet and novelist. However, what is barely known at all is that from 1947 to 1962, Vita Sackville-West sat in Cranbrook and Tenterden, in the County of Kent, as a magistrate. This article both situates Vita within the literary and intellectual milieu of her day and discusses her time on the bench. The powers and responsibilities of magistrates during the late 1940s through the early 1960s are discussed and passages from Vita's novels and letters are quoted which shed light on her perspective on, and approach to, her largely unknown judicial role.*

**Keywords:** *Judicial career – responsibilities – erratic and volatile character – qualities sought – cases presided and outlook on writings – well-suited to the magistrate's role*

## A Brief Introduction

Vita Sackville-West was a woman of substantial talent and accomplishments. She was born in England into an aristocratic family in 1892. She died in 1962. She was a controversial and intriguing figure who wrote many purely fictional novels, some historical fiction and several books of poetry. She also wrote plays, short stories and books on gardening on the grand scale. Beyond all of that, Vita Sackville-West fulfilled an almost wholly unknown judicial role during the last 15 years of her life that I have taken it upon myself to research. The project is far from complete but you may consider this to be an interim report regarding a work in progress.

Vita Sackville-West achieved fame as a writer at a time when women faced significantly greater challenges getting into print than they do today. Some of her better-known novels include *The Edwardians*, *All Passion Spent* and *The Easter Party*. Though certainly no saint herself, she nevertheless wrote biographies of three saints: St. Joan of Arc and (in a single volume) St. Teresa of Avila and St. Thérèse of Lisieux. She also wrote biographies of writers Andrew Marvell and Aphra Behn – the latter being the first woman in the English speaking world said to have made

her living purely as an author. In 1927 her long poem, *The Land*, won her the Hawthornden Prize – one of the highest modes of formal recognition accorded to poets in England. In 1946 another long poem, *The Garden*, was awarded the Heinemann Prize. That same year the King appointed her a Companion of Honour, again in acknowledgement of her contributions to literature.

## Her Life As A Magistrate: Barely Known

It is an almost wholly unknown fact about Vita Sackville-West that qualifies her for discussion in the pages of the *Commonwealth Judicial Journal*. As I have mentioned, that fact is that she sat from 1947 to 1962 – the year she died – in Cranbrook and Tenterden, in the County of Kent, as a justice of the peace and a magistrate. As such she heard all manner of minor criminal and quasi-criminal cases, usually sitting as one member of a panel of three.

This interesting and, arguably, formative aspect of Vita Sackville-West's later life has received scant coverage in scholarly writings about her. In particular, it is barely acknowledged in two otherwise excellent biographies. Victoria Glendinning devotes little more than a couple of paragraphs to the subject in her definitive *Vita: The Life of Vita Sackville-West*. Apart from mentioning the fact of her appointment in 1947, Michael Stevens says nothing at all on the subject in his brief, but nevertheless illuminating, *V. Sackville-West: A Critical Biography*.

I came across mention of the largely obscure fact that Vita Sackville-West pursued a judicial career when reading the Glendinning biography a few years ago. With this discovery I immediately discerned a convergence of my literary and legal interests. I then determined that I would find out more and I have been researching the subject, on and off, ever since. I have done so in libraries here and via online resources; I have also worked a little research into two vacations I have spent in England in recent years.

I will soon return to a discussion of Vita's judicial life.

## A Volatile Early Life

Vita Sackville-West had close ties with the Bloomsbury Group – that remarkable and exclusive collection of influential English intellectuals that comprised writers like Virginia Woolf, Lytton Strachey and E.M. Forster, economist John Maynard Keynes and painters Roger Fry and Duncan Grant. Writer Clive Bell and his wife Vanessa – Virginia Woolf's sister – also belonged. These individuals thrived on controversy. They were self-consciously *avant garde* in their thinking, their writing and their art. They were unapologetic in their condemnation of orthodoxy in almost all domains of human thought and action. It must also be said that in some respects they were intolerable cultural and intellectual snobs. There are reasons why some of their behaviour has been condemned on moral grounds.

Vita's life in some respects resembled the lives of her Bloomsbury associates. Indeed, her excesses and contempt for orthodoxy arguably exceeded theirs. While her writing has endured to a degree, it is her reputation for romantic escapades – in the company of the likes of Violet Trefusis and Virginia Woolf, for example – that best explains why Vita Sackville-West is remembered today. During one such escapade she “eloped” to France with Violet Trefusis, leaving two young children and her husband Harold Nicolson behind without giving anyone any indication of where she was going, with whom or for what purpose or duration. The “elopement” was seen as scandalous blot on the reputations of both women.

Vita and Harold shared a profoundly unconventional marriage in which both seemed to maintain a strong bond with one another throughout their lives despite the fact that both also indulged numerous relationships outside the marriage. They did not conceal those relationships from one another. They were, in every way, a markedly unconventional couple, although much of what made them so was little known while they were living and only became known in a general way after both of them had died.

## Vita Sackville-West On The Bench

I turn now to a brief description of Vita Sackville-West's powers and responsibilities as a magistrate. A full history and outline of the incidents of her commission as a justice of the peace is beyond the scope of this paper. The picture, for present purposes, is complicated by the fact that the legislation governing the magistracy in the UK underwent important

changes in 1948, 1949 and 1952, very soon after Vita's appointment.

As I have previously noted, Vita Sackville-West took office as a justice of the peace, and thus a magistrate, in 1947. She and one other justice were sworn in together on October 16<sup>th</sup> of that year, in Cranbrook. Some 28 years earlier *The Sex Disqualification (Removal) Act, 1919* had been enacted and that statute eliminated the barrier that, to that point, had prevented women from serving as justices of the peace.

When Vita Sackville-West began sitting, there was no requirement that she have any legal training whatsoever. A lay magistrate's position was then (and remains) an unpaid one. The former requirement that magistrates possess substantial landholdings had by the time of Vita's appointment been long abolished (although she could easily have satisfied it). As well, religious, political and other forms of inappropriate influence in appointments (which had caused many difficulties historically) had been largely eliminated by the creation in the 1920s of an advisory committee system.

Vita's candidacy was recommended by the advisory committee for the County of Kent and her appointment was made, on that advice, by Viscount Jowitt, the Lord Chancellor of the day. The qualities sought in such appointees included (and still include today):

- (a) Good character;
- (b) Understanding and communication;
- (c) Social awareness;
- (d) Maturity and sound temperament;
- (e) Sound judgment; and
- (f) Commitment and reliability.

It is evident from these criteria – and her appointment pursuant to them – that to the extent Vita may have had a tarnished reputation flowing out of her early indiscretions and colourful history, she must also have developed a reputation within her broader community during the 1940s for integrity, intelligence, fairness, good judgment and reliability.

Virtually no one having first hand knowledge of Vita and her life on the bench is still alive. During one visit to England I interviewed James Stearns who, like his father before him, ran the working farm on the Sissinghurst property. In fact he was born there and so he grew up, in a sense, in Vita's presence. While he had little specific knowledge of her judicial activities, he did confirm that in his opinion she possessed the qualities described above in abundance.

Vita's appointment conferred upon her criminal jurisdiction in summary conviction matters involving adult and youth accused, including jurisdiction over offences created by non-criminal statutes (such as the *Salmon and Freshwater Fisheries Act, 1923*, for example). Like all magistrates in her day, she generally sat as a member of panels of three. She was also empowered to preside at committal proceedings, akin to preliminary hearings of the sort conducted in provincial courts in Canada. While historically justices of the peace also took a fairly active role in the conduct of municipal business during Quarter Sessions, by the time Vita Sackville-West took office in 1947, liquor licensing and tax enforcement were about all that was left of that aspect of magistrates' work.

A Magistrates Association already existed in 1947, when Vita was appointed, and its function was, in part, to provide continuing legal education to sitting justices of the peace. However, with the introduction of amendments to the *Criminal Justice Act, 1948*, the *Justice of the Peace Act, 1949* and the *Magistrates Courts Act, 1952*, the requirements for ongoing courses of instruction for justices of the peace increased markedly. We can assume that Vita Sackville-West would have participated to some degree in such instruction, although compulsory training in the law for new appointees was not introduced until 1966, four years after her death.

### Research Findings Regarding Vita's Judicial Role

Justices of the peace did not give written reasons for decision during Vita's sitting years (they still do not do so in criminal matters) and so all that survives of the cases she heard and decided, usually *en banc* with other magistrates, are bound folio records of the outcomes that record basic information – dates, names, offences, pleas and dispositions – and little more.

Thus far, the only records I have been able to locate of cases that Vita heard relate to criminal and quasi-criminal matters that she heard while sitting in Cranbrook. (The Tenterden records have thus far mostly eluded me.) In Cranbrook the magistrates presided at Quarter Sessions and Petty Sessions in a large upstairs room in the Vestry Hall. The building survives but it no longer serves as a location for proceedings before magistrates in Kent.

Some of the records maintained by justices of the peace who presided in Cranbrook during

the 1940s and 1950s (including Vita Sackville-West) are now kept in an archival collection of court documents maintained at the Centre for Kentish Studies (the “CKS”) in Maidstone, a pleasant half-hour drive east from Cranbrook on the A229. Some folio registers regarding prosecutions of “juvenile” and adult accused heard during Petty Sessions are archived there. Among them is a Book of Oaths containing originally signed attestations confirming that all justices of the peace presiding in the County of Kent swore their Oaths of Allegiance to the Sovereign and as well their Judicial Oaths. I managed to locate Vita's originally signed attestation among the others in the Book of Oaths that record the appointments of magistrates for the county in 1947.

Among the cases over which Vita presided that are found in the folios at the CKS was the case of a juvenile who was accused of “throwing an acorn out of a public service vehicle”. The offence date was 10 October 1948, and his matter came on for hearing at Cranbrook on 19 January 1949 before magistrates C. Russell Scott (chair), the “Hon. Mrs. V.M. Nicolson” (Vita's married name) and Major J.S. Robson, M.B.E. The youth entered a plea of guilty and the record of proceedings shows that the charge was “dismissed under the *First Offenders Act*”. This notation is likely intended to refer to the *Probation of Offenders Act, 1907* which succeeded and replaced the earlier *Probation of First Offenders Act, 1887*. Section 1(1) of the act in force when the young person entered his plea and was sentenced provided that where, “having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed or [where] it is inexpedient to inflict any punishment or any other than a nominal punishment” the court may “dismiss the information or charge”.

Section 1(1) of the *Probation of Offenders Act, 1907* and its minimally punitive sanctions compares closely to s. 42(2)(b) and (c) of Canada's *Youth Criminal Justice Act*. One might hope that, today, a youthful Canadian first offender accused of an offence akin to throwing an acorn out of a public service vehicle might, depending upon the circumstances, either be referred by the Crown for extrajudicial measures or, perhaps, be discharged (absolutely or conditionally) or be sentenced with a reprimand under s. 42(2)(a).

Another sample page found in a magistrates' court folio book for 21 June 1961, shows the

wide variety of court business that occupied Vita (or the “Hon. Lady Nicolson” as she is styled) and her judicial colleagues. Sitting with her on the panel that day was her frequent companion on the Cranbrook bench, Sir George Jessel, Bt., M.C. – a descendant of the Sir George Jessel who served as the Master of the Rolls between 1873 and 1883. Vita, Sir George Jessel the Younger and another panel member dealt on 21 June 1961, with, among other matters, an application for a temporary transfer of the liquor license for the Three Chimneys Public House and an application to vary a removal order previously made under the *National Assistance Act, 1948*.

The *National Assistance Act, 1948* – invoked by the second applicant on Vita’s court list for 21 June 1961 – is the statute that effectively abolished the barbaric and antiquated Poor Laws system and ushered in Britain’s social safety net. Although it has been amended, the Act remains in force today. To the extent that it is part of the larger architecture of the British Welfare State, the *National Assistance Act, 1948* has conceptual and policy ties to Maynard Keynes and his particular brand of economic theory.

The “removal order” that was being sought by the Cranbrook District Council to be varied before Vita and her colleagues was an order that would have been granted earlier under s. 47 of the Act. That section creates a jurisdiction in county magistrates to order, upon application, the removal of persons in need of care and attention to suitable premises. The persons contemplated by the section are those who are “are suffering from grave chronic disease or, being aged, infirm or physically incapacitated, are living in insanitary conditions” and who “are unable to devote to themselves, and are not receiving from other persons, proper care and attention” (subs. (1)). The variation power is found in s. 63(4).

The folio sheet for the day in question confirms that both applications – that is, for the liquor license transfer and the variation of the removal order – were granted. On the same day, the panel also took guilty pleas and fined a number of accused on larceny charges and one accused on a charge of failing to get her children to school. Panel members also heard and decided a summary trial for one larceny accused and adjourned him over to a future date for sentencing. They fined and sentenced several other accused who pleaded guilty of various driving offences. Vita’s court day on 21 June 1961 does not sound greatly

different from what might be unfolding on any given day in Provincial Court courtrooms around the province of British Columbia.

Other folio sheets, which I will not cover in detail, show that Vita sat on cases involving charges of making false representations to obtain a benefit, “having milk for sale for human consumption to which water had been added”, not having third party automobile insurance, fraudulent use of a vehicle license, breaches of probation, “stealing growing apples,” “stealing growing plums,” assault, unlawful wounding, indecent assault against a person under 16 years and so forth. She also heard civil applications for custody and maintenance of an infant, child maintenance arrears, orders of ejection, and the like.

### Echoes of Vita’s Judicial Experience and Outlook in her Writings

Vita’s judicial experience only rarely came up for mention in her writings. Given the confidential nature of the charges and disputes over which she presided, that is to be both expected and admired. Undoubtedly, though, her exposure to persons less fortunate than herself who came before her in trying circumstances enlarged and gave balance and depth to her patrician worldview. Vita was plainly a passionate individual but she was also an empathetic one. She was intellectually curious. Though born to privilege she was not pervasively snobbish or condescending. Her biographers have both commented that she could be “remote”. This was confirmed to me by James Stearns who, as I have mentioned, laboured on and eventually managed the Sissinghurst working farm. He described her as a person who was not particularly at ease with “common folk.” In his own words, “she was a bit shy with the likes of us”. But he was quick to add that Vita always treated him and all of her staff with respect, dignity and kindness.

It seems clear that as a mature woman Vita’s judicial experience served to quicken her social conscience and her compassion for the disadvantaged. It also deepened her suspicions and dislikes for those of her own social stratum, and those in officialdom, who displayed airs and pretences. I can illustrate these points with a few examples from her letters and fictional writings.

When handling a case in January 1948 (just weeks after her appointment) in which a brother and sister, aged 10 and 11, were charged with stealing bicycle lamps “by the dozen,” Vita was horrified to learn that they came from a family

of nine who lived in just two rooms. In a letter to Harold, Vita refers to the fact that both children had “streaming colds”:

*“They [the family] have been trying to get a cottage, and of course they can’t. Now this is the sort of thing I should be interested in if I were you – as a potential MP. How can kids like that get a decent moral upbringing? I hate to add any suggestion which would increase your many activities, but I am not at all sure that you wouldn’t get a low-down on the life of the lower income groups if you joined the Cranbrook bench. You would see aspects of life which I don’t think you have ever really taken in.”*

This *cri de coeur*, to me, does not smack of *noblesse oblige*. I do not sense in this or other examples of Vita’s writing a high-to-low, dilettante’s feigned interest in the circumstances of the disadvantaged. Her words ring true and they are borne out by her actions, including those described to me during my interview with James Stearns. He remembered that he and the other working class “staff” at Sissinghurst received generous gifts at Christmas. Mr. Stearns also had a vivid recollection of a time when, as a boy, he broke his leg while working with his father on the farm and received a visit from Vita in hospital. She came bearing gifts and much warmth and kindness. It was a gesture quite outside the norm for her class, he said. If she were only expressing *pro forma* sympathies for the less fortunate, the positively poor and the downtrodden, then surely Vita would not have taken time away from her writing, her gardening and her busy social calendar for 15 years to deal with the matters that came before her in magistrate’s court.

One finds in Vita’s fictional writings a preoccupation with dissembling and falsity. She often places in the action of her novels and stories characters who display a veneer of respectability and propriety but who are lesser and baser creatures beneath the veil. One such character is Noble Godavary, a deceased justice of the peace whose obituary parrots potted truths about a man whose true nature was starkly at odds with his public persona. He appears in the short story, “The Death of Noble Godavary,” which is included in the collection *Thirty Clocks Strike the Hour*. The narrator (a niece of the deceased) comes across her uncle’s obituary in a local newspaper and is appalled by the disingenuous portrait it paints of him:

*“... [A]s for friends, that lonely old wolf, my uncle, never had any; and as for respect and esteem, if Noble Godavary*

*with his sly cowardly ways could delude men into respect and esteem, why, then, there was a chance for all of us ... Here was the Kendal Messenger writing up his devotion as a justice of the peace, his ‘type of the old English squire’; all of which was, as to facts, indisputable, but as to the spirit completely misleading.”*

It is not difficult to imagine how a person like Vita – whose antennae were carefully tuned to detect signs of dissimulation – might have an interest in sizing up witnesses and evaluating their credibility, and be good at it.

Similarly, Vita Sackville-West’s fictional writings reveal that she was concerned about the risk that the human dimensions of conflicts and disputes might become lost in formal legal processes or that those with legal training might become hardened, inclined to over-intellectualise and thus incapable of recognising those human dimensions. *The Easter Party* was written six years after Vita began sitting as a magistrate. In the novel one of her characters makes these rueful remarks about lawyers and their work:

*“... Lawyers are obliged to be a bit inhuman, aren’t they. They have to take an objective attitude towards their cases; and taking the objective attitude sometimes means that you must lose sight of the human side; I mean, you have to administer the law, and you can’t take into consideration the personal case or hardship ...”*

Vita’s concerns in this regard are worthy ones – concerns of which (it is hoped) any properly introspective judicial figure would be mindful.

Vita did not revel in the ceremony of judicial office or in the displays of pomposity that are sometimes associated with it. These things, she believed, could lead to “los[ing] sight of the human side”. She quite disliked appearing as the embodiment of state power, wrapped in the finery and formalities of office, particularly when the accused before her – almost always unsophisticated in the ways of the law – were young, bewildered and fearful. On 14 December 1949, Vita wrote to Harold, saying:

*“I am somewhat agitated, because the police telephoned for me to take a rather complicated case this morning. I rather hate these cases, although the human aspect of them always interests me objectively. I don’t like it when I am the only Justice, as I was this morning, and have to sit in a large armchair behind a table, while the wretched delinquent*

*stands before me, and the room is full of police officers and the Clerk of the Court and his Clerk and the Detective Superintendent, all bringing charges and evidence against the prisoner, and all the ponderous weight of the Law and its apparatus of which I am a part. I always feel that here is a wild animal trapped and caged, and that if it sprang suddenly at my throat it would be seized and restrained by a dozen strong hands; and above all I feel, 'There but for the grace of God and B.M.'s [her mother's] Marriage Settlement, go I.' 'Take your hands out of your pockets when Her Worship speaks to you!' Oh darling, it makes me feel like a character in a Galsworthy play."*

This tendency toward a natural humility also comes through in the breezy, almost dismissive, way she describes the formalities of her judicial role and function to an American correspondent written on 17 February 1955:

*"... I am a Magistrate, or what we call a Justice of the Peace – and I have to be all tidy in a coat and skirt and a hat – and have to administer justice to my fellow countrymen. Then I come home and change into my old gardening clothes, which means breeches and high boots, and I go and tramp about in mud and snow. Then as dusk falls I come in, and write the book I am trying to write – and then I really feel myself – in my tower, shut away. I become an author again, and am happy..."*

This letter also confirms that, while she wore several hats (including a judicial one), Vita was at bottom a writer and most comfortable when bent upon authorial pursuits.

Along with numerous other public intellectuals of the day, Vita Sackville-West was asked by the CBS Radio Network to contribute her perspectives on spiritual matters to its famous *This I Believe* series, hosted during the 1950s by Edward R. Murrow. Vita's offering was broadcast in America (and re-broadcast in Europe by Radio Luxembourg) in mid-June of 1953 and while it reflects uncertainty about the tenets of organised religion, it reveals nevertheless a clear belief in the transcendent importance of charity and human compassion. She said, among other things, the following:

*"My religion, if I have one, is of the profoundest humility. It can be resolved into the few words: I simply do not know ... That there is a Something behind the creation – an Absolute Abstract if you like,*

*to which in our human dread and weakness we must give a personal name, and to which we must attach such human attributes as mercy and justice and loving-kindness, for which Nature shows us no justification at all – I can have no doubt whatsoever: it is an inescapable conviction ..."*

It seems inconceivable to me that that perspective was not shaped, in part, by the encounters Vita had with those who came before her in her judicial capacity and with whom she must have dealt in a manner that reflected her duty to the public but was also leavened by notions of mercy.

## **A Summing Up And Anecdotal Evaluation**

Concerns with genuineness, and with truth and truth telling; humility; compassion, especially for the disadvantaged; an appreciation that the formalities of legal processes can sometimes overwhelm its human subject matter; a recognition that mercy fits into larger conceptions of justice – these are some of the things that the written record tells us preoccupied Vita Sackville-West as a person, a writer and a magistrate. One might say that these are fitting preoccupations for a person who, after much tumult in her younger years, was entrusted by the Lord Chancellor (on the advice of a citizen committee) to dispense justice as a magistrate in the County of Kent for a decade and a half until the year of her death.

There is evidence to show the kinds of cases that occupied Vita during her judicial life. And her own writings help us to divine what her outlook and priorities were, in some instances specifically in relation to her actual duties on the bench. There is almost nothing that I have been able to find that speaks directly to the way she performed in her judicial role but there is no reason to doubt that, in general, she performed it with sensitivity and, increasingly as her experience grew, with skill. Her longevity on the bench certainly suggests that.

On the other hand, there are some distaff notes with which we must contend. James Stearns, previously mentioned, recalled that when she drove, it was Vita's habit to drive dangerously and well over the speed limit. She was also not above having three or four strong gin and tonics and then, realising that she was late for court, roaring out of the Sissinghurst car park in a spray of gravel on her way to sit in either Cranbrook or Tenterden. Mr. Stearns mused that when she got there, she likely sat on and decided impaired driving cases. In this way

Vita clearly fell short of reasonable expectations of a sitting justice of the peace.

The question must be raised of whether, given the erratic and volatile character of her early life particularly, Vita was suited by temperament to the office of justice of the peace. This question does not arise in a lawsuit or a prosecution but, rather, in the course of a backward-looking survey of a thin tissue of historical evidence carried out by an enthusiastic amateur. I do not contend that the case concerning her suitability for judicial office is, or can be, proven or disproven on the evidence that I have been able to marshal thus far and that I have summarised here. But I do think it fair to say, at this point, that while she remains an enigmatic figure, the circumstantial evidence I have been able to gather so far urges the conclusion that in her later and more settled years, with occasional lapses, she proved herself well-suited to the magistrate's role. Quite apart from having ontributed significantly to English literature – a point that is certainly not in doubt – I believe

that the preponderance of the evidence currently available shows that Vita Sackville-West made a valuable contribution to the life of her local community in her role as a justice of the peace.

*The writing of this article would not have been possible without the kind, expert and willing assistance of the following people (to whom I express my sincere gratitude): the late James Stearns and Mary Stearns of Castle Farm, Sissinghurst; Geoff and Pam Piper of Cranbrook and the invaluable Cranbrook Community Website; Mark Ballard, Elizabeth Finn, Deborah Saunders and Michael Carter of the Centre for Kentish Studies, Maidstone; Debbie Davidson and Sandra Wilson of the Maidstone Reference Library; David Barrett and June Wenborn of the Ashford Library; Robert Barman, editor, and Linda Evans, reference librarian, at the Kent Messenger; and Rodney Dann, curator of the Cranbrook Museum.*

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# THE ROLE OF THE CHIEF JUSTICE IN PROMOTING AND PROTECTING THE INDEPENDENCE OF THE JUDICIARY

Benjamin J. Odoki, Chief Justice of Uganda.

Extracted from a lecture delivered at the Southern African Chief Justices' Forum.

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**Abstract:** *This article underscores the need for strong public confidence in the Judiciary as a pre-requisite for promoting and safeguarding the independence of the Judiciary. It emphasises the fact that Judiciaries are part of an ever evolving dynamic society and must be dynamic to address new challenges and demands caused by local, national, regional and international concerns, otherwise they risk being relegated to mere observers. It notes that, whereas de jure independence of the Judiciary is a certainty in most jurisdictions, de facto independence of the Judiciary in Africa remains a challenge, and highlights the central role of the Chief Justice in steering the Judiciary into an outward and result-oriented institution which is responsive to public needs and is therefore relevant.*

**Keywords:** *Public confidence in the Judiciary – role of Chief Justice – threats to judicial independence – external pressure and influence – difference between de jure and de facto independence – accountability – result-oriented approach – service delivery surveys – reforming the Judiciary – principles of corporate governance – information management systems*

## Introduction

The Chief Justice as the Chief Executive of the Judiciary bears the greatest responsibility in nurturing, promoting and protecting the independence of the Judiciary – because judges and the public look upon the Chief Justice as the beacon of the Judiciary's independence as well as a protector of their own independence.

A strong Chief Justice not only inspires public confidence within the Judiciary but gives the country the satisfaction that the courts will determine disputes before them fairly and justly without undue influence from any quarter particularly the Government. The Chief Justice must therefore, be vigilant in dealing with threats to Judicial independence and in addressing inefficiencies within the Judiciary, which undermine the capacity of the

institution to deliver timely, efficient and effective justice.

Equally, the Chief Justice must make the institutional wellbeing as well as the professional strength of judicial officers his constant preoccupation if he or she is to protect and promote the independence of the Judiciary in a sustainable manner.

## Judicial Independence

Article 10 of the Universal Declaration of Human Rights (UDHR) provides that:

*Everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*

Likewise, art.14(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that:

*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*

The provisions of the UDHR and the ICCPR have been largely domesticated in national Constitutions to provide for the independence of the Judiciary. Despite the codification of the principles on the independence of the Judiciary, the United Nations found that there existed serious shortcomings between independence of the Judiciary on paper and practice. The Preamble to the United Nations Basic Principles on the Independence of the Judiciary notes that frequently there still is a gap between the vision underlying those principles and actual situation.

The United Nations, therefore, formulated the UN Basic Principles on the Independence of the Judiciary to assist Member States in their task of securing and promoting the independence of

the Judiciary. Consequently, while the Basic Principles do not attempt to exhaustively lay down the normative contents of the independence of the Judiciary, they nonetheless lay down accepted international standards, or specific standards which are applicable to a Judiciary in an open and democratic society.

Article 1 of the United Nations Basic Principles on the Independence of the Judiciary provides that the independence of the Judiciary shall be guaranteed by the state and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

The UN Basic Principles further enjoin the State to guarantee the independence of the Judiciary; and for the Judiciary to decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper inducements and pressure from any quarters. The UN Basic Principles further lay down the criteria for the independence of the Judiciary, which include: the right to appeal its decisions, judicial immunity, protection of judicial officers against threats, adequate resources, availability of qualified staff to assist the judges; access to laws and precedents; adequate number of judges; merit based appointment of judges and adequate powers of the Judiciary to review actions of the Executive or the other branches of Government, as well as other rights and obligations. Of course the UN Basic Principles, the UDHR and the ICCPR, as well as national Constitutions, provide in unequivocal terms that the Judiciary shall be accountable to the people. Independence of the Judiciary inescapably requires the Judiciary to be accountable.

In practice, the independence of the Judiciary has come to mean that the Judiciary shall decide matters before it independently without interference, undue pressure from any quarter based on the facts and law. But this is only effective if the Judiciary enjoys institutional, administrative, individual and financial independence in the discharge of its functions and mandate.

Judicial Independence can take two forms: (1) *de jure* independence – this is the independence of the court as can be deduced from the Constitutions or the law; and (2) *de facto* independence – this is the degree of independence that the court *actually* enjoys in practice. An independent Judiciary enjoys both *de jure* and *de facto* independence.

In Africa, most Constitutions entrench the provisions of the UDHR, the ICCPR and the UN Basic Principles on the Independence of the Judiciary. On paper, African Judiciaries can be described as enjoying *de jure* independence. Most Constitutions provide that the Judiciary is an independent arm of the Government and that all organs, agencies and institutions shall be obliged to assist the Judiciary in carrying out its mandate. In some countries, there are also Constitutional and statutory provisions providing for institutional, financial and judicial autonomy for the Judiciary.

That notwithstanding, most Judiciaries both in Africa and beyond still face challenges to their independence because their independence on paper has not been translated into real independence in practice. In rankings of selected countries in Judicial Independence by both the World Bank and the World Economic Forum, African countries consistently fare worse than their counterparts in the Northern Hemisphere. Although it must be said that even in the developed democracies, the pressures on the executive to respond to new threats such as terrorism, economic downturns, pressing needs to adopt a liberal or conservative approach to national issues such as abortion and control of guns, have seen, especially the executive, interfering with the space of the Judiciary.

In Belgium, the Fortis gate, as the affair came to be known, arose in consequence of the world banking crisis. Fortis was Belgium's biggest financial service company until October 2008 when it found itself facing bankruptcy. Its bail out led to legal proceedings during the course of which it was found that the government had tried to influence judges who were adjudicating on the legality of the proposed sell off. The Minister of Justice was forced to resign when the Prime Minister admitted publicly that one of the Minister's officials had contacted the husband of a judge of the Court of Appeal on several occasions during the course of the litigation.

Lord Phillip, the former Chief Justice of England and Wales observed that this case had provided a salutary example that these things can happen (interference with the independence of the Judiciary), even in a mature democracy, where, and perhaps because, the principles are taken for granted.

In Africa, interference in the Judiciary's space has been most pronounced in states refusing to obey and enforce decisions of the courts, open attacks on the Judiciary; storming of the Judiciary (as happened in Uganda some years

back), poor facilitation of the Judiciary; delays in the appointment of Judges; failing to provide an adequate working environment for judicial staff; poor pay and relegating the Judiciary among the second or third best priorities of Government. Suffice to mention that the meager resources allocated to the Judiciary, as compared to the other organs of Government, is a reliable indication of the priority placed on the Judiciary in Africa. The de-prioritization of the Judiciary – which is the cornerstone of the rule of law – therefore begs the question whether the rule of law, is still accorded significant priority in Africa.

### **Justification for Judicial Independence:**

Despite the threats to Judicial Independence, the Judiciary still continues to play a crucial role in upholding the rule of law; orderly settlement of disputes and in guaranteeing the observance, respect and enjoyment of fundamental human rights by all, especially the most vulnerable.

It is undeniable that the pursuit of an independent Judiciary, as Lord Phillips held at the 16<sup>th</sup> Commonwealth Law Conference (2009):

*Flows from the specific character of the function of the Judiciary: to adjudicate disputes between the Government and the citizen, or between the one citizen and another, in accordance with the law. Constitutional democracy and the rule of law requires a separation between, on the one hand, the legislative and executive branches that make and implement the law, and on the other hand, the judicial branch that interprets and applies the law when disputes arise in a particular case ... More particularly, an independent judiciary is necessary for the enforcement of constitutional limits imposed on the power of the executive and legislative branches. If the executive branch is seen as being able to exercise improper influence on the judiciary's exercise of judicial functions, the rule of law is undermined. If the legislature or the executive branch is seen as being able to improperly influence the adjudication of constitutional limits on the powers of these branches, the basic structure of constitutional democracy is also undermined.*

In addition, an independent Judiciary ensures that the rule of law applies to every one equally. It ensures that all, including the State, respect and observe the basic fundamental freedoms. At the level of trials, judicial

independence guarantees the rights to a fair trial. At higher levels, respect for and subjection to the law can only be sustained if neutral institution exists to ensure that the law is respected and enforced against all.

### **The Role of the Chief Justice in Maintaining and Protecting the Independence of the Judiciary**

Because the Judiciary plays a central role in good governance and remains under constant threat, the Chief Justice, as head of the institution, bears the greatest responsibility in shouldering and protecting the institution from the predatory instincts of the executive and the legislature.

Reflecting on the role of the Chief Justice, the Chief Justice of the Republic of Singapore observed that:

*The functions of the Chief Justice as head of the Judiciary generally can be said to be threefold. First, the Chief Justice is the symbol of the third arm of government... and, as its head, acts for the Judiciary in its relations with the other two arms of government (i.e., the Legislature and the Executive). Second, the Chief Justice is the administrative head (i.e., the chief executive officer) of the Judiciary and is responsible for the efficient and proper administration of the courts, including obtaining sufficient judges and court staff to run the courts smoothly. Third, the Chief Justice is the senior judge in the Judiciary and, depending on his or her personal qualities as a judge, can, by his or her leadership, influence the development of the law and the legal system of the country.*

Therefore, because of his or her public standing, the Chief Justice has a special role in ensuring the continued existence of the independence of the Judiciary. He or she establishes the values for the Judiciary and sets the direction and “tone” of the judicial system. The Judges look to the Chief Justice for leadership. The public looks to the Chief Justice for justice. To the people, the Chief Justice is the face of justice in the State and the protector of the people against the wrongs of others and abuses of power or wrong-doing or unlawful acts of state agencies. A strong and independent Chief Justice can personify the independence of the Judiciary and exemplify the exercise of independence in judicial proceedings.

But a weak Chief Justice will undoubtedly have a debilitating effect on the other judges and

affect public trust and confidence in the entire judicial system. It goes without saying that the Chief Justice must always be available to provide strong leadership to the Judiciary, paying particular attention to securing institutional independence of the judiciary as well as personal independence of individual judges. The Chief Justice must lead by example and at the front line – guarding against interference from the executive because it is the executive (which) is the most frequent litigator in the courts. It is from executive pressure or influence that judges require particularly to be protected.

Apart from offering strong leadership, the Chief Justice can promote judicial independence by building a robust judiciary and responding to threats to judicial independence. Threats to judicial independence include poor service delivery, overbearing executives; weak legal frameworks; limited resources; national, regional and global threats; weak internal institutions; corruption; inward looking judiciaries; conservatism and slow reform; limited use of technology and innovation, and inertia to adopt a business approach to service delivery. These and other threats, caused by the enemies from within are bigger threats to judicial independence than external executive pressure.

### **Promoting Judicial Independence beyond the Chief Justice: Improved Service Delivery the hallmark of Judicial Independence**

An independent Judiciary is of no value to a litigant if it cannot deliver timely and quality justice. A litigant expects no more than a fair and timely decision from the court.

It is therefore an accepted fact that the Judiciary is responsible for delivering a public good called justice. In many cases, Judiciaries have failed to deliver timely and efficient justice resulting in loss of public confidence in the Judiciary. The existence of delay, case backlogs and unpredictability of the judicial system are glaring signs of an inefficient Judiciary.

Lord Denning warned that inefficiencies in the administration of justice can turn justice sour while Charles Dickens warned that inefficiencies in the administration of justice can exhaust finances, patience and hope - and we could add, loss of faith in the Judiciary as an independent arbiter of disputes. Loss of public confidence in the Judiciary often provides the moral justification for the State to intervene and interfere in the Judiciary under the guise of sorting out the Judiciary. As we all

know, this can only result into interference with the independence of the Judiciary.

Therefore, every Chief Justice must focus on creating a vibrant and respectable Judiciary, which is efficient, effective and responsive in addressing the needs of the public. Reforming and strengthening the Judiciary must be the preoccupation of every Chief Justice as the Chief Executive of the Judiciary.

The starting point is for the Judiciary to carry out service delivery surveys to establish whether it is meeting the expectations of the population; if not, why it is not meeting the expectations; what are the gaps in service delivery and what are the areas for improvement. A service delivery survey will help the Judiciary to assess what the public thinks about it; why the institution is under performing; which processes and procedures need to be changed and what processes and procedures need to be introduced.

No doubt, this will call for a paradigm shift. The Judiciary has to change from being a bureaucracy to a business-oriented institution. The Judiciary has to move from an overly supply-focused institution, which often second guesses what the public wants to a demand-focused institution, which exists for the wellbeing of its clients. Only dynamic institutions survive in the hostile environment because they can innovate and respond meaningfully to the needs of their clients.

Likewise, the Judiciary can only survive loss of public confidence by responding to public needs as a pre-requisite to effective service delivery. African Judiciaries must, therefore, focus more on dealing with delayed justice; bridging the gap between the people and the law; lowering the transaction costs of doing business or litigation in courts; being humane and customer focused and friendly; dealing with corruption; being predictable and adhering to service delivery standards.

There can be no doubt that a Judiciary, which has the confidence of the people will be protected and assured public support in times of attacks from the other organs of the State. It is also true that a Judiciary, which is distrusted for being partial and inefficient, may be rejected for mob justice (as happened to the Judiciary in the aftermath of the Kenya general election in 2007).

**Improving the integrity of the Judiciary**  
Strengthening the integrity within the Judiciary through the elimination of real and perceived corruption can go a long way in building public

trust and insulating the Judiciary against inducements caused by bribery and corruption. This can be done through the adoption of codes of conduct based on the Bangalore Principles of Judicial Conduct and ensuring that the Codes are domesticated and enforced as part of the routine disciplinary measures of the Judicial Service Commission. Additionally, Judiciaries, as is the case in Uganda, should make it a punishable offence for judicial officers to violate codes of conduct to enhance adherence and respect for the codes.

Corruption in the judiciary ought to be addressed holistically through strategies that address the causes of corruption, detection, punishment and reform of the convicts. Such strategies include a zero tolerance to corruption; streamlining processes; enhancing financial management; improved pay; establishing a strong public complaints system with strong response mechanisms to the public; providing hotlines to receive calls on corruption; opening up the Judiciary through simplification of laws, procedures and processes so that the public can very easily understand, approach and contact the court without recourse to third parties; automating some processes to reduce physical contact between court staff and the public; providing legal aid to balance equality of arms and help the more vulnerable, and operating an open door policy which engenders the public to the courts. Anti-corruption measures should be matched by deliberate policies on the part of the Judiciary to extricate corruption from its systems.

Public support for the judiciary's anti-corruption efforts is a pre-requisite to winning the war on corruption. Public support can be garnered through an outreach program which not only opens up the Judiciary to public scrutiny but provides a mechanism for the Judiciary to explain itself and receive views and/or complaints and suggestions from the public. The establishment of public relations offices within the Judiciary is a necessary tool for opening up communication channels and providing the link between the public and judiciary which may be seen as aloof, corrupt and out of touch with reality.

Other avenues include: establishing hotlines and web-based complaints processing mechanisms; using suggestion boxes; involving the public in the administration of justice through participation in court of user committees and involving the public in quality assurance of the Judiciary. These measures serve to strengthen and empower communities

to fight and protect the Judiciary from the excesses of the other branches of Government.

### **Corporate Governance**

Whereas the strict application of the doctrine of separation of powers abhors corporate governance between the three organs of the State and whereas critics, such as Lord Phillips, think that corporate Governance can erode judicial independence, evidence from jurisdictions where principled corporate governance is practiced tend to suggest the opposite.

In Uganda, when the Judiciary was attacked by the Executive, it took the Judiciary and the Executive to candidly discuss the issues that caused the affront on the Judiciary. Uganda was able to peacefully resolve the issues and to secure the commitment from the Executive that it would never carry out such actions against the Judiciary. That occasion gave the warring arms of State an opportunity to understand each other's mandates and spheres of operations.

Be that as it may, corporate governance in institutions does not, however, mean abdication of principle, but should rather reinforce the trinity of the separation of powers and the need for the three arms of the State to work towards the upholding of the rule of law and respecting the basic freedoms.

Judiciaries can use corporate Governance to argue for increased resources to meet their needs by getting the Executive and the Legislature to appreciate the role of the Judiciary in the transformation of the country.

### **Strengthening Judiciaries: a healthy mind in a healthy body**

The courts can only deliver timely justice when they are well resourced, facilitated and are supported by adequate numbers of qualified staff to discharge their mandates. Judiciaries must, therefore, aim at having financial and institutional autonomy entrenched within the law with clear provisions protecting and providing for the autonomy. Whereas inclusion of such provisions in the Constitution has given superficial relief to the Judiciary, enactment of an elaborate law with clearly defined rights, responsibilities and obligations of the three arms of government has proved to be more sanguine and efficient in holding to account the Executive, which has tended to exploit the unclear and unequivocal provisions on the Judiciary. Judiciaries world over must ensure that they have a separate and elaborate law to define their powers, scope and

relationship in the national set up of the Government. Such laws must secure and protect adequate funding for the Judiciary; adequate professional and administrative staff; proper working environment and tools; better terms and conditions of service, as well as the insulation of the Judiciary against external threats.

In Uganda, we have proposed the enactment of the Administration of Justice Bill which is already with the Government.

### **Repositioning the Judiciary among government priorities: The missing link:**

Governments are obsessed with result-based management which emphasizes impact and accelerated growth based on preconceived priorities. Resources are allocated on the basis of priorities. Finding sufficient resources however, requires the Judiciary to identify itself among the key priorities of the Government. Prioritizing the rule of law, which the Judiciary contributes to, is therefore of utmost importance. Judiciaries must urge the State to prioritize the rule of law and be strategic and avoid blind budgeting which emphasizes activities and processes. Judiciary budgets must focus more on achieving impact, which in this case may include strengthening the rule of law, accelerated economic growth; increased investor confidence in the country; safety of the person and security of property.

### **Increased use of Technology**

Technology has brought about innumerable benefits of speeding up production and lowering transaction costs. Yet despite the conspicuous benefits of technology, Judges and Judiciaries still continue to rely on mainly human energy in processing cases. Courts can invest in court room technology to speed up processes and deliver timely justice. As the former Chief Justice of England, Lord Philips, observed:

*We must train ourselves to take advantage of technological developments so that our systems are improved by it, so that judges are its masters and not its slaves.*

Investing in accurate data collection and processing of data into information through an integrated information management system enables the Judiciary's management to plan for the future, managing public needs, and allows

for evidenced-based planning and budgeting from a position of knowledge which is essential to garnering more resources.

### **Continuous professional training of judges**

Judiciaries are part and parcel of a dynamic society which is changing at a pace equal to forces of innovation caused by advancement in knowledge, technology and globalization. Judges have an obligation to constantly update their knowledge of the law and their environment if they are to be part of the human revolution. Consequently, Judges should maintain their knowledge of the law and keep up with developments in the law.

Chief Justices should prioritize establishment of Judicial Training Institutes to provide tailored continuous professional training for judiciary staff to keep them ahead of the private bar and abreast with developments at a national, regional and international level. In Uganda we have established the Judicial Studies Institute headed by a High Court Judge to conduct judicial training.

### **Conclusion**

Protecting the independence of the Judiciary largely falls on the hands of the Chief Justice because he or she represents the public face of the judiciary and is required as chief executive of the Judiciary to promote its core values which include Judicial independence. Being the core function of his job, the Chief Justice cannot take a back seat. He must be at the front line, but like any good commander, he must have at his call the Judges and other judicial officers who are his soldiers in the trench and constitute the second line of defence.

The Chief Justice may well do better by building linkages with the community, the private bar and regional, continental and international Judiciaries to reinforce his capacity to protect and promote Judicial independence. The Chief Justice must take care to ensure that courts exhibit real and perceived independence for we have to recognize that however ill-founded a perception may be in fact, perception itself is a fact. As it was once said, "the judge who gives the right judgment while appearing not to do so may be thrice blessed in heaven but on earth he is no use at all".

# LAW REPORTS

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## FEDERATION OF WOMEN LAWYERS KENYA AND OTHERS v ATTORNEY GENERAL AND ANOTHER

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25 August 2011, [2011] 5 LRC 625

HIGH COURT OF KENYA (MWERA, WARSAME AND MWILU JJ)

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*Constitutional law – Fundamental rights – Freedom from discrimination – Sex discrimination – Judicial appointments – Constitutional requirement for not more than two-thirds of members of elective or appointive bodies to be of same gender – Supreme Court – Appointment of five men and two women as judges – Petitioners claiming that appointments null and void – Whether requirement of at least one-third of Supreme Court to be women mandatory – Whether giving rise to immediate enforceable right – Whether Judicial Service Commission required to take affirmative action to apply two-thirds gender principle – Whether court having jurisdiction to hear and decide petition – Whether two-thirds gender principle applicable to judicial appointments – Constitution of Kenya 2010, arts 19, 27, 165, 168, 172.*

Article 163 of the Constitution of Kenya 2010 established a Supreme Court of seven judges as the highest court in Kenya. The appointment of judges was to be made by the President on the recommendation of the Judicial Service Commission (the commission). The commission, in accordance with the Judicial Service Act 2011, short-listed and interviewed persons having the requisite qualifications and experience and recommended a male and female to be Chief Justice and deputy Chief Justice and four men and one woman to be judges. The President accepted the recommendations and gazetted the appointments of the judges. The court accordingly comprised five men and two women. Article 27(8) of the Constitution stated that ‘the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender’. The main petitioners, the Federation of Women Lawyers of Kenya, petitioned the High Court for a declaration that the commission’s recommendation was gender insensitive, discriminatory, disre-

spectful of women and contrary to art 27(8) of the Constitution and therefore null and void; they also sought an order restraining the appointments. Under the provisions relating to equality and freedom from discrimination in art 27, ‘Every person is equal before the law’ (art 27(1)), ‘Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres’ (art 27(3)), ‘The State shall not discriminate directly or indirectly against any person on any ground, including ... sex’ (art 27(4)) and ‘To give full effect to the realisation of the rights guaranteed under [art 27], the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination’ (art 27(6)). Article 172(2)(b) required the commission to be guided in the performance of its functions by ‘the promotion of gender equality’. A sweeping-up clause in Sch 5 of the Constitution stated that the implementation period of ‘Any other legislation required by this Constitution’ was five years. The petitioners contended that at least one-third of the persons recommended by the commission for appointment to the Supreme Court ought to have been women and therefore at least three out of the seven judges ought to be women, that the requirement of at least one-third of the Supreme Court to be women was mandatory under the Constitution and that the commission was required by art 27(6) to take affirmative action to attain that object as evidenced by the word ‘shall’ in arts 27(6) and 27(8). The commission contended that the court had no jurisdiction to entertain and determine the issues raised in the petition because once the five judges were appointed and gazetted as Supreme Court judges in accordance with art 166 of the Constitution they could only be removed under the procedure set out in art 168 for the removal of a

superior court judge on grounds of mental or physical incapacity, misconduct, bankruptcy or incompetence by a special tribunal appointed by the President. The commission further contended that appointments to superior courts had to be made according to the criteria specified in art 166(2), namely on their qualification for office, their experience and their high moral character, integrity and impartiality, and that the recommendations had been made purely on merit. The questions arose: (i) whether the court had jurisdiction to entertain and decide the issues raised in the petition, (ii) whether the equal protection and affirmative action requirements in art 27 required that at least one third of the Supreme Court judiciary be women, (iii) whether art 27(8) gave rise to an immediate right which had to be implemented and enforced by the court and (iv) whether the commission in exercise of its mandate under art 172, read together with the Judicial Service Act, had strictly, sufficiently and satisfactorily complied with art 27(8).

#### **HELD: Petition dismissed**

(i) The jurisdiction of the High Court under art 165 of the Constitution was completely different from that of a tribunal appointed under art 168 to consider the removal of a superior court judge. The tribunal's jurisdiction only arose when there was alleged misconduct, inability to perform the functions of office because of mental or physical incapacity, breach of the code of conduct, bankruptcy, incompetency, gross misconduct or misbehaviour on the part of a judge. By contrast, under art 165(3) the High Court's original jurisdiction in civil matters was unlimited and included jurisdiction to determine questions regarding the rights and fundamental freedoms in the Bill of Rights. The court had the requisite jurisdiction to hear and determine the petition because it concerned the process and constitutionality of appointment of Supreme Court judges and the court would be required to evaluate and assess whether the commission had conducted the appointments in accordance with the law, fairness and justice and whether the process of appointment was invalid because it was unconstitutional, wrong, unprocedural or illegal.

(ii) The 2010 Constitution was a flexible and adaptable instrument, some of its provisions being highly specific, others no more than a broad outline; sometimes it had to be read restrictively, at other times loosely. It had a consistent and not contingent meaning and could not be interpreted as

having different meanings at different times. When interpreting the Bill of Rights Chapter the court was required to promote the values underlying an open democratic society based on human dignity, equality and freedom and to have regard to the spirit, purport and objects of Bill of Rights and its purpose, set out in art 19, of 'recognising and protecting human rights and fundamental freedoms [in order] to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings' in Kenya. That required the court to adopt a generous and sustainable interpretation of the Bill of Rights which gave individuals in full measure the fundamental rights and freedoms, while taking full cognizance of the social conditions, experiences and perception of the people of Kenya. The court had to be liberal and pragmatic, with a degree of humility and common sense, in order to advance the rights and liberties enshrined in the Constitution, and fundamental issues concerning the Bill of Rights were not to be decided on narrow, pedantic, flimsy or conservative grounds which were likely to erode the confidence of the people in the administration of justice.

(iii) The issue before the court was not whether the commission's conclusions were patently unreasonable but whether its interpretation of the provisions of the Constitution was unconstitutional. Article 27 concerned 'equality' and 'freedom from discrimination', which were one and the same thing, and the basis of art 27 was the recognition of the worth of all human beings. A person claiming a violation of art 27 of the Constitution had to establish, first, that because of a distinction drawn between the claimant and others he had been denied equal protection or equal benefit of the law and, second, that the denial constituted discrimination on the basis of one of the grounds in art 27. Whether the distinction between the claimant and others had the effect of imposing a burden, obligation or disadvantage not imposed on others or of withholding or obstructing access to benefits or advantage which were available to others was an essential and important element in determining whether there was a violation of art 27.

(iv) The Constitution did not require things and circumstances which were different in fact or opinion to be treated in law as though they were the same. The law requiring equal protection permitted many



practical inequalities and the equal protection requirement enshrined in art 27 did not mean that all laws passed by the legislature had to apply universally to all persons or that a law could not create differences as to the persons to whom it applied or the territorial limit within which it was enforced. Thus the equal protection requirement did not prevent reasonable legislative classification of people into different groups, depending on the purpose for which the classification was made. Classification was permissible if it was based on a real and substantial distinction which bore a just and reasonable relation to the object sought to be attained and was not arbitrary or without substantial basis. A classification had to be rational: not only did it have to be based on qualities or characteristics which were to be found in all the persons grouped together and not in those who were left out, but also those qualities and characteristics had to have a reasonable relation to the objects of the legislation. The classification had to fulfil two conditions, first that it was founded on intelligible differentia which distinguished those who were grouped together from others (although the difference which warranted a reasonable classification need not be great) and secondly, that the differentia had a rational relation to the object sought to be achieved by the legislation. The question for the court was not whether a provision resulted in inequality but whether it gave rise to a difference which bore a just and reasonable relation to the object of the legislation, since mere differentiation or inequality of treatment did not per se amount to discrimination which was contrary to the equal protection requirement in art 27.

- (v) Affirmative action was both a remedy or redress for past wrongs, by giving a minority preference to make up for past discrimination that placed them at an unfair disadvantage, and a means of advancing socially a worthy and progressive aim by equipping a disadvantaged minority with the means to advance to positions of leadership in key public institutions in order to serve the common good and wider interest of society and reflect homogeneity of race, ethnicity and class. However, if the aim was to help the disadvantaged it ought to be based on something more than female gender and the concept of affirmative action was not meant to secure special treatment for any group within society. Moreover, it was not appro-

priate for judicial appointments, which required persons to have received rigorous legal training and to have the necessary experience to be judges.

- (vi) In recommending persons to the President for appointment to the Supreme Court, the commission was required to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice. Judicial appointments ought to be based on merit and non-discrimination and above all ought to reflect the diversity of the people of Kenya, but also taking into consideration the values, beliefs and experience that could be brought by an individual to a particular position. Women were just as likely as men to possess the attributes and experience of good judges and any person who met the criteria and standards set had a legitimate expectation to be recommended for appointment. The role and the powers of the commission were clearly defined by the Judicial Service Commission Act and the Constitution and, in the exercise of its constitutional duty, the commission had no discretion other than to comply with the provisions of art 27 and 172 of the Constitution. In the event, there was no evidence that the commission had failed to comply with art 27(8) in exercising its functions.
- (vii) The rights under arts 27(6), (7) and (8) were by their nature aspirational and progressive in character, since they depended on the enactment of legislation and formulation of policies for their realisation and therefore did not give rise to immediately enforceable rights. Instead, art 27 created positive obligations on the state to establish coherent programmes capable of facilitating the realisation of art 27 rights within the time frame of five years from 27 August 2010, within the state's available means. The purpose of art 27(8) was to place a future obligation on the state to address historical or traditional injustices that had been encountered by or visited on a particular segment of the people of Kenya. Article 27(8) obliged the state to take positive measures which were reasonable, practicable and able to address the genuine needs of the vulnerable groups of society and redress any disadvantages suffered by individuals or groups because of past discrimination, but Parliament had a mandate to do what it considered appropriate for the purpose of enforcing or securing the enforcement of the two-thirds gender principle and the precise contours

and content of the measures to be adopted were primarily a matter for the legislature and the executive, not the courts. It would be unrealistic and unreasonable to hold that art 27 gave an immediate and enforceable right to any particular gender in regard to the two-thirds principle. Moreover, art 27 did not address or impose any duty on the commission in the performance of its constitutional, statutory and administrative functions. Any claim under art 27 could only be sustained

against the government and then only by a specific complaint that it had failed to take legislative and other measures to achieve the progressive realisation of a right under art 27. Since the rights under art 27(8) had not crystallised and could only do so when the state took or failed to take legislative or other measures designed to redress any disadvantage within the time frame set by Sch 5 to the Constitution, the petition had to be dismissed.

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# BRITISH AMERICAN TOBACCO AUSTRALIA SERVICES LTD v LAURIE AND OTHERS

1 September 2010, 9 February 2011, [2011] 3 LRC 513

HIGH COURT OF AUSTRALIA (*French CJ, Gummow, Heydon, Kiefel and Bell JJ*),

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*Judiciary – Bias – Judge – Allegation of bias – Apprehension of bias in form of prejudgment – Fourth respondent judge finding that appellant had adopted fraudulent document destruction policy – Existence of that policy being in issue in subsequent and unrelated proceedings brought against appellant by first respondent – Fourth respondent refusing to disqualify himself from hearing claim – Whether apprehension of bias rule disqualifying fourth respondent from hearing first respondent’s claim.*

The first respondent was the widow of D, who died from lung cancer in 2006. Shortly before his death he had commenced proceedings in the Dust Diseases Tribunal of New South Wales (the Tribunal) claiming damages in negligence against three defendants including the appellant (BATAS). In the case against BATAS, D pleaded that he had smoked tobacco products for a number of years and that throughout that period BATAS knew, or ought to have known, that smoking tobacco products could cause lung cancer. He claimed that BATAS was in breach of the duty of care that it owed to him. The breaches of duty particularised included making public statements denying that there was reliable evidence that smoking could cause lung cancer and disparaging material in the public domain which indicated the existence of that link. D asserted that BATAS had developed and implemented a policy of destroying documents that could have provided evidence adverse to its interests in litigation. Similar allegations concerning the existence and implementation of a document destruction policy had been pleaded in earlier proceedings in the Tribunal, in which the fourth respondent (a judge of the Tribunal) found during a discovery application that ‘on the present state of the evidence’ BATAS had drafted or adopted its document retention policy for the purpose of a fraud. The finding was substantially based upon acceptance of the evidence of G, the in-house counsel and company secretary of BATAS. The fourth respondent was mindful that the application was interlocutory and of the limited challenge that BATAS had advanced to the acceptance of G’s evidence. The question of

whether BATAS adopted and implemented a document retention/destruction policy for the purpose of destroying documents adverse to its interests under the guise of a non-selective housekeeping policy was a live and significant issue in the first respondent’s proceedings. In 2009 BATAS made an application to the fourth respondent asking him to disqualify himself from hearing the first respondent’s claim. The apprehension of bias rule required a judge not to hear a case if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question that the judge was required to decide. In the instant case the apprehension raised was of prejudgment; it was an apprehension that, having determined the existence of the policy in the earlier proceeding, the fourth respondent might not be open to persuasion towards a different conclusion in the first respondent’s proceeding. The application was refused. In his reasons on the recusal application, delivered three years after the discovery judgment, the fourth respondent addressed BATAS’s submission that G had been cross-examined ‘in a red-blooded way’ and that the discovery application had been a ‘mini trial’. He considered that it was apparent from the earlier judgment that G’s credit had been subjected to no more than a ‘peripheral attack’. BATAS sought leave to appeal from the fourth respondent’s order to the Court of Appeal. BATAS also commenced proceedings in that court claiming an order prohibiting the fourth respondent from hearing or determining the first respondent’s claim. The Court of Appeal dismissed both summonses. The majority of the Court of Appeal concluded that the hypothetical observer would have some understanding that the fourth respondent’s finding was interlocutory and made on hearsay evidence that would not be admissible on a final hearing, that the observer would appreciate that for tactical reasons BATAS might have decided not to call evidence on the application to counter that of G and, in those circumstances, that the hypothetical observer would not reasonably apprehend that the fourth respondent might not bring an impartial

and unprejudiced mind to the determination of the issue once all admissible evidence had been received and the matter had been fully argued. The minority pointed out that the fourth respondent had made a relevantly unqualified finding of dishonesty and fraud and the grave quality of such a finding by a trial judge and the necessity for the judge to be persuaded in his mind as to its truth was such that a fair-minded lay observer might reasonably think that the judge might not be able to bring a mind free of the effect of the prior conclusion to bear in dealing with the same issue in respect of the same party on a later occasion. BATAS appealed. The question raised by the appeal was whether the apprehension of bias rule disqualified the fourth respondent from hearing the first respondent's claim.

### **HELD: (French CJ and Gummow J dissenting) Appeal allowed**

Per Heydon, Kiefel and Bell JJ. It was fundamental to the administration of justice that the judge was neutral. It was for that reason that the appearance of departure from neutrality was a ground of disqualification. Because the apprehension of bias rule was concerned with the appearance of bias, and not the actuality, it was the perception of the hypothetical observer that provided the yardstick. It was the public's perception of neutrality with which the rule was concerned. The lay observer might reasonably apprehend that a judge who had found a state of affairs to exist, or who had come to a clear view about the credit of a witness, might not be inclined to depart from that view in a subsequent case. It was a recognition of human nature. At issue in the instant case was not the incautious remark or expression of a tentative opinion but the impression reasonably conveyed to the fair-minded lay observer who knew that the fourth respondent had found that BATAS engaged in fraud and who had read his reasons for that finding. Judges were equipped by training, experience and their oath or affirmation to decide factual contests solely on the material that was in evidence. The hypothetical observer was reasonable and understood that the fourth respondent was a professional judge. None the less, the observer was not presumed to reject the possibility of prejudgment. If it were otherwise an apprehension of bias would never arise in the case of a professional judge. Whenever a judge was asked to try an issue which he or she had previously determined, whether in the same proceedings or in different proceedings, and whether between the same parties or different parties, the judge would be aware that

different evidence might be led at the later trial. In the instant case the fourth respondent's express acknowledgment of that circumstance did not remove the impression created by reading the judgment that the clear views there stated might influence his determination of the same issue in the first respondent's proceedings. In addition to the possibility of the evidentiary position changing, a reasonable observer would note that the trial judge's finding of fraud was otherwise expressed without qualification or doubt, that it was based on actual persuasion of the correctness of that conclusion, that while the judge did not use violent language, he did express himself in terms indicating extreme scepticism about BATAS's denials and strong doubt about the possibility of different materials explaining the difficulties experienced by the judge, and that the nature of the fraud about which the judge had been persuaded was extremely serious. In the circumstances of the instant case, a reasonable observer might possibly apprehend that at the trial the court might not move its mind from the position reached on one set of materials even if different materials were presented at the trial, that it might not bring an impartial mind to the issues relating to the fraud finding. It followed that the fourth respondent would be prohibited from hearing or determining the first respondent's claim.

Per French CJ (dissenting). The fair-minded lay observer aware of the circumstances in which the fourth respondent made his finding against BATAS and the qualifications which he expressed in relation to it, would not have an apprehension, firmly established on reasonable grounds, that he might undertake the trial of the first respondent's claim other than impartially. The fair-minded lay observer was aware: that the fourth respondent made his finding of fraud in dealing with a dispute about whether legal professional privilege meant that certain material could not be used in the earlier proceedings; that his finding was made in 2006 and that the motion for his recusal was brought in 2009 in subsequent proceedings; of the content of the fourth respondent's reasons for the ruling on the matter of legal professional privilege and the information conveyed by those reasons, including the information they conveyed about the nature of the proceedings and the fact that the ruling was not a final determination of fraud in relation to the document retention policy for the purpose of the earlier proceedings; and of the qualifications stated by the fourth respondent in relation to his findings. The salient features of his finding against BATAS would be apparent to the fair-

minded lay observer without assistance from special knowledge of the law, the Tribunal or the rules of practice and procedure. He made it clear that he was not making a finding which would stand, come what may, as a finding at trial. The observer would need no understanding of the rules relating to the admissibility of hearsay evidence in interlocutory proceedings to come to that conclusion. The fourth respondent qualified his finding of fraud by his statement that he was persuaded to that finding 'on the present state of the evidence' and his reference to the decision by BATAS not to call any rebuttal evidence in the interlocutory proceedings carried with it the clear implication, which an observer would not require a law degree to draw, that it would be open to BATAS to call rebuttal evidence at trial. On that material alone, the fair-minded lay observer would not conclude that there had been firmly established a reasonable fear that the fourth respondent's mind was so prejudiced in favour of his finding of fraud that he would not alter that conclusion irrespective of the evidence or arguments provided to him in the trial of the first respondent's claim. That the judge might be led to decide the case other than on its legal merits would require the observer to give no account to the express qualifications made by the judge in his findings in the earlier ruling. Even allowing for a reasonable scepticism about human nature, there was nothing in the instant case to warrant the view that the fourth respondent's disclaimers were simply to be put to one side as having little or no weight. As a general rule, a judge's own explanation for refusing a recusal motion would not assist in determining whether the facts and circumstances upon which the judge's ruling

was based were such as to give rise to a reasonable apprehension of bias in the mind of a fair-minded lay observer and thus, in the instant case, the fair-minded lay observer was not assumed to have had regard to the reasons for the fourth respondent's judgment dismissing the BATAS motion for his recusal.

Per Gummow J (dissenting). There could have been no objection to the fourth respondent trying the dispute in the earlier litigation upon such evidence as then was presented, notwithstanding his ruling on the discovery application. A fortiori, should the first respondent's claim go to trial, the fair-minded lay observer would not, upon the basis of the earlier litigation, apprehend that the judge would not bring an impartial and open mind to the resolution of the issues in the trial of the first respondent's claim. For the observer there would be lacking the necessary logical connection between the 2006 reasons and the trial of the first respondent's claim to support such an apprehension. Moreover, the understanding to be attributed to the lay observer depended upon the circumstances. In the instant case the reasoning of the judge was laid out in the 2006 reasons and explained further in the reasons on the recusal application. The hypothetical observer, upon reading the 2006 reasons, would appreciate that the fourth respondent was qualifying his conclusions by emphasising that if the same issues arose at a later stage he would decide them on the evidence then led by the parties. The reasons on the recusal application underscored the point that there was not the ineradicable apprehension of prejudgment of which BATAS complained.

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