Commonwealth Judicial Journal

Journal of the
Commonwealth Magistrates'
and
Judges' Association

Vol 23 No 1 June 2017

CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX, U-K. Tel: +44 207 976 1007
Fax: +44 207 976 2394 Email: info@cmja.org website: www.cmja.org

COMMONWEALTH
JUDICIAL
JOURNAL

CONTENTS

Journal of the
Commonwealth Magistrates' and
Judges' Association
Vol 23 No 1 June 2017

EDITORIAL

The reticence of the Lord Chancellor of England and Wales, Elizabeth Truss, in face of the infamous "Enemies of the People" headline, published by the British newspaper *Daily Mail* on 4 November 2016, has refocused attention on the question of who is responsible for defending the judiciary in face of ill-informed and inappropriate criticism? This is a question of relevance not only for the UK, but for many Commonwealth jurisdictions.

The criticism of the judiciary is, of course, nothing new. Indeed, when magistrates and judges do their work fairly and impartially, the tendency is that they will be criticised. Judges' decisions can be criticised, judges' misconduct can be criticised. However, as Lord Judge noted, "what you are doing if you attack the judiciary is you are attacking that bit of the constitution that can't defend itself" (*The Times Online*, 'A great British asset: judges who won't be bribed or told what to do', 19 November 2016).

While criticism of the judiciary may not be new, there are a number of contemporary strands which make the question above more pressing. One such strand is the prevalence of "post-truth", which has been selected by Oxford Dictionaries as 2016's international word of the year. Post-truth relates to circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief. Another strand is the rise of social media, which enables news items to spread, and go "viral," with little or no scrutiny as to their veracity.

In the UK, the *Daily Mail* called the Lord Chief Justice and two senior colleagues "Enemies of the People" because they had ruled that the UK Government would require the consent of Parliament to give notice of Brexit. When subsequently asked to explain her reticence, the Lord Chancellor insisted that it was not her role to condemn the press. However, as one observer put it, "what she was being asked to do was to defend the independence of the judiciary, as she had sworn to do on her appointment" (Joshua Rozenberg, 'Will Liz Truss be shuffled?', The Law Society Gazette, 24 April 2017).

Glover described the apparent breakdown of the relationship between the executive and the judiciary as indicative of an unprecedented constitutional crisis (Peter 'Glover, Beleaguered bench' The Law Society Gazette, 24 April 2017). On the one hand, fundamental rights, not least the right to freedom of expression which includes the right to criticise judges, have to be jealously guarded in democratic societies. On the other, however, if the judiciary is not robustly defended in face of inappropriate criticism, this will have far-reaching consequences and will damage public confidence in the judiciary. Some readers believed what they read. As Rozenberg noted, circuit judges were very concerned because litigants in person were coming and saying, "You're an enemy of the people".

Our readers are reminded to register for the CMJA Conference on "Building an Effective, Accountable and Inclusive Judiciary," to be held in Dar Es Salaam, Tanzania on 24-28 September 2016. Please visit www.cmja.biz for more details.

This issue opens with a tribute to the memory of Sir John Fieldsend, Chief Justice of Zimbabwe 1980-1983. We are also pleased to provide a profile of Hassan Bubakar Jallow, who became the Chief Justice of The Gambia on 17 February 2017. In *Back to Basics: A Canadian Judge's Journey Observations in International Human Rights Protection*, Dallas K. Miller gives some suggestions on how Canada's experience may assist courts in countries that are working hard to establish the rule of law and create a judicial system that has the confidence of the public in dealing with human rights issues. In *The Rule of Law – Judicial Independence and Accountability*, David Doyle explores the concepts of judicial independence and accountability and suggests ways of protecting such concepts. Gareth Seah and Choong Yeow Choy examine the Singapore International Commercial Court and the Singapore International Arbitration Centre in their article *International Commercial Courts as the Third Alternative: Are Litigants Spoilt for Choice?* In *The Transformation of Judiciary in Uganda*, Bart M. Katureebe considers a number of developments and challenges relating to the transformation of the judiciary in Uganda. Joseph Fok discusses the role and use of non-local judges in the Hong Kong Court of Final Appeal in his article "*The Use of Non-local Judges in Overseas Jurisdictions.*" Finally, Nic Madge provides an overview of his experience in his article *A Stage in the Tribunal de Grand Instance, Lyon.*

The Journal has collaborated with LexisNexis to publish two cases from the Law Reports of the Commonwealth (LRC). There are *Orozco v Attorney General (Commonwealth Lawyers Association And Others, Interested Parties)* which concerns the constitutionality of criminal law relating to homosexual acts, and *Ghana Bar Association And Others v Attorney General And Another* which concerns the judicial appointment procedure. These reports have been reproduced by permission of RELX (UK) Limited, trading as LexisNexis.

At this juncture, I would like to express my heartfelt gratitude on behalf of the Editorial Board of the Journal to Prof. James S. Read and Dr. Peter E. Slinn, who recently stepped down from the editorship of the LRC. Prof. Read and Dr. Slinn have been joint General Editors of the LRC from the first volumes in 1985, about 130 volumes to date. Originally there were 3 subject volumes per year (Constitutional and Administrative Law, Criminal Law, and Commercial Law), each with its own introduction. From 1993, 4 then 5 volumes were published embracing all relevant subjects. Over the years, the LRC have carefully and systematically recorded and disseminated key judicial decisions within the Commonwealth, promoting the cross-fertilisation of ideas and the spreading of good judicial practice in the Commonwealth. Readers will know that we have regularly featured law reports from the LRC in this Journal. For these reasons, once again, I would like to thank Prof. James S. Read and Dr. Peter E. Slinn for their pioneering work in this field. I also look forward to maintaining the strong working relationships we have developed with the LRC in the future.

Finally, two book reviews have been included in this issue, namely, Jonathan Swan's *Law and War: Magistrates in the Great War* and *Judicial Accountability in the New Constitutional Order*, edited by Jill Contrell Ghai.

STOP PRESS

As we were going to print with this edition of the Journal, we were informed of the passing of two of our members:

The **Hon. Robin Millhouse** passed away on 28 April 2017. Robin was Regional Vice President and Council Member of the CMJA between 2003-2012. He was a former MP for South Australia and had been Attorney General of South Australia. He was a Supreme Court Judge of South Australia, as well as former Chief Justice of Kiribati, Nauru and also served on High Court Judge in Tuvalu). A full Obituary will appear in the next issue.

Mrs Hazel Billings JP passed away on 14 May 2017 in Chatsworth, UK. She was a long term individual member of the CMJA who had attended a number of CMJA Conferences.

Both will be sadly missed.

PROFILE

Hassan Bubakar Jallow

Born in Bansang, Gambia, Hassan Jallow became Chief Justice of The Gambia on 17 February 2017 following the resignation of the former Chief Justice, Justice Emmanuel Fagbenle and the inauguration of Mr Adama Barrow as President of the Republic of the Gambia on 19 January 2017. Chief Justice Jallow has had a highly distinguished career as a legal practitioner and judge. Having won a scholarship to study law in Dar- Es- Salaam, Tanzania, he continued his legal education in Lagos State, Nigeria by qualifying for the Bar there. He returned to The Gambia in 1977 and was appointed State Counsel in the Attorney General's Office.

Due to his professionalism and diligence, he rapidly progressed through the ranks becoming Principal State Council, Registrar General and Solicitor General in the same department in Sir Dawda Jawara's government. During this time he was instrumental in the drafting of the 'Banjul' African Charter on Human and Peoples Rights, the accession of then Gambia to the International Covenants and a number of Human Rights Treaties. He was also involved in the negotiations relating to the short-lived SeneGambia Confederation in the 1980s not to mention a number of prominent cases on behalf of the Government during that time. His interest International Public Law led him to undertake a Masters in the subject at London University in 1979.

In 1984,at the age of 33, he became Attorney General and Minister of Justice of the Gambia. As Attorney General he initiated a number of structural reforms in the legislative process as well as the legal profession and the judiciary to ensure better effectiveness. He was also involved in the modernisation of the law bringing his vast knowledge to bear and ensuring that the laws, mostly inherited from England, were more relevant to the people and culture of The Gambia at the time and ensuring Gambians had better access to justice.

He was a member of the Commonwealth Working Group on Human Rights in the early 90s which followed the setting up of the Human Rights Unit of the Commonwealth Secretariat.

Unfortunately, on 22 July 1994, the coup d'état by the military led by Lt. Yahya Jammeh put a stop to his career in Government and to many of the reforms he had commenced including the first computerisation of the courts in Africa. He was imprisoned for a number of weeks with fellow Ministers immediately following the coup, an experience he describes in detail in his autobiography "Journey for Justice" as well as being detained under house arrest. He refused to return to his former post as Attorney General and Minister of Justice on release.

In 1998, after being in private practice for 4 years, he accepted a post as a Judge at the new Supreme Court. In his autobiography he points out that he felt that with the return to democracy and the adoption of a new Constitution, there were no "constraints of principle" to serving as a judge in The Gambia. Unfortunately this position did not last long as in 2002, under severe threats from the Government of Yahya Jammeh, to terminate his appointment, he decided to resign.

In 1998 he was appointed by the United Nations Secretary General to serve as an international legal expert and carry out a judicial evaluation of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Yugoslavia.

In 2002, Justice Jallow was appointed by the UN Secretary General as a Judge of the Appeals Chamber of the Special Court for Sierra Leone. He was also nominated onto the Commonwealth Secretariat Arbitral Tribunal. In 2003, he was appointed by the United Nations Security Council as the Chief Prosecutor of the International Criminal Tribunal for Rwanda (UNICTR). His mandate was renewed by the U.N. Security Council in 2007and in 2011 for a further four year term. In 2012 he was also appointed concurrently by the U.N. Security Council for a four year term as the chief Prosecutor of the International Residual Mechanism for Criminal Tribunals (MICT), the successor tribunal to the UNICTY and the UNICTR, a post he held until February 2017 when he became Chief Justice of the Gambia.

Karen Brewer

OBITUARY

Sir John Fieldsend 1921-2017

We regret to report the death at the age of 95 of Sir John Fieldsend, Chief Justice of Zimbabwe 1980-1983. He had originally been appointed a judge of the High Court of Southern Rhodesia (as then it was) in 1962. In 1965 the white minority government of Ian Smith made an illegal declaration of independence (or 'UDI' as the 'unilateral' declaration of independence was usually known) purporting to introduce a new constitution severing ties with Britain. The legal situation had an Alice in Wonderland quality. The 'rebels' continued to acknowledge the Queen as head of state and the Governor of Southern Rhodesia remained in Government House, having enjoined judges and civil servants to carry on with their normal tasks. The Appellate Division of the Rhodesian High Court, on which Fieldsend was sitting as an Acting Judge, was forced to confront the issue of the legality of the Smith regime in the case of *Madzimbamuto v Lardner Burke* 1968 RLR 203. Daniel Madzimbamuto was the subject of a detention order which the Smith regime had purported to extend after UDI. The legality of the order was challenged on the basis that all actions and laws made on the authority of the regime were void and of no effect. The majority were satisfied that the Smith regime was the de facto government and that its actions were lawful. Fieldsend JA, in dissent, rejected the majority's argument but accepted that the regime's actions might be justified on ground of necessity. His assertion of the rule of law ranks in Commonwealth jurisprudence with Lord Atkin's dissent in *Liversidge v Anderson*. When the Rhodesian authorities denounced the jurisdiction of the Privy Council, Fieldsend resigned in protest. He was joined by Justice Dendy Young. Fieldsend returned in the United Kingdom and Dendy Young became Chief Justice of Botswana.

Fieldsend's courage was to be rewarded when, after the collapse of the Smith regime and the achievement of the Independence of Zimbabwe in 1980, he was invited to return as Chief Justice, in which office he served with distinction until 1983. Ironically, he was faced with the excessive use by the new government of the very same emergency powers which the Smith regime had used and which had remained in force, legitimated by the independence Constitution. Fieldsend's determination to limit the use by the executive of powers of detention without trial established the reputation for independence of the Zimbabwe Supreme Court, a reputation which was ably maintained by his successors until the subversion of the judiciary by the ZANU PF government since 2001. The distinguished Zimbabwean human rights lawyer David Coltart has paid the following facebook tribute to Sir John: 'Chief Justice Fieldsend was unwavering in standing up for human rights and respect for the rule of law and the judiciary during his tenure provided a bulwark of stability within the country'.

Peter Slinn

BACK TO BASICS: A CANADIAN JUDGE'S JOURNEY OBSERVATIONS IN INTERNATIONAL HUMAN RIGHTS PROTECTION

His Honour Judge Dallas K. Miller, Court of Queen's Bench in Lethbridge, Alberta, Canada. The author has volunteered for the past decade with the International Justice Mission.

Abstract: *Recently, the United Nations through its Commission on Legal Empowerment of the Poor came to the startling conclusion that over half of the world's population lives without the protection of the rule of law. One of the main reasons is the total lack of law enforcement. The author has volunteered for a human rights NGO and has travelled to many countries that struggle with a scourge of unprosecuted sexual violence, widows' right to own property and the problem of slavery. As a trial judge, the author gives some suggestions on how Canada's experience may assist courts in countries that are working hard to establish the rule of law and create a judicial system that has the confidence of the public in dealing with these types of issues.*

Keywords: rule of law – human rights protections – enforcement – slavery – bonded labour – continuous trial – witness evidence

Canada is a constitutional monarchy that has a strong tradition of protecting minorities and a judiciary that is truly independent. In tandem with these features, our Parliament moved Canada into the modern human rights era by passing the *Canadian Bill of Rights* in 1961 and adopting the constitutional *Charter of Rights and Freedoms* in 1982.

To say that Canada has an unblemished human rights or justice record since its founding would not be accurate. We have had our share of forced internments during war time and historic blind spots relating to racial and gender discrimination, not to mention the maltreatment, oppression and state-mandated family and cultural destruction of our aboriginal populations. Notwithstanding our problems, blemishes and challenges as a nation, we have had some consistent success in the areas of justice and human rights. We are, as the preambles to our *Bill of Rights* and *Charter of Rights* specify, a nation under the "rule of law," a necessary prerequisite for maintaining a society focused on justice and protection of human rights.

Recently I had the privilege of visiting several countries in the majority world to experience firsthand their justice systems in operation; I saw Uganda struggling to protect the rights of widows to retain and own land, the lack of prosecution for sexual violence against minors in Bolivia, and the continued use of slave labour in India. I witnessed societies and judicial systems that are far behind in enforcing the most basic standards of human rights protection. Some limited lessons we have learned in our Canadian justice system over the past century and a half can be passed on to those nations still working at building a justice system equipped for the modern human rights era.

The failure to provide basic human rights protection to the poor and vulnerable in some parts of the world cannot be overstated. A recent study by legal and human rights experts concludes that almost half of the global population lives outside the protection of even a rudimentary legal system. The summary of the report is alarming:

Most poor people do not live under the shelter of the law, but far from the law's protection and the opportunities it affords. Informal local norms and institutions govern their lives and livelihood, and where they are not excluded from the legal system, they are often oppressed by it. Because the poor lack recognized rights, they are vulnerable to abuse by authorities that discriminate, seek bribes, or take the side of powerful interests who may wish to prevent the poor from competing economically or seek to evict them from their land. Such discrimination has massive consequences. The Commission finds that at least four billion people are excluded from the rule of law. It is the minority of the world's people who

can take advantage of the legal norms and regulations. The majority of humanity is on the outside looking in, unable to count on the law's protection and unable to enter national, let alone global markets. (Commission on Legal Empowerment of the Poor and United Nations Development Programme, *Making the Law Work for Everyone* [New York, 2008], volume 1, p. 3).

Although statistics and numbers are very important, their true impact can be lost unless a social context is given in a particular nation and a human face is presented. It has been argued that the problem is not the need for *more* laws or *more* human rights conventions. The pressing need in the 21st century is old-fashioned "enforcement" of existing laws. If only existing national laws were enforced, a significant number of human rights abuses could be eliminated or avoided. If within a domestic context law enforcement were improved or simply initiated, the victims of egregious human rights abuses — almost entirely the poor — would see justice and human rights relief.

A test case for this theory is the issue of slavery. For much of the premodern world, slavery was the norm. Indeed, to the people of my generation the issue of slavery has been easily relegated to a chapter in a history book. I must confess that in my legal education and throughout much of my legal career I understood slavery to be a historic phenomenon, a thing of the past. It was made illegal; therefore, of course, it simply did not exist. At least that was my understanding. I was surprised to learn a decade ago that not only did slavery exist in the 21st century but it was flourishing and growing. Far more slaves exist in the world today than were transported across to the Americas from Africa during the transatlantic slave trade.

Slavery has been defined as holding a person by violence or threat of violence for economic exploitation and includes bonded labour and sex trafficking. As of 2016, reports by some NGOs estimate that in excess of 40 million people are in slavery in almost 170 different countries (www.globalslaveryindex.org). Almost half of those in modern-day slavery are in India. A particularly egregious form of this problem is bonded labour, made illegal by way of the *Bonded Labour System (Abolition Act),* 1976, which defines the system as follows:

2(g) "Bonded labour system" means the system of forced, or partly forced, labour under which a debtor enters, or has, or is presumed to have, entered, into an agreement with the creditor to the effect that,—

(i) in consideration of an advance obtained by him or by any of his lineal ascendants or descendants (whether or not such advance is evidenced by any document) and in consideration of the interest, if any, on such advance, or

(ii) in pursuance of any customary or social obligation, or

(iii) in pursuance of an obligation devolving on him by succession, or

(iv) for any economic consideration received by him or by any of his lineal ascendants or descendants, or

(v) by reason of his birth in any particular caste or community,— he would—

a. render, by himself or through any member of his family, or any person dependent on him, labour or service to the creditor, or for the benefit of the creditor, either without wages or for nominal wages, or

b. forfeit the freedom of employment or other means of livelihood for a specified period or for an unspecified period, or

c. forfeit the right to move freely throughout the territory of India, or

d. forfeit the right to appropriate or sell at market value any of his property or produce of his labour or the labour of a member of his family or any person dependent upon him, and includes the system of forced, or partly forced, labour under which a surety for a debtor enters, or has, or is presumed to have, entered into an agreement with the creditor to the effect that in the event of the failure of the debtor to repay the debt, he would render the bonded labour on behalf of the debtor. (*Bonded Labour System [Abolition Act]*, 1976 [New Delhi: Universal Law Publishing 2011], p. 4)

In 2012, the Supreme Court of India noted that bonded labour is particularly rampant in brick kilns, stone quarries, crushing mines, beedi manufacturing, carpet weaving, construction

industries, fish processing and other identifiable industries. The Court also noted enforcement of the legislation is key and that the first-level judiciary must discharge their duties and implement the provision of the legislation with due diligence. (*Public Union for Civil Liberties* v. *State of Tamil Nadu, et al*. [2012] INSC 623).

During my time in India and observing the work of NGOs and concerned government officials, I saw weaknesses in enforcement of the law, as follows:

1. Delayed trials after extensive adjournments
2. Changing the presiding trial judge in the middle of the trial
3. The difficulty in procuring witnesses to come to court and testify

These problems are not necessarily unique to India and its attempt to deal with bonded labour. These same challenges exist in Bolivia, where the state struggles to forge an efficient justice system that hears sexual assault cases in one continuous trial until completion with the same judicial panel, and in Uganda when the rights of widows to maintain their land are being enforced. However, dealing with these basic challenges in an emerging justice system is the only way possible to meet the demands of justice and ensure appropriate human rights protection at its most fundamental level. In order to move within the protection of the rule of law, courts and court administration must do their part to put in place proper law enforcement.

Canada has learned over time the importance of a consistent, continuous trial process, which has been successful and can inadvertently be used as an important piece in the enforcement puzzle that so often plagues developing nations. The legal and judicial experience of our nation in the areas referred to above may provide some assistance to those nations who wish to have a model in properly enforcing their own laws.

Delayed trials after extensive adjournments

The practice of continuous trials in Canada is rooted in the development of our court system in medieval England and is engrained in the common law. J. C. Holt gave the example of one of the earliest recorded cases, dating from 1226 in Lincolnshire. When the sheriff attempted to postpone the remainder of the pleas he was required to hear to the next day, the knights in attendance resisted on the basis that court should be held for one day only. The requirement of a continuous trial seems to have been a firm rule of court sittings for centuries after, and it was not uncommon up until the 1800s to have numerous jury trials held in one day, with a jury often having to deliberate on as many as six or seven trials between dawn and dusk. Canada adopted English law in the 18th century, and the practice of continuous trials was established in both the criminal law and the civil law forum. As our legal system evolved to address increasingly complex matters with multiple issues, it was no longer possible to have the guarantee that a trial start and end in one day. Rather, it was necessary to recognize that trials last more than one day and, at times, be adjourned to a subsequent week or month, provided it was continued as close to the commencement of the trial as possible. For example, *The Magistrates Manual*, dated 1878, made it clear a judge was permitted to adjourn a trial to a subsequent day without giving the reason on the record for the adjournment.

The requirement of continuous trials is so entrenched that legal authority developed over the centuries to establish that a trial or hearing could be adjourned to a subsequent court day provided that certain conditions were met. Those conditions include the following: (i) the adjournment must be set to a certain date, (ii) there cannot be a significant delay between two court dates and (iii) the same judge who heard the first part of the trial must also hear the trial following the adjournment.

In addition to the historic development of the trial process, there are a number of policy reasons underlying the requirement of a continuous trial. First, a trial must have a start date and a finite end date. Second, in fairness to the litigants involved in a trial, the temporal limits of the trial should be established so that the litigants and witnesses and legal counsel can plan the other parts of their lives. Third, the trial should be concluded in a timely manner so that evidence can be heard before the litigant or the witness dies or before evidence is lost or destroyed. Fourth, a continuous trial ensures that the court's business is predictable and orderly. One trial will conclude, and another trial can commence. This is an important safeguard to the administration of justice. A

concerted effort to determine the length of the trial at the pretrial stage and fixing the trial for the requisite number of days is a practice that helps ensure trial continuity.

Changing the presiding trial judge in the middle of the trial

The requirement that one judge hear the same trial from the start to the conclusion is related to the need for a continuous trial. The common law has evolved in such a way that the duty to hear a case from start to finish is imposed by statutes such as the *Criminal Code* as well as ethical and procedural rules demanded by case law. In criminal matters, it is settled law that the judge who hears the evidence or a guilty plea must be the same judge to impose the sentence on the accused person. One judge conducting one continuous trial avoids re-calling of the witnesses, assists all participants to focus on the issue and makes for a more efficient and transparent justice system.

The weaknesses in procuring witnesses to come to court and testify

A witness's evidence is crucial to the conduct of a trial and to the ultimate decision by the judge. The power of the court to summon a witness rests in a centuries-old court document called a subpoena. In fact, the term "subpoena" is translated from the Latin definition as *under penalty.* The first use of the subpoena has been traced to the Bishop of Salisbury during the reign of Richard II. Prior to his investiture as Bishop of Salisbury, John de Waltham was the Master of the Rolls in the Court of Chancery and devised the subpoena as a method in equity to compel defendants to attend court to answer the claims of the plaintiffs. Over time, the subpoena became an instrument for compelling witnesses to attend court. However, resistance to the subpoena arose in the 14th and 15th centuries. During the reign of Henry V, successor to Richard II, the Commons unsuccessfully petitioned against the use of the subpoena, but Henry V refused to end this useful practice.

Subpoenas may compel the production of a document as well as the attendance of a witness. A witness's attendance at trial was considered to be so important to the court and to the administration of justice that a penalty was imposed on a witness failing to attend court. In some common law jurisdictions, a subpoena can only issue by a judge's order. In Canada, subpoenas are issued by the Court at the request of the lawyer. We employ a more contemporary name for the subpoena in the civil law forum: "Notice to Attend." However, in the criminal law forum, we still call the document a "Subpoena to a Witness." Other jurisdictions, including the United Kingdom, no longer use the term subpoena. Regardless of the name of the document, once it has been served on a witness with sufficient funds to enable the witness to travel to the trial, it has the force of law with significant legal consequences for failure to attend the trial.

At times witnesses may fear repercussions from a litigant if they testify. This is a valid concern. Various safeguards can be put into place to protect a witness from repercussions, ranging from criminal law sanctions against a person for tampering with a witness to witness protection programs where relocation and a new identity are possible.

Consistent trial procedure by the court controlling its own process is key in the proper enforcement of laws and to maintain the rule of law. The perpetrators of crimes under the *Bonded Labour Act* should receive due process and a trial within a reasonable time as articulated in international treaties. At the same time, while providing the accused with due process, the victims whose human rights have been abused and who have been the subject of cruel breaches of international and domestic law against slavery are certainly entitled to relief from oppression, freedom from abuse, and knowledge that the perpetrators will be prosecuted within a reasonable time.

The case of Darshon and Bonarasi Singh from Delhi is an example of two people enslaved for 22 years. They had been in captivity since 1994 in a rice mill. While in slavery, they raised their eldest son, gave birth to three more children and welcomed a grandchild into the world. At one point, it looked as though three generations would inherit the same plight of being caught in India's illegal but flourishing bonded labour market. The Singhs were physically abused and denied their wages by rice mill owners. Due to the physical abuse and the threat of more violence, there was little hope of escaping their slavery in the rice mills.

Thanks to the diligent work of an NGO in Punjab, Bonarasi Singh met with a field

worker, and the investigative meeting resulted in a government-led raid of the rice mill and the ensuing freedom of the Singh family.

Although freedom of victims of bonded labour such as the Singhs is a cause for celebration, the legal mechanism to prosecute the perpetrators under the *Bonded Labour Act* and court-ordered repayment of wages must not be thwarted through an inefficient and dysfunctional legal system. The justice system at the front lines must be responsive to the landmark decision of the Indian Supreme Court. The Canadian experience in conducting trials may be a model for Indian magistrates to ensure that the law is enforced, one judge conducts a continuous trial, the guilty are punished and reparation is paid to victims of bonded labour.

No legal system is perfect, but the features outlined herein, which Canada has inherited from England over the centuries, are akin to high points of the British Empire that received the praise of Mahatma Gandhi a century ago. Gandhi singled out the British legal system in a speech at the Madras High Court:

I discovered that the British Empire had certain ideals with which I have fallen in love, and one of those ideals is that every subject of the British Empire has the freest scope possible for his energies and honour and whatever he thinks is due his conscience. I think that this is true of the British Empire, as it is not true of any other Government. . . . And I have found that it is possible for me to be governed least under the British Empire. Hence my loyalty to the British Empire. (Mahatma Gandhi, *Speeches and Writings of M.K. Gandhi,* 3rd ed. [Madras, India: G.A. Natesan and Co., 1922], p. 22)

The author acknowledges and thanks Catherine Christopher QC for her assistance in preparing this paper.

THE RULE OF LAW – JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

His Honour Deemster David Doyle, First Deemster and Clerk of the Rolls of the Isle of Man.
This article is based on a lecture delivered at the Oxford Union on 6 July 2016 as part of the Small Countries Financial Management Programme

Abstract: *The rule of law can only be maintained by clearly defined judicial independence and accountability. The judiciary must be, and be seen to be, independent and accountable or there will be no confidence in the administration of justice. The judiciary should not be subjected to any improper outside interference. Independence is maintained through appropriate judicial appointments and the provision of sufficient resources. Judges are accountable through the concept of open justice, publicly available judgments and an effective appeal system. There is further accountability through clear standards including a Judicial Code of Conduct and compliance with the judicial oath together with a robust law on judicial recusal and the prompt delivery of judgments. Everyone can and should become guardians of the rule of law to protect and defend an independent and accountable judiciary. This article explores the concepts of judicial independence and accountability and suggests ways of protecting such concepts.*

Keywords: rule of law – judicial independence – judicial accountability

Opening remarks

The rule of law can only be maintained by clearly defined judicial independence and accountability. The judiciary must be, and be seen to be, independent and accountable or there will be no public confidence in the judicial system and anarchy and chaos will shortly follow. A free dinner to anarchy and chaos may be a bit of a stretch. But the fact remains that the judiciary must be able to maintain their independence.

The foundation stones of judicial independence are appropriate protection from improper influences and what might corporately be called, an appropriate employment package. Equally, the judiciary must be accountable through the imposition of clear standards and open justice. In the case of judges, clear standards are laid down through a code of conduct and a judicial oath. Open justice is made possible through courts being open to the public and reasoned decisions being made available to the public. Accountability is further enhanced by the availability of systems of appeal and the prompt delivery of clear decisions.

Judicial independence

The Code of Conduct for the judiciary in the Isle of Man provides a possible starting point when it states:

"Judicial independence is sometimes mistakenly perceived as a privilege enjoyed by judges, whereas it is in fact a cornerstone of our system of government in a democratic society and a safeguard to the freedom and rights of the citizen under the rule of law."

The code goes on to clarify that every individual judge and the judiciary as a whole must be, and be seen to be, independent of the legislative and executive branches of government. This means that judges must appear "to a reasonable observer" to be free from inappropriate connections with, and influences by, members of the legislative and executive branches of government.

The code remains unambiguous to the last:

"Members of the judiciary should always take care that their conduct does not undermine or appear to undermine their institutional or individual independence."

A judge's principal function is to interpret and apply the law.

The judiciary should not be subjected to any improper outside influence. If the politicians or others are able to direct judges on how to decide cases, there will be no justice according to the law.

Lord Hope in *The Role of the Court in the Development of Society*, Journal of the Commonwealth Magistrates' and Judges' Association, Vol 22, No 2, December 2015 at page 12 stated that what the judges do is not always universally popular but stressed the need to have systems which respected and guaranteed their independence. Lord Hope cautioned:

"It is when that system breaks down that we really do need to worry."

The processes by which judges are appointed, and the security of tenure that they enjoy once they have been appointed, are designed to ensure that they are truly independent from the executive arm of government.

- **Independence through appropriate appointment and resources**

To ensure you have a stable, effective and well-motivated judiciary, make sure you appoint the right people to the appropriate judicial positions, provide them with security of tenure and provide them with a competitive salary and pension. As Shetreet and Turenne at page 156 of their well-regarded publication *Judges on Trial* (2nd edition 2013) ("Shetreet and Turenne") state:

"Judges should be free from financial anxieties."

At page 156 Shetreet and Turenne refer to the importance of judicial remuneration and the need to safeguard pensions "which are a critical part of a judge's remuneration package".

Do not try and adversely change the terms of judicial appointment part way through the period of appointment. This fundamental requirement is wisely recognised by Tynwald, our Parliament, in section 57A of the High Court Act 1991.

In civilised countries which truly value the rule of law such provision is usually expressly incorporated into the constitution and strictly complied with in the letter and the spirit. This reflects the special category of judges as public servants and the place of the judiciary within the constitution. Judges fall within such protected category in view of the nature of the work they are obliged to perform and the onerous and serious responsibilities placed on their shoulders on behalf of civilised societies.

Shetreet and Turenne at pages 166-167 stress that:

"Comparisons with other public sector groups … are limited by the judiciary's constitutional position …"

Reference is made to the concern being "one of quality of recruitment and retention".

Shetreet and Turenne at page 172 refer to:

"… the principle that a serving judge shall not have his terms of service adversely affected without his consent during his term of service as part of the rule of law and an internationally recognised principle."

Shetreet and Turenne make another powerful point at page 176 when they state:

"While some may have a limited sympathy for high earners, the judges are entitled to be treated fairly and to have confidence that once they have taken an appointment, the rules of the game will not change adversely to them."

As well as not adversely interfering with existing terms of appointment, you must ensure that judges have independent administrative support and you must also provide judges with adequate resources to enable them to do their jobs.

But above all, make sure they are valued. If you want a legal system that is fair, efficient and effective, judges must *feel* properly valued and properly protected from improper influence and, in the words of Shetreet and Turenne, "free from financial anxieties" (at page 156).

Moreover, any vacant judicial positions should be filled on merit using open advertised competition, while taking into account the need for diversity and flexibility. The appointment process should be transparent with specified attributes, qualifications, experience, knowledge, skills and personal qualities that of course include integrity, independence, fairness and impartiality.

There should be the ability within the judiciary of small jurisdictions, as there is in the Isle of Man, to bring in "outsiders" if necessary. Such "outsiders" need knowledge of local values, local tensions and must be sensitive to local concerns.

While sticking to this process please take care that there is no political influence applied to the appointment of judges. We do not want a legal system packed with judges who are reluctant, where the law requires, to decide cases against the government.

The English tradition of judicial independence depends, in the words of Lord Bingham:

"… on the willingness of the most successful practitioners, at the height of their careers, to accept appointment to the judicial bench." (the Judicial Studies Board Annual Lecture on *Judicial Independence* given on 5 November 1996)

Unfortunately judicial salaries have long been significantly below what most senior and successful practitioners (advocates, barristers and solicitors) expect to earn.

Lord Neuberger, the President of the Supreme Court of the United Kingdom, in a keynote closing address delivered at the World Bar Conference in Edinburgh on 16 April this year made reference, without criticism, to the high earnings of those first class members of the legal profession and issued the following warning (at paragraph 21 of his address):

"Without a cadre of first class advocates, many of whom are prepared to become judges, the very high standard of judiciary we enjoy, indeed which in many of the countries represented here today, is taken for granted, will be lost."

Lord Neuberger added (at paragraph 22):

"… a professional, expert, respected and independent advocates profession, which faces up to its responsibilities represents a very precious asset to a modern civilised society. Indeed, it is a vital component of a modern civilised society."

Clearly the legal system cannot function properly in the absence of advocates and judges with the necessary levels of skill, knowledge and motivation. So the challenges of attracting to the judicial bench the best practitioners who will normally be taking a significant pay cut upon entry to the bench must be anticipated and dealt with.

In summary, individuals of suitable character, ability, experience and motivation will only be attracted to the judicial office if the total reward for judicial posts shows that the judiciary is valued.

On a personal note, in February of this year I was honoured to be invited to participate in a dialogue at the Chinese University of Hong Kong between Hong Kong Court of Final Appeal Justice Kemy Bokhary and the US Supreme Court Justice Nino Scalia, just days before his untimely death.

The subject was *Judges and Democracy*. In discussion both Justices endorsed the importance of a democratic country making provision for the separation of powers and especially preserving and protecting the necessary independence of the judiciary.

I believe that travel and the international exchange of ideas is important, and I would suggest you both encourage and facilitate physical and intellectual travel for your judiciary. Travel increases knowledge and understanding and that is vital for judges who might otherwise be confined to a local and at times somewhat insular courtroom.

International connectivity is extremely useful for me because the vast majority of the cases I deal with have an international element, and visiting other jurisdictions is just part of building better international judicial cooperation.

In May of this year I paid a personal visit to Justice Sonia Sotomayor at the US Supreme Court. When appointed to the Supreme Court she was the third woman Justice to be appointed and the only Justice with Hispanic heritage. Brought up in the Bronx her remarkable life story will, I am sure, make it to film. The very fact she was happy to meet with me, a judge from a little island in the Irish Sea, and arrange for me to attend the Supreme Court in session as her guest, gives you an indication of the nature of the unstoppable force that is Justice

Sonia Sotomayor. Whilst in Washington I also attended a judicial conference with over 40 countries represented. I could happily spend the rest of my lecture sharing the details of my visits to Hong Kong and Washington, but I must press on with protecting judges from improper influences.

Independence through protecting judges from improper influences

A judge's decision may only be influenced by the law, the evidence and the submissions of the parties. Any decision should not therefore be improperly influenced by the media, big business, pressure groups, politicians or any other outside third parties.

Moreover, individual judges must be left to decide the legal issues before them without input from other judges unless they are hearing the case with them. It would be quite wrong for even a Chief Justice to endeavour to direct another judge how to decide a case before him or her, just as it would be quite wrong for a government Minister or party official to issue a judge with an instruction about how to decide a case.

Although a Chief Justice may allocate cases to certain judges to deal with, he may not direct that judge how to decide that case. That judge is only accountable through his or her oath, code of conduct and the appeal court.

Unfortunately in some jurisdictions the real threat comes from outsiders in positions of influence. In my previous lectures I have referred to examples of Russian telephone justice and Chinese three chief's justice.

James Spigelman (in a lecture delivered on 10 March 2016 – *Justice "Seen to be Done" or "Seem to be Done"?)* stressed that the delivery of reasons after argument in open court helps to ensure that a person not directly involved in the proceedings has no influence as to the outcome of those proceedings.

All jurisdictions must guard against improper outside influences being exerted over judges.

I will admit these are extreme situations, but I hope they flag up the need to insulate your judges from improper outside influence. Keep your politicians off the backs of your judges.

Pressures on small jurisdictions

Before I leave the general subject of external influences and get stuck into judicial accountability, I would like to pause for a moment to consider the external pressures and influences on small jurisdictions.

Because I come from a small jurisdiction, I know there is frequently pressure from much bigger countries or outside international bodies. These countries and organisations sometimes lack a full and objective appreciation of the difficulties on the ground in the small jurisdictions with limited resources in terms of money, people and infrastructure.

Mark Shimmin, your Executive Director, has reminded me that small jurisdictions such as ours are frequently required to deliver judicial, regulatory and governmental services to high and demanding international standards. And this is putting extreme pressure on our limited resources.

To a certain extent I have some direct personal experience of international initiatives that have tested our resources.

In 2002 I was involved in the Island's legal response to an International Monetary Fund review of our regulatory structures.

More recently I have been heavily involved over the last couple of years in the Manx judiciary's engagement with MONEYVAL. The aim of this European body is to ensure that countries have in place effective systems to counter money laundering and terrorist financing and comply with the relevant international standards in these fields. Insofar as the Manx judiciary were concerned, the assessment focused on the integrity and independence, and the competence and capacity, of the Manx judiciary. It was a useful opportunity to increase awareness of the competency, integrity and independence of the Manx judiciary to members of the assessment team and others.

Although a time-consuming and intensive process, we relished the opportunity to contribute positively and constructively. Of course our hope is that our competence, integrity and independence will be recognised by influential outsiders, and the resulting

recommendations will enhance our position in the future. The final report is due early next year.

I believe we should, where ever possible and no matter how time consuming it may be, welcome and positively engage with such international initiatives. We have nothing to hide, but we do have a lot of good things in our jurisdictions to shout about.

The tasks set for us by such international bodies may at first appear somewhat daunting and unachievable. But that does not mean that we should not strive for excellence with the limited resources we have. We can all help and learn from each other to ensure we are not drowned by the increasing tide of international standards.

The international level playing field still seems somewhat elusive and although I must keep out of matters of potential political controversy I cannot resist sharing with you the comments of Allan Bell, the Island's Chief Minister, at the international anti-corruption summit held in London on 12 May 2016 and hosted by David Cameron, the former Prime Minister of the United Kingdom of Great Britain and Northern Ireland. Here is what Mr Bell had to say:

"… I would like to join with others to congratulate the Prime Minister on the excellent work that he has done to bring this conference together, and in particular his focus on leadership, and I congratulate again the Prime Minister for the leadership he has shown and we have heard a lot about today.

But the elephant in the room where leadership absolutely is necessary is the United States, and no-one seems to talk about that. If you look at the Tax Justice Network Secrecy Jurisdiction which was released last year, Switzerland, not surprising, was number one, the United States was number three, Panama was number thirteen. The Isle of Man, I have to add, was thirty-second, so we're not in that league.

But, if you were going to make meaningful inroads into tackling international corruption, the United States absolutely has to be at the forefront taking a lead on this. Now, when Mr Obama took over he attacked a single building in Cayman for having 19,000 companies registered there. There is one building in Delaware which has 285,000 companies registered in that one building, and they don't know the beneficial owner of any of them. That's ten times the total number of companies we have in the Isle of Man and we know the beneficial owner of all of them.

Now the point I am making is, it is all very well to pick on small jurisdictions like Crown dependencies, overseas territories, [but] the United States [must] join in this international agreement, and the Prime Minister is absolutely right to say this will only be resolved in a global sense. Every country has to sign up to this. If the United States does not do more and give confidence to other jurisdictions that they are actually sincere in what they say, and it was heartening to hear Mr Kerry's comments this morning, but we need actions, not fine words, I'm afraid."

Justice requires that everyone is treated equally. As I stated in my first lecture in this series of lectures, the rule of law must ensure that just laws apply equally to everyone except where different treatment is objectively justified. All countries, not just small countries, must comply with their international obligations. We as small countries can all do our best within the limited resources we have as we strive to continue to improve, meeting and potentially setting, international standards.

Judicial Accountability

A great example of accountability and the Court of Appeal relates to a young Manx advocate, Adam Killip, who posted a stimulating article in a 2015 copy of *Insolvency, Dispute Resolution*, under the provocative heading "Insolvency Update : Has the Privy Council turned the Isle of Man's Chief Justice into a timorous soul?" In it he commented on my judgment in *Lombard Manx Limited v The Spirit of Montpelier Limited* 2014 MLR 530. I have to say Adam was arguably proved right as our Appeal Court (in a judgment delivered on 18 June 2015) overturned my first instance judgment and provided me with jurisdiction to do what I felt I did not initially have jurisdiction to do, which was in effect tantamount to legislating from the bench where Tynwald had failed to modernise Manx law. Now that is a great example of both

accountability and the bold workings of our Appeal Division.

The Appeal Division in *The Spirit of Montpelier* appeal in its judgment delivered on 18 June 2015 stated:

"56. We accept, as did Deemster Doyle in *In Re Impex Services Worldwide Limited*, at 133, that although judicial development of the common law is both inevitable and desirable, 'certainty should not be sacrificed for flexibility or vague notions of where the interests of justice may lie' and that litigants need to be able to know what the law is and the judges need to recognise that their role is to determine the law and not assume the mantle of the legislature."

A perusal of the Manx Law Reports will reveal that my comments at paragraph 50 on page 133 of *Re Impex Services Worldwide Limited* 2003-05 MLR 115 read as follows:

"50. Some judicial development of the common law is inevitable and indeed desirable. The European Court of Human Rights has described this as "a well entrenched, necessary part of legal tradition" (see *S.W.* v. *U.K.* (48) (21 E.H.R.R. at 399)). I accept, however, that judicial development of the common law should be kept within proper limits and that certainty should not be sacrificed for flexibility or vague notions of where the interests of justice may lie. Litigants need to know where they stand in relation to the law and judges need to be aware that they are there to administer the law of the land and not assume the mantle of the legislators."

You will spot some subtle yet important differences. I qualified my opening comment with the word "Some". I used the word "administer" not "determine". There is, I would respectfully suggest, an important distinction between such words. These differences do not however detract from the significance and importance of the Appeal Division's progressive and bold judgment.

This April advocate Killip also demonstrated he had physical tenacity when he beat me in the Isle of Man 50 kilometre Firefighters' Memorial road race. Out of 103 contenders he came an impressive fourth overall, but I must point out I came third. Well, third in my age group.

I should add that on 19 June 2016 Adam again finished well ahead of me on the road. This time it was the Island's famous Parish Walk, a challenging 85 mile walk through the Island's parishes which must be completed within 24 hours. I hobbled over the finish line on Douglas promenade in 22 hours, 17 minutes and 51 seconds whereas Adam (smashing my personal best in 2006 by nearly 5 minutes) met the challenge in an impressive 17 hours, 30 minutes and 40 seconds.

Accountability through clear standards including a Judicial Code of Conduct and compliance with judicial oath

Physical prowess aside, I must move on. As I mentioned at the outset, judicial accountability should be built on a solid Code of Conduct supported by judicial oaths, alongside procedures that fairly deal with complaints against judicial officers, including senior judges.

As to procedures for removing judges from office for misconduct or unfitness, see the report in respect of a former Chief Justice of Gibraltar [2009] UKPC 43 and the report in respect of a judge in the Cayman Islands [2010] UKPC 24.

Codes of Conduct and procedures should of course be publicly available. Ours are available in hard copy and on www.courts.im.

The first line of our Code of Conduct tells most of the story - "Members of the judiciary shall uphold the integrity and independence of the judiciary and perform their duties with competence, diligence and dedication."

The Manx code is based on the six Bangalore Principles of judicial conduct which are well recognised internationally and which are concerned with judicial independence, impartiality, integrity, propriety, equality of treatment and competence and diligence. These principles seek to "establish standards for ethical conduct of judges". They are designed to provide guidance to judges and give the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and legislature,

and lawyers and the public in general, to better understand and support the judiciary.

So judges must always comply with their judicial oath and their judicial code of conduct.

Accountability through a robust law on judicial recusals

However, no judge is perfect and equally no situation is perfect.

Because of this you need a robust law on judicial recusals.

Applications may be made seeking to disqualify a judge from participation in the decision in a case for reasons of a personal interest in the outcome, or an actual or perceived bias against or in favour of a party to the proceedings.

This is of particular importance in small jurisdictions where judges are perhaps closer to the local community than might otherwise be the case in larger jurisdictions. Judges however need to be appropriately robust and not unduly sensitive.

Our Judicial Code of Conduct, reflecting the common law, provides that members of the judiciary shall not sit in a case where they have a financial interest or where the circumstances are such that a fair minded observer, having considered the facts, would conclude that there was a real possibility that the judge was biased. However, in all other cases they are bound not to abstain from their duty to sit.

Judges should also guard against judge-shopping, particularly in small jurisdictions with a limited number of judges available. Judge-shopping is where litigants try and make a judge recuse without good reason in an endeavour to get another judge to deal with the case, in the hope that the new judge will be more favourable to their case.

Judges should not recuse for inappropriate, wrong or inadequate reasons. See *Inappropriate Recusals* (2016) 132 L.Q.R. 318 by Abimbola A Olowofoyeku, Professor of Law, Brunel University, London.

Accountability through open justice

One of the key foundation stones to accountability is that judges hear cases in open court under the watchful eyes of members of the public and the media.

There are some exceptions to hearings in open court, for example to protect children, but these are rare. See also my judgments in *Delphi* 2014 MLR 51 and *CMI Trust Company (IOM) Limited* 2014 MLR 45 in respect of open justice and private trust matters.

Judicial decisions, with reasons, being delivered in open court, and judgments being publicly available, are in my opinion the two keys to accountability.

In the Isle of Man all court proceedings are recorded and transcripts can be obtained. The proceedings and the decisions of the judges can be scrutinised by the parties, their advisers, lawyers, academics, other judges, members of the public and others. That intense scrutiny helps to hold judges to account. Open justice means that judges are some of the most scrutinised individuals in the world.

Jeremy Bentham captured the depth of the concept when he said

"Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity."

Just this year, on 21 April, Lord Neuberger in a keynote address on *Technology and the Law* emphasised (at paragraph 6) the importance of open justice:

"… save to the extent that it is necessary to have secrecy (protection of children, national security, trade secrets for example), the public must have the right to see and hear what happens in court. So, too, we must allow journalists to attend hearings and be free to report what happens in court …"

Earlier, on 3 March of this year, Lord Neuberger captured the essence and importance of the idea at paragraph 20 of his lecture:

"Open justice is a fundamental ingredient of the rule of law. Unless what goes on in court can be seen by the public, by those in government, and by the media, there is a real risk that public confidence in the courts will start to wane, and, indeed, a real risk that we

Judges will gradually start to get sloppy in our ways. Sunlight has been famously said to be the best disinfectant, and without public access to the courts, there is a real danger that justice is neither done nor seen to be done."

However, sunlight in the form of social media is not always so helpful. I referred to the use of social media in my last lecture. I am all in favour of modern technology, but we must all guard against social media being abused in attempts to irresponsibly and improperly influence the result in legal proceedings.

Accountability through an effective appeal system

Another key foundation stone to accountability is an effective appeal system.

Every national legal infrastructure needs an effective appeal system that can be used as a check on judicial decisions at first instance.

Judges, like all human beings, make mistakes. In the Isle of Man our final appeal court is the Judicial Committee of the Privy Council.

Accountability through prompt delivery of judgments

Shetreet and Turenne at page 99 state:

"Delays in judicial proceedings are not normally attributable to the judges, but judges are very occasionally responsible for delays in then giving judgment. A strong judicial policy aims for a prompt delivery of judgments …"

Judgments must be delivered promptly and be readily accessed. There must be investment in the judiciary and the administrative machinery which supports the prompt delivery of judgments.

I can promise you this will be money well spent. Undue delays in judicial proceedings are frustrating and they erode public confidence in the whole system. We must do everything we can to eradicate them.

In my judgment in *Taylor and Neale* 2012 MLR 621 at 627 paragraph [13] I referred to the delay in another court at first instance from a hearing on 27 July 2010 to delivery of the judgment on 7 December 2010 as unsatisfactory. I also stressed that where it was not possible to deliver an extempore judgment, reserved judgments at first instance should not normally be reserved for more than six weeks. I referred to the judgment the Judicial Committee of the Privy Council in *Sakoor Patel v Anandsing Beenessreesingh and Sicom Ltd* [2012] UKPC 18 delivered by Lord Sumption where at paragraph 38 it was stated:

"In the Board's opinion it is only in the most difficult and complex cases that judgment on an appeal should be reserved for more than three months, and intervals of more than six months should be altogether exceptional."

Of course the judiciary should decide cases assigned to them within a reasonable time. But this will always depend on a realistic volume of work being assigned to them and the appropriate means and resources being placed at their disposal.

The existence of an independent administrative infrastructure will not necessarily ensure prompt decisions but you will be able to say that you have done everything in your power to facilitate them.

Concluding remarks

When it comes to money you may also feel that my suggestion that judges should be encouraged to travel internationally and connect with the judiciary in other jurisdictions is also self-serving because I do not want to be on my own out there.

Far from it. The role of judges today must include stepping beyond their national boundaries to learn from, and collaborate with, the rest of the world.

The importance of giving your judges some international exposure has been emphasised by Lord Dyson in *The Globalization of the Law* at paragraph 41 and by Lady Justice Arden in *An English Judge in Europe* (28 February 2014) at paragraph 87. At paragraph 6 the learned justice stated:

"By looking abroad we can in my view learn to do a better job at home …"

Moreover, contact with other judges facing similar problems can be refreshing and provide

an effective and much needed re-charging of judicial batteries. Just as I hope your batteries have been recharged during this programme.

Lord Neuberger in the lecture delivered on 3 March 2016 at paragraph 32 stated that judges had a duty to ensure that the rule of law is appreciated, maintained and upheld at all times. He said that "judges have a responsibility to act as ambassadors for the rule of law". At paragraph 33 Lord Neuberger referred to the higher public profile of the judiciary in recent times and felt that this was a good thing "because it reminds people that the law has a human face, that it is made and administered by people".

Kemy Bokhary, one of the smiling human faces of the Hong Kong judiciary, in *The Rule of Law in Hong Kong Fifteen Years After the Handover* (Columbia Journal of Transnational Law, Volume 51, 2013, Number 2, 287 at page 299) put it well when he reminded us that inhumanity anywhere diminishes humanity everywhere and that the rule of law, human rights and democracy must be supported by the judges and by "an alert population, a free media, a learned academy and a dedicated profession". I respectfully and wholeheartedly concur. You are all part of "an alert population" that keeps judges on their toes and ensures that the rule of law is respected.

Anthony Lester in *Five Ideas to Fight For* (2016) underlines the need for support where at page 205 he states:

"No law and no system of government can secure the rule of law unless it is supported by a culture of respect for the rule of law and unless men and women of integrity hold it in their DNA."

This brings me to my closing thought for you all this evening.

When your responsibilities surrounding government structures and finance are combined with:

- your understanding of the rule of law and its role in economic growth;
- your understanding of the absolute need for a separation of powers; and
- your understanding of the fundamental requirement for judicial independence and accountability

you can, and should, become the guardians of the rule of law and the judiciary.

INTERNATIONAL COMMERCIAL COURTS AS THE THIRD ALTERNATIVE: ARE LITIGANTS SPOILT FOR CHOICE?

Gareth Seah, Solicitor and Barrister of the Supreme Court of Victoria, Australia, and Choong Yeow Choy, Professor, Faculty of Law, University of Malaya, Malaysia.

Abstract: *There are various institutions that provide services for the resolution of transnational commercial disputes. Whichever institution and the corresponding mechanism is best suited to deal with a particular dispute is dependent on a plethora of factors. This article will examine two distinct institutions that offer their differing mechanisms – international commercial courts on the one hand and international arbitration centres on the other hand. In view of the growing trend in certain jurisdictions to set up international commercial courts, the central question is whether this additional option provides litigants in transnational commercial disputes an advantage over the more traditional mechanisms of litigation in national courts or arbitration in international arbitration centres. A corresponding question is whether international commercial courts pose a challenge to international arbitration centres in terms of attracting and diverting cases from one another. This article will attempt to answer the above questions by using the Singapore International Commercial Court and the Singapore International Arbitration Centre as the template for deliberation. The overriding aim is to enable parties who enter into international commercial contracts to make an informed decision as to the appropriate dispute resolution clause for adoption into their contracts.*

Keywords: transnational commercial disputes – mechanisms for the resolution of disputes – party autonomy – international arbitration centres – international commercial courts.

I. Introduction

The last few decades have seen an exponential rise in the number of alternative dispute resolution centres across the globe. These centres are primarily established to provide an avenue for the resolution of transnational commercial disputes through arbitration and mediation. A noteworthy phenomenon is the setting up of new international commercial courts in recent years. In view of such a trend, the central question is whether these international commercial courts provides litigants in transnational commercial disputes an advantage over the more traditional mechanisms of litigation in national courts or arbitration in international arbitration centres. A corresponding question is whether international commercial courts pose a challenge to international arbitration centres in terms of attracting and diverting cases from one another.

In our attempt to address the above questions, we will begin by briefly charting the growth in demand for these institutions in Part II. This will be followed in Part III by placing the spotlight on the Singapore International Commercial Court (SICC) and the High Court of Singapore to highlight their distinguishing features. Part IV then shifts the focus to the SICC and the Singapore International Arbitration Centre (SIAC). In Part V, we conclude by providing our observations on these developments and how they may affect potential litigants.

II. Growth in Demand for Dispute Resolution Services

The catalyst for growth in demand for dispute resolution centres is attributed to the escalating growth of international trade around the world, particularly in Asia. With such growth in transnational commerce, the number and complexity of cross-border disputes will increase accordingly. Consequently, there are corresponding demands for timely and cost-efficient dispute resolution services in the region that could meet the needs of the commercial community of different jurisdictions, backgrounds and legal cultures.

A. The Augmentation of International Commercial Arbitration

Leading international arbitration bodies such as the International Chamber of Commerce (ICC) and the SIAC have reported a continual growth of caseload. The race to arbitrate is also evident across Africa, Asia, and the Middle

East. The main factor that has influenced this significant development is the perceived view of the advantages that arbitration enjoys over litigation. In this regard, the combined factors of enforceability, confidentiality, neutrality, expertise, costs and time are often offered as the justifications for the argument that arbitration trumps litigation.

Whilst the first four features have always held largely true, there is doubt as to the veracity on the claim relating to the issues of costs and time. As a result, this has led contracting parties to consider other forms of dispute resolution mechanisms that would better suit their needs.

A. From Courts to Arbitral Tribunals to Courts

Concurrent with international commercial arbitration's rise, another trend in recent decades is the creation of a network of international commercial courts specialising in international commercial matters in several countries. These include the English Commercial Court, the English Technology and Construction Court, the Delaware Court of Chancery, the Dubai International Financial Centre Courts (DIFC Courts) and the SICC. Calls have also been made for the establishment of an International Commercial Court in Australia.

Since international commercial arbitration has its limitations, International Commercial Courts present themselves as an alternative dispute resolution mechanism to the former.

A. The Position in Singapore – A Case Study

The establishment of the institutions for the resolution of transnational commercial disputes is most apparent in one particular jurisdiction, namely Singapore. Within a relatively short period of three months, two international commercial dispute resolution entities were launched in Singapore. The unveiling of the Singapore International Mediation Centre (SIMC) and the SICC in November 2014 and January 2015 respectively can be attributed to the ambition of the Government of Singapore in elevating Singapore as Asia's dispute resolution hub. Whether such a goal can be achieved will become apparent in due course. As for now, what is certain is that these two bodies will function together with the well-established SIAC.

The principal business of the SICC is to hear and resolve international commercial disputes. As the SICC is a division of the High Court of Singapore, a question that arises is: How different is this International Commercial Court (and for that matter all the other International Commercial Courts) from the High Court of Singapore (and on the same note, other National Courts)?

III. The SICC and the High Court of Singapore – Same Same But Different

To all intents and purposes, the SICC is still a national court of the Republic of Singapore. The proceedings before the SICC are court-based and the Singapore Rules of Court apply, albeit with modifications. The hearings take place in a courtroom setting in the Supreme Court of Singapore premises. As a general rule, its judgments are subject to an appeal process and its judgments can be enforced like any judgments of the High Court of Singapore.

Be that as it may, a perusal of the provisions of the Supreme Court of Judicature Act will reveal a number of unique features. The SICC is not bound to apply any rule of evidence under Singapore law. The rules of discovery in the SICC are not as regimented. The same can be said when it is required to determine questions of foreign law. A whole spectrum of confidentiality applications is available to the litigants. It may also be added that the concept of party autonomy operates to allow the party to determine the right and scope of appeal. Hence, the attractiveness of the SICC lies in the flexibility that it offers to the litigants.

The above features have indeed proven to be effective in the first case before the SICC, that is, *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] SGHC(I) in the saving of costs and time. The adeptness in which the SICC disposed of the case was ably captured and explained by Teh, Yeoh and Seow under a commentary entitled "The Singapore International Commercial Court in Action" in Volume 28 of the Singapore Academy of Law Journal.

In short, while the SICC is still a division of the High Court of Singapore and thus is still a national court, the laws and rules that are applicable to the SICC permit it avoid some of the rigidities typically inherent in a civil litigation process before a national court. At the

same time, these laws and rules incorporate the lithe features of arbitration and thus improve the efficiency of the SICC. If these features are adopted and replicated by the other international commercial courts, the draw of international commercial courts will certainly be heightened.

IV. The SICC and the SIAC – Two Peas in a Pod?

As the SICC will rival the efficiency that arbitration has long claimed to offer, it is thus unsurprising that the questions of whether the SICC and SIAC are two peas in a pod or whether the SICC will be in direct competition with the SIAC has been raised and discussed by jurists and commentators.

The general rule is that a dispute before the SICC must be international and commercial in nature while the dispute before the SIAC must be one which is arbitrable. Other than that, there is in fact substantial overlap in the dispute types that can be heard before these institutions. But each of the disputes can only be heard in one of the institutions and not both. This has led one commentator that the SICC and the SIAC are "distinct substitutes".

The importance of the characteristics that are intrinsic to each of these two institutions must be understood and appreciated lest the parties to a dispute opt for the less appropriate or expedient institution and mechanism. A proper understanding of the intricacies that are tied to the workings of these institutions will go a long way in helping parties make an informed decision as to which institution or mechanism is best suited to resolve their disputes.

The similarities and differences between the SICC (and DIFC Courts) and arbitration were highlighted and expounded by Chief Justice Sundaresh Menon of the Supreme Court of Singapore in the Opening Lecture for the DIFC Courts Lecture Series 2015. One commentator, Ashvin Thevar, in his article published in the Singapore Law Gazette in 2015, raised the question of whether the SICC will be a competitor to or a companion of the SIAC and proceeded to answer the above question by examining six areas, namely (i) enforceability of judgments and awards; (ii) the concept of arbitrability; (iii) appeals; (iv) cost-efficiency; (v) joinder/consolidation; and (iv) confidentiality. These six areas give a fairly good picture and understanding of the intricacies underlining both these institutions and the dispute resolution mechanisms they represent.

A. Ease of Enforcement

On the issue of enforceability of judgments and awards, Ashvin Thevar did acknowledge that in some instances, a judgment from the SICC may be more easily enforceable but by and large, an award of the SIAC will have an edge. The crucial factor is the jurisdiction where the assets of the judgment debtor are located.

There is no doubt that the enforceability of an SICC's judgment would still be dependent on the principles governing the recognition of foreign judgments in the relevant jurisdictions where the judgment is sought to be enforced. The complexities in this aspect of the law contrast starkly to the well-established regime of international commercial arbitration where the interlocked UNCITRAL Model Law, the New York Convention and the Washington Convention for Investment Disputes have been widely adopted by numerous countries. International commercial arbitration enjoys a large degree of homogeny in this aspect of the law. As 156 countries have acceded to the New York Convention, international commercial arbitration has a greater ability to effectively and efficiently enforce arbitral awards in most countries throughout the world.

The above view will hold true if a losing party in an arbitral process respects the outcome of the arbitral proceedings. As arbitral awards are subject to be set aside or challenged when enforced in a foreign jurisdiction, a winning party may find that the choice of having pursued arbitration over litigation may not prove to be as expedient as initially believed. When a losing party resorts to such recourse, the parties will find themselves litigating at national courts and these will add strain to both costs and time. We should thus perhaps then pay heed to the reminder by Chief Justice Menon when he reasoned that since the judgments of the SICC are "equivalent to judgments of a national court, they can, in these scenarios be enforced relatively easily, or even directly". Chief Justice Menon was of course alluding to the scenarios where the judgments are sought to be enforced under a reciprocal statutory scheme.

A. Arbitrability

On the concept of arbitrability, it essentially involves the question of whether the subject matter of a dispute is capable of determination by international commercial arbitration. This is because it affects third party rights and public interests.

Although the courts in Singapore are pro-arbitration and usually enforce valid arbitration agreements, whether a dispute is arbitrable will still be subject to public interest considerations. In this respect, the argument that the SICC can "seize" disputes that the SIAC cannot adjudicate upon, namely disputes that are non-arbitrable, is indeed valid.

No doubt it is beyond the scope of this article to discuss the contours of arbitrability. However, the concept of arbitrability is limited in scope and it would be farfetched to argue that this concept can easily be invoked in most cases that are international and commercial in nature. Thus, its inhibition to the arbitral process is not significant.

A. Recourse to an Appeal

Is the availability of recourse to an appeal a positive or a bane? This is a question only the parties can answer.

One of the underlying philosophies of international arbitration is the concept of finality. Therefore, if parties opt for arbitration, it must be assumed that they must have done so fully aware that there is no right of appeal, save for internal challenges, corrections and interpretation of awards and recourse to national courts to set aside the award or challenge the enforcements of such awards.

On the other hand, if the parties are comforted by an appeal process, the mechanism at the SICC is most appealing. As noted, the flexibility which permits the parties the liberty to determine the right and scope of appeal must surely put the SICC in a very favourable light from the perspective of the parties when compared with arbitration.

A. Cost-Efficiency

It is often assumed that the absence of an appeal process in arbitration will keep costs down. However, there are weaknesses in this assumption.

The first is premised on another supposition that the losing party will pay up and not resort to the national courts, be it to sets aside the award or to challenge the enforcement of the award. There is yet another assumption, that is, that the arbitral proceedings will proceed without resistance by the other party to have the matter litigated in court. When an attempt is made to thwart the arbitration process, through an application for an anti-arbitration injunction or through the filing of a claim in a national court, which will then necessitate an application for a stay of proceedings or the like, costs will escalate. Suffice to note that the studies conducted by the Queen Mary School of International Arbitration in 2008 and 2013 had concluded that the costs involved have come to be seen today as a major disadvantage of international arbitration.

On the overall scheme of things, if one party is bent on making it difficult for the other party and the former has the resources to arbitrate and litigate (through recourse to national courts at every given opportunity and stage), a party without the resources might be better off if the dispute is brought before the SICC.

A. Joinder/Consolidation

There is a lesson to be learnt from the *Astro v Lippo* dispute. This was a commercial dispute arising out of a joint venture agreement between a Malaysian media group (Astro Group) and an Indonesian conglomerate (Lippo Group). This *Astro v Lippo* dispute was first heard and resolved in Singapore – by a tribunal set up by the SIAC. The arbitral tribunal in this case proceeded to hear the claims and awarded the claimants, Astro Group, over USD250 million. The Lippo Group refused to perform on the awards made against them. What became inevitable was a series of litigation in a number of national courts on a number of issues.

Pertinent for purposes of our current discussion is the issue relating to the application by the Lippo Group to set aside the award in Singapore. The Lippo Group's key contention was that the arbitral tribunal had erroneously allowed a few entities from the Astro Group to be parties in the arbitral proceedings when they were not parties to the arbitration agreement. Hence the awards made in favour of these parties were unenforceable and should be set aside.

In a well-reasoned albeit lengthy judgment, the Singapore Court of Appeal in *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, refused the Astro Group leave to enforce all but a small proportion of the awards against the Lippo Group, resulting in the award sum being reduced to approximately USD700,000 – less than 0.3 percent of the original USD250 million sum of the awards. On the issue of forced joinders of third parties in arbitration, the Court of Appeal held that the then in force Rule 24(b) of the 2007 SIAC Rules did not confer on the arbitral tribunal the power to join third parties who were not party to the arbitration agreement. Accordingly, the Court of Appeal was of the view that the arbitral tribunal's exercise of its power under Rule 24(b) to join three of the respondents from the Astro Group who were not parties to the Subscription and Shareholders' Agreement to the arbitration was improper with the corollary that no express agreement to arbitrate existed between the these respondents and the Lippo Group.

The question we wish to pose is simply this: Would the outcome on this issue have been different if the proceedings had been before the SICC or another International Commercial Court? No doubt the SICC had not been established at that time and the SIAC Rules have been amended. The subsequent amendment of the SIAC Rules demonstrates that arbitration can offer a very flexible approach but the same can be said of international commercial courts.

B. Confidentiality

In Part III, we have alluded to the fact that a whole spectrum of confidentiality applications is available to the litigants in the SICC. In this regard, the benefit of confidentially as offered in arbitration can equally be enjoyed by parties before the SICC.

V. Conclusion

Chief Justice Menon was spot on when he concluded that while many of the features that are present in the SICC were intentionally introduced with a view to avoid some of the issues in international commercial arbitration, they do not result in making international commercial courts superior to international commercial arbitration. In the words of his Lordship: "Ultimately, the preferred mode of dispute resolution depends very much on the needs of the parties".

We argue that the attitude of the parties will have an important bearing on the type of mechanism that ought to be invoked, if such an option exist. If one suspects that one's opponent will respect the outcome of the proceedings, be it an award or a judgment, it does not quite matter which mode of dispute resolution mechanism the parties opt for. On the other hand, if one suspects that one's opponent will be uncooperative and will make every attempt to impede or thwart the proceedings, it is argued that arbitration may not be a worthwhile option. This is because the opportunities to derail an arbitral process are aplenty and the applications to national courts to stay proceedings, for an injunction, set aside an award or to challenge the enforcement of an award will be a great set back.

Since national courts, and by extension, international commercial courts can exist and function without the assistance, control or interference by arbitral tribunals, all things considered; it may be worthwhile for parties to consider international commercial courts as a viable option. In addition, with a pool of exceptionally experienced, reputable and qualified judges drawn from all over the world, these judges can ensure that cases can be disposed of in a timely manner through their case management skills, which will come with the consequential effect of costs-saving.

The old adage that in litigation no one is the winner holds true. To that we may also add arbitration. Litigation and arbitration should be avoided at all costs. But where a settlement or compromise is not possible and the parties want a decision to be made by a "third party", it is no longer the case where parties are limited to only two choices – litigation at national courts or arbitration. As international commercial courts have now been added to the equation, it is no longer the case of the lesser of the two evils but a case of the least of the evils.

THE TRANSFORMATION OF JUDICIARY IN UGANDA

His Honour Judge Bart M. Katurebe, Chief Justice of Uganda. This article is based on Opening Remarks delivered at the 13th East African Magistrates and Judges Association Conference, Kampala, Uganda, 1st November 2016.

Abstract: *This article considers the transformation of the judiciary in Uganda, which aims to enhance access to justice for all persons through adoption of modern and cost effective methods of adjudication and by developing and implementing people-centric approaches to justice. This transformation has focused on, inter alia, building a functional Judiciary, building integrity, increasing access to justice and modernization particularly in terms of implementing new technologies and developing more efficient and effective work methods. However, the article notes that a number of challenges still remain in relation to, inter alia, insufficient resourcing of the Judiciary and low empowerment of the population.*

Keywords: access to justice – people-centric approaches to justice – integrity – modernising the Judiciary – new technologies – resourcing – empowerment

The theme of *"Transformation of Judiciaries in East Africa for Improved Service Delivery: Strategies, Successes and Challenges"* calls upon all Judiciaries in the region to work towards achieving transformation in the way we do our business so as to suit the needs and expectations of the people in the region. We need to develop a Judiciary that relates to the ordinary person that we serve. We need to assess the relevance of our services from the point of view of how we respond to the demands of the citizenry in the region. The major way in which we can do this is by enhancing access to justice for all persons through adoption of modern and cost effective methods of adjudication and by developing and implementing people-centric approaches to justice.

We have to remind ourselves of our calling to answer the justice needs of our people. We must always be in constant search for the best strategies that are capable of delivering judicial services in the most efficient and effective way. With a gathering like this one, we have before us an opportunity for benchmarking both at regional and international level so as to share experiences and come up with the best practices that will improve not only our methods and processes of justice delivery but also the quality of our judicial services. We also need to use this opportunity to work towards the development of agreed minimum standards for purpose of fostering uniformity and consistency in the administration of justice within the region.

One apparent realization is that, world over, corporate governance is gradually permeating all institutions and such institutions are focused at re-engineering their methods of work and transforming their service delivery mechanisms. As Judiciaries, we cannot afford to lag behind since we have the mandate to safeguard, promote and ensure adherence to the rule of law. The rule of law is an essential ingredient of any development efforts any country may make. As such if we don't move at the same pace as other sectors of our respective governments, no meaningful development will be achieved and any gains will be lost.

In Uganda, we have had our focus on a number of pillars for transformation, namely:

- Building a functional Judiciary: The Judiciary cannot be in position to transform if it is dysfunctional. Institutional independence and a sound legal and regulatory framework are pre-requisites to a Judiciary undergoing transformation. This pillar has been prominent in our Strategic Investment Plans over the years. As a result, we have realized a number of legal reforms with an emphasis on simplifying legal processes and strengthening the administration of justice generally. We have done our part and we are doing continuous lobbying to facilitate the passing of the Administration of the Judiciary Bill which is currently awaiting final consideration by Parliament. This law, when passed, will go a long way

in strengthening the independence of the Judiciary in Uganda and streamlining its operations.

- Building Integrity: We have made efforts to improve integrity both at institutional and individual levels as Judicial Officers. Our efforts are geared at transforming from a corrupt institution, both real and perceived, to a corrupt-free Judiciary. In this regard, we have strengthened the Inspectorate of the Courts which is now headed by a Justice of the Supreme Court. We have put in place communication channels to enable the public address their grievances to us and for us to address them more effectively. Just last week, we launched the Justice, Law and Order [JLOS] Sector Mid-term Review Report which indicated that the image of the Judiciary among other JLOS institutions in Uganda has improved from 26% in 2012 to 48% and satisfaction level with our services has increased from 59% to 72% in the same period. This may not be excellent but it is sufficient to show that we are on course in the transformation process.

- Increasing access to Justice: We have invested in strengthening Alternative Dispute Resolution mechanisms [ADR] particularly mediation; introduction of Plea Bargaining; establishment of the Small Claims Procedure; creation and operationalization of specialized Divisions of the High Court and other specialized Courts. We have developed a Civil Bench Book and a Gender Bench book which are meant to assist Judicial Officers deliver justice in a more people-centric way. We were involved in the development and launch of the Commonwealth Judicial Bench Book on Violence against Women and Girls in East Africa which was launched at the end of June 2016 in Nairobi. We have put in place measures to fight case backlog to ensure that people spend less time in our court system when pursuing their cases. At the end of 2015, we conducted a Court Case Census which revealed the number, categories and other circumstances surrounding pending cases in our system and we now know what to do and where to go.

- Building Bridges between the Judiciary, the other arms of the State and other stakeholders: We have a strong linkage built along the Justice, Law and Order Sector framework which has strengthened the sector institutions operating under the three principles of Communication, Co-ordination and Co-operation. We have also benefited from the close involvement of Civil Society Organizations who have made tremendous contribution to the administration of justice.

- Modernization particularly in terms of implementing new technologies and developing more efficient and effective work methods: We have introduced video link technology by which persons can testify without being physically present in the courtroom. We are in the process of introducing e-filing and management of cases. We are finalizing the development of a modern performance management tool. We are continuously benchmarking with other Countries on modernization as one of our pillars of transformation.

The foregoing however is not to say that we have overcome all challenges. We still face very critical challenges that impede our capacity to deliver justice to the people's expectations. Such challenges include the following:

- Insufficient resourcing of the Judiciary: Transformation requires sufficient financial and human resources. We are greatly constrained in that regard since, currently, only one third of the Budget proposed by the Judiciary gets funded. We have less than optimum number of Judicial Officers at all levels of the Judiciary.

- We are still faced with low technology levels: Court recording technology has not been installed in majority of the courts in Uganda which slows down court processes. We are still struggling to operationalize e-filing and management of cases.

- Low empowerment of the population: We are faced with the problem of a public that is ignorant of the law on the one hand and a weak legal aid service provision on the other. This greatly hinders effective access

to justice on the part of the common Ugandan.

- Unfavourable legal environment: We still suffer from non-prioritization of legislation that is meant to strengthen administration of justice. Such laws take too long to be passed which slows progress. A clear example is the Administration of the Judiciary Bill which has remained un-passed for the last over 5 years.

The question is, what are we doing to address those challenges?

- We are working on developing social capital for the Judiciary. The State has an obligation to sufficiently fund the Judiciary. The Judiciary should then transform its operations and be in position to attract other partners to invest in and support the institution. v We have put emphasis on the elimination of corruption and institutional inefficiencies. We are strengthening mechanisms for improving overall integrity. I know that all Judiciaries in the region are accused of corruption. My view therefore is that we should start with self-examination. We should unite our efforts in the fight against corruption. We are also focused at delivering justice at affordable rates by eliminating unnecessary costs and inconvenience.

- Increased use of informal systems to decongest the judicial system. We need to operationalize the Local Council Courts and to empower tribal systems to be able to handle local disputes that would ordinarily not need to come to the formal courts.

- There is need to invest in appropriate technology that is easy to use within our respective environments. E-registration and management of cases, and digital court recording have great potential for improving the performance of the Judiciary.

- There is need to build strong partnership with other government structures and Civil Society Organizations to be able strengthen legal aid, anti-corruption campaigns, training and other advantages associated with being closer to the people than us. We have made a strong co-operation with the bar in Uganda by forming a bar bench forum. v We need to promote continuous professional training to judicial and non-judicial staff. We must be alive to the fact that we are running a knowledge-based industry; what is an invention today may easily be redundance tomorrow.

- At regional level, we are looking forward to enhanced judicial co-operation. We shall need to pick a leaf from more developed jurisdictions like some countries in Europe on cross border practices like enforcement of judgments and decrees beyond local borders, extra-territorial service of process, e-library services, among others.

The above are just a few proposals on what each of us needs to do in advancing the process of transformation. There is no uniform way of doing it but the bottom line is that we need not only to embrace the goal of transformation but also to put in place comprehensive monitoring and evaluation mechanisms to ensure consistency and uniformity of judicial processes and products.

THE USE OF NON-LOCAL JUDGES IN OVERSEAS JURISDICTIONS

His Honour Judge Fok, Permanent Judge of the Hong Kong Court of Final Appeal. This article is based on a presentation delivered at the Commonwealth Law Conference 2017, as well as a speech to the Law Council of Australia Hong Kong Chapter on 3 November 2016.

Abstract: *This article considers the role and use of non-local judges in the Hong Kong Court of Final Appeal ("CFA"). It firstly describes the constitution of the CFA and what leads to it sitting with visiting judges. It then proceeds to identify the visiting judges who have sat with the CFA. The article then discusses the rationale for including visiting judges on the CFA. Particularly in the early years of the Court's existence, the judicial experience of visiting judges in building up its initial body of jurisprudence, in particular in constitutional law, was very important. Moreover, the Chief Justice is able to assign cases to particular non-permanent judges, in whose fields of specialty a particular case may lie. Overseas non-permanent judges also bring an international dimension to the Court's deliberations and eventual judgment. And the participation of such judges in the CFA is a demonstration of confidence both internally and externally in the independence of the Hong Kong Judiciary. Finally, the article considers the influence of those judges on its jurisprudence. It holds that their influence, collectively, on the development of the law of Hong Kong since 1997 has been immense.*

Keywords: non-local judges – visiting judges – judicial experience – building body of jurisprudence – international dimension – influence on jurisprudence – independence of the judiciary

Introduction

The Hong Kong Court of Final Appeal ("CFA") sits as a court of five judges to hear appeals. One of those judges is almost invariably a visiting judge from another common law jurisdiction.

I shall address the following matters relevant to the participation of those visiting judges in the Hong Kong Court of Final Appeal:

1. The constitution of the CFA and what leads to it sitting with visiting judges;
2. The identity of the visiting judges who have sat with the CFA;
3. The rationale for including visiting judges on the CFA; and
4. The influence of those judges on its jurisprudence.

Crudely, these matters may be described as the *what*, the *who*, the *why* and the *how* of the CFA's use of visiting judges.

Before going any further, there are some definitional issues to deal with.

(1) First, by the term "non-local", I refer to a judge qualified for the bench otherwise than by reason of local legal qualifications. In other words, I do not use the term as the equivalent of "nonindigenous", which is an altogether different concept. In the CFA's founding Ordinance (the Hong Kong Court of Final Appeal Ordinance (Cap.484)), our visiting judges are referred to as "judges from other common law jurisdictions".

(2) Secondly, the reference to "overseas" jurisdictions in the title of this stream topic has the potential to confuse. When referring to an "overseas" jurisdiction, those who sit or practise within that jurisdiction are doing so in their own "home" jurisdiction. It is an "overseas" jurisdiction only from the perspective of the "nonlocal" visiting judge, who in all likelihood will be from overseas (hence the risk of confusion). In Hong Kong, the visiting judge in the CFA is often referred to as the "overseas non-permanent judge" or "overseas NPJ".

The constitution of the CFA and what leads to it sitting with visiting judges

4. I begin with what leads to the CFA including visiting judges. The CFA is the final

appellate court within the court system of the Hong Kong Special Administrative Region ("HKSAR"). The Court was established on 1 July 1997, on the commencement of the Court's founding Ordinance, and it replaced the Judicial Committee of the Privy Council in London as Hong Kong's highest appellate court after 30 June 1997. The Court hears civil and criminal appeals involving important questions of law, including in particular points of public and constitutional importance, or where leave to appeal has otherwise exceptionally been granted.

The jurisdiction and constitution of the CFA is to be found in the Basic Law of the Hong Kong SAR and in the Court's founding Ordinance. The Basic Law guarantees the continuation of the previous legal system, namely the common law, rules of equity, ordinances, subordinate legislation and customary law. Article 81 of the Basic Law provides for the establishment of the CFA and that the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court. Crucially, Article 82 of the Basic Law then provides:

"The power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal."

The first part of that provision is arguably of greater importance, conferring on the CFA the power of final adjudication within the Region. It is that power, coupled with the three separate references in the Basic Law to exercise by the courts in Hong Kong of judicial power independently [4] that guarantees the power and duty of the courts to exercise judicial independence including the role of constitutional review of legislative and administrative acts. However, the latter part of Article 82, enabling judges from other common law jurisdictions to be invited to sit on the CFA, is also, I believe, one of the key factors in the success of the Court since its establishment.

Under the Court's founding Ordinance, the Court is constituted by the Chief Justice and the permanent judges and may as required also invite other non-permanent Hong Kong judges and judges from other common law jurisdictions to sit. To hear a substantive appeal, the Court sits as a bench of five (overseas NPJs only sit in substantive appeals and not on the Appeal Committee, which hears applications for leave to appeal as a bench of three). The number of permanent judges appointed at any one time has not been more than three, so to constitute the full Court, at least one other non-permanent judge – either a non-permanent Hong Kong judge or a judge from another common law jurisdiction – is required to sit.

A list of judges from other common law jurisdictions is maintained, together with a list of non-permanent Hong Kong judges, the latter consisting of retired permanent judges of the CFA and retired judges of the Hong Kong Court of Appeal. The total number of non-permanent judges on these lists may not exceed 30 at any one time.

To be eligible for appointment as an overseas non-permanent judge, the Ordinance provides that he or she must be: (i) a judge or retired judge of a court of unlimited jurisdiction in either civil or criminal matters in another common law jurisdiction; (ii) a person who is ordinarily resident outside Hong Kong; and (iii) a person who has never been a judge of the High Court, a District Judge or a permanent magistrate, in Hong Kong.[7] Non-permanent judges hold office for terms of three years, and these terms may be extended by the Chief Executive on the recommendation of the Chief Justice.

Although from other common law jurisdictions, the visiting overseas nonpermanent judges are, nevertheless, Hong Kong judges upon their appointment. That this is so is underscored by the provisions in the Basic Law that require the Chief Executive, when acting in accordance with a recommendation of the Judicial Officers Recommendation Commission to make the appointment, (i) to obtain the endorsement of the Legislative Council for that appointment and (ii) to report the appointment to the Standing Committee of the National People's Congress of the People's Republic of China.

That they are Hong Kong judges is also reinforced by the fact that, upon taking up

appointment, in practice on the first occasion on which the overseas non-permanent judge comes to Hong Kong to sit, he or she will attend before the Chief Executive to take the judicial oath of a Hong Kong judge to uphold the Basic Law, bear allegiance to Hong Kong and to serve it "conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit". So it bears emphasising that the non-permanent judge, although he has acquired that status because of his pre-eminence in another common law jurisdiction, is appointed to be a Hong Kong judge and to discharge a constitutional function as such.

Unlike the Chief Justice and permanent judges of the CFA, there is no retiring age for the non-permanent judges. Like all other judges in Hong Kong, a non-permanent judge of the CFA may only be removed by the Chief Executive on the recommendation of an independent tribunal consisting of other judges.

As a matter of convention and practice, except for about 10 cases (mostly heard in the early years of the court's existence and when an erupting Icelandic volcano interfered with air travel), the Court has heard all other full appeals with one overseas non-permanent judge sitting on the bench.

This is a significant feature of Hong Kong's judicial system. The overseas judge, in substance a foreigner, has an equal say on all final appeals, including appeals by way of constitutional review of legislation and administrative action.

The identity of the visiting judges who have sat with the CFA

So who are the judges who discharge this important function? There are currently 10 judges on the list of overseas non-permanent judges: seven are from the UK and three from Australia. They are: Lord Hoffmann, Lord Millett, Lord Neuberger of Abbotsbury, Lord Walker of Gestingthorpe, Lord Collins of Mapesbury, Lord Clarke of Stone-cum-Ebony and Lord Phillips of Worth Matravers from the UK; and Justices Murray Gleeson, James Spigelman and William Gummow from Australia.

The former judges who have been overseas non-permanent judges of the CFA are no less eminent a group of jurists, hailing from the UK, Australia and New Zealand. There are twelve former overseas NPJs.

1. Two are former Chief Justices of the High Court of Australia: Sir Anthony Mason and Sir Gerard Brennan. Two others are former Justices of the High Court of Australia: Sir Daryl Dawson and Justice Michael McHugh.
2. Four are former Lords of Appeal in Ordinary from the UK: Lord Cooke of Thorndon, Lord Nicholls of Birkenhead, Lord Woolf of Barnes and Lord Scott of Foscote.
3. CFA judges from New Zealand have been: Sir Thomas Eichelbaum, a former Chief Justice; Sir Thomas Gault, a former Justice of the New Zealand Supreme Court; Sir Ivor Richardson, a former President of the New Zealand Court of Appeal; and Sir Edward Somers, a former Judge of the New Zealand Court of Appeal.

The rationale for including visiting judges on the CFA

Why was it thought necessary to include visiting judges on the CFA?

Under the constitutional framework, as a matter of the CFA's jurisdiction, each judge has an equal say to that of the other members of the Court in the outcome of any appeal. The Court's founding Ordinance provides that: "The judgment or order which is that of the majority of the judges sitting shall be deemed to be the judgment or order of the Court." So the judgment of an overseas non-permanent judge is but one voice out of five as far as the determination of an appeal is concerned.

But our visiting overseas non-permanent judge is, of course, much more than just another Hong Kong judge when sitting with us on the CFA. By dint of their backgrounds, the overseas NPJs bring enormous judicial experience and wisdom to the Court. They are all judges who have had significant influence in shaping the jurisprudence of their own jurisdictions and they bring that wealth of experience to bear when they participate in the deliberations and decisions of the Court.

I would like to highlight four important aspects of the role of the overseas NPJ on the CFA that address the "why" question I have posed.

The first aspect is the dimension of judicial experience at the level of a final appellate court. This dimension should not be underestimated. Prior to 1997, there were no Hong Kong judges who had experience of sitting in any Hong Kong court other than an intermediate court of appeal. The role and function of the CFA as a final appellate court, especially in a jurisdiction where the courts are charged with a duty of constitutional review of laws, is different to that of an intermediate court of appeal. It is not simply a second court of appeal reviewing again the decision of a trial court. Instead, it fulfils the role, at the apex of the court hierarchy, of resolving questions of law of general importance. This was not a capacity in which any Hong Kong judge had prior experience when the CFA was originally established and commenced operation. In contrast, the overseas non-permanent judges sitting on the Court bring a wealth of experience in this respect. This was particularly important in the early years of the Court's existence, when it was building up its initial body of jurisprudence, in particular in constitutional law.

The second aspect I would highlight is the practical ability that the Chief Justice has of assigning cases to particular non-permanent judges, in whose fields of specialty a particular case may lie. The panel of overseas nonpermanent judges consists of judges who, both in practice as advocates and on the bench, have specialised in various areas of the law. It is certainly no exaggeration to say that, in many cases, their expertise in those fields is recognised worldwide and their judgments are regularly cited as definitive expositions of the common law in diverse fields of law. The panel of overseas non-permanent judges therefore provides a deep pool of specialist expertise on which the Chief Justice draws when assigning particular overseas judges to particular sitting sessions of the Court during the year and also when the Appeal Committee grants leave to appeal and fixes hearing dates for specific cases in those particular sessions.

The third aspect I would highlight, which very much follows from the second, is the international dimension that the overseas non-permanent judge brings to the Court's deliberations and eventual judgment. The Basic Law permits the courts of Hong Kong to refer to precedents of other common law jurisdictions, continuing the previous practice. Having experienced judges from some of those jurisdictions to whose precedents reference is made is an obvious and practical advantage. This aspect of the function of the overseas NPJs was also alluded to by Lord Cooke in an early case heard by the Court as to whether the Hong Kong courts should give effect to a Taiwanese bankruptcy order. In that case, he stated that he was in full agreement with the judgment given by one of the permanent judges, with which the other three members of the Court also agreed. But he thought it right to add a separate judgment because of the role in the CFA of the judges from other common law jurisdictions. In particular, he said this:

"… I think that it may be inferred that, in appropriate cases, a function of a judge from other common law jurisdictions is to give particular consideration to whether a proposed decision of this Court is in accord with generally accepted principles of the common law" (*Chen Li Hung & Ors v Ting Lei Miao & Ors* (2000) 3 HKCFAR 9 at 23B).

The fourth aspect I would highlight is the demonstration of confidence both internally and externally in the independence of the Hong Kong Judiciary. This, I believe, is a critically important role played by the overseas nonpermanent judges. By their participation in the work of the CFA, and also their public statements about their own experiences as Hong Kong judges, the overseas non-permanent judges provide an external affirmation of real value about the independence of the Court and the Hong Kong Judiciary. It is perfectly reasonable to ask, "Would so many eminent serving and retired judges have sat, and continue to sit, in a court in Hong Kong if any of them thought the system was subject to improper interference from outside agencies?" There is also what may, in crude terms, be described as the allied "canary in the coalmine" phenomenon. By this, I mean the confidence generated internally within the Court and the Hong Kong Judiciary as a whole that our judicial system is operating independently and free from outside interference.

The influence of those judges on its jurisprudence

How do the visiting judges contribute to the work of the CFA?

The standing of any court and its jurisprudence is primarily, if not solely, to be measured by the quality of its judgments and it is in this respect that the overseas NPJs make their most direct contribution to the work of the Court. There are two ways in which they do so: first and foremost in writing a judgment; and secondly, in collegiate discussions contributing to a judgment written by another member of the Court.

The first and most direct way in which an overseas NPJ influences the work of the CFA is in writing a leading or concurring judgment or in contributing to a joint judgment of the Court as a whole. The CFA usually sits to hear seven or eight sessions of final appeals each year. The practice is for an overseas NPJ to come to Hong Kong for a stint of four weeks in the course of which the Court hears appeals during the first two weeks, leaving the latter two weeks for the writing of the judgments. Given the number of overseas NPJs on the Court's panel, each judge will usually sit once every 12 to 18 months or so. In the, now, twenty years of the CFA's operation, the overseas NPJs have written, or contributed to, many of the leading judgments of the Court. This is not the time to analyse the particular decisions constituting the jurisprudence of the CFA, but the judgments which the overseas NPJs have written or to which they have contributed are significant and establish important binding precedents on the courts of Hong Kong in all areas of the law. Their judgments have also been cited in final appellate courts in other jurisdictions.

The second way in which an overseas NPJ influences the jurisprudence of the Court, that is by way of collegiate discussions leading to the Court's decisions, is more abstract but nevertheless very real. This is an indirect way in which the overseas NPJs shape the eventual judgment or judgments that decide a particular appeal. In an article in the Southern Cross University Law Review, Sir Anthony Mason included a reflection, in the context of a discussion of the argument for joint judgments in the High Court of Australia, on the practice in the CFA in Hong Kong of seeking to arrive at an agreed judgment and that he adjusted to this practice, which is more rigid than that in Australia, "because it involves more continuous discussion between the judges than occurred in the High Court" (*The High Court of Australia – Reflections on Judges and Judgments* (2013) 16 Southern Cross University Law Review 3 at 14-15.). The CFA has been described, accurately, by its first Chief Justice, Andrew Li, as a "collegiate" court and this involves extensive discussion of a case before, during and after a hearing amongst the participating judges. In the article to which I have just referred, Sir Anthony Mason commented that the collegiality and practice of the CFA "has a lot to commend it". Even if they are not writing, the overseas NPJs all contribute to a greater or lesser extent in each appeal.

These contributions of the overseas NPJs to the work of the CFA have substantively rebutted the minority of doubters, one of whom described the visiting judges from outside Hong Kong as "parachute judges" (see Ma Lik, *A Judgment Found Wanting*, Hong Kong iMail, 5 December 2000), and who warned that they would not be familiar with conditions in Hong Kong (see See Cliff Buddle, *Judges Who 'Drop in'*, South China Morning Post, 9 March 2001). The overseas NPJs have been sensitive to their roles as Hong Kong judges and any concerns that these eminent jurists would seek to dominate the working of the Court have proved unfounded. In practice, the overseas NPJ always sits as the most junior judge of the Court of five and it is rare for the visiting judge to dissent from the majority: this has only happened in two final appeals and once in relation to an ancillary matter of consequential relief after a unanimous substantive decision.

One obvious respect in which an overseas judge can offer particularly valuable assistance to the work of a common law court is in relation to the citation of comparative law. The important place of comparative law in the development of the jurisprudence of Hong Kong has been recognised, in particular in an article written by Sir Anthony Mason to commemorate the 10th anniversary of the establishment of the HKSAR (see *The Place of Comparative Law in Developing the Jurisprudence on the Rule*

of Law and Human Rights in Hong Kong (2007) 37 HKLJ 299). As Sir Anthony has separately noted, there is a strategic advantage in referring to authorities in other jurisdictions since external impressions of Hong Kong judicial decision-making may be important for its reputation and standing in the international commercial world.

As well as influencing and contributing to the jurisprudence developed by the CFA, the overseas NPJs have also contributed positively to the standing of the Court and the independence of the Judiciary. As to the latter, I have earlier mentioned how the non-permanent judges provide reassurance that Hong Kong continues to be served by an independent judiciary. As to the former, the overseas NPJs on the CFA regularly participate in speaking engagements when visiting Hong Kong and refer to the jurisprudence of the Court in their extrajudicial writings: Sir Anthony Mason, for example, has spoken on his experiences of sitting on the CFA and written about the development of Hong Kong law since 1997.

In addition, it is an inevitable by-product of their judicial careers in Hong Kong that, in discussions on matters of law with their colleagues and legal connections in their own jurisdictions, the overseas NPJs are likely to refer to any relevant decisions of the CFA and thereby propagate the jurisprudence of the Court in the legal circles in which they travel.

Conclusion

It is to Hong Kong's great advantage that we have distinguished visiting judges from overseas participating in the work of the CFA. Their influence, collectively, on the development of the law of Hong Kong since 1997 has been immense. Undoubtedly, the standing of the Court has been raised by their participation. What they derive from their participation is a matter you will have to ask them. But, from a Hong Kong judge's point of view, it is a privilege and a pleasure to sit with them and they have our respect, admiration and gratitude.

A *STAGE* IN THE TRIBUNAL DE GRAND INSTANCE, LYON

His Honour Judge Nic Madge, Circuit Judge, Inner London Crown Court.

Abstract: *An overview of the French Criminal Justice System with examples of cases taken from a stage in the Lyon Tribunal de Grand Instance. Comparisons between substantive law, procedure and sentencing in the French codified system and the English and Welsh common law.*

Keywords: France – criminal law and procedure – *Code Penal* – *Code de procédure pénale* -. investigating magistrate – judicial functions - sentencing

Introduction

I was very privileged, through the auspices of the Judicial College of England and Wales and the European Judicial Training Network, to spend two weeks in October 2016 *en stage* (on placement), shadowing judges, at the *Tribunal de Grand Instance* in Lyon. In this article, I set out a few reflections on this experience. A full version of my report, containing summaries of cases which I witnessed is available at http://www.nicmadge.co.uk/media/Stage_Report.pdf

Importance of international exchanges

The stage was extremely beneficial. Whenever people travel, it is axiomatic that they learn about the country visited. However, perceptive travellers also learn (by comparison) about their own country and about their own personality. During my *stage*, I learnt a huge amount about French criminal law and procedure and about French judges. It also made me think deeply about our own criminal justice system and the way in which I judge. There are lessons to be learned. I also hope that the French judges to whom I talked benefitted in the same way. My personal hope is that, if (or when) the United Kingdom leaves the European Union, such *stages* can continue. There is a great deal to be gained by international judicial co-operation.

Our different legal systems

Although English and French are different languages, in part, they come from the same roots. Some words are the same. Some words are completely different. Confusingly, some words are the same but have very different meanings (e.g. "magistrate" and "bail"). The two languages can be used as an analogy for our two legal systems. The roots of both the English and Welsh and French criminal justice systems lie in similar medieval systems. Many of the legal words we use come originally from Norman French. However, the French legal system was torn up, root and branch, in 1789 and replaced by Napoleon with new codified laws and procedure. Our two legal systems are now as different as our two languages. There are aspects of the French legal system which it is hard for an Englishman to understand. Just as it takes many years to become fluent in French, it is impossible in two weeks to master all the complexities of the French criminal justice system. However, a few general points can be validly made.

In some ways, the two systems are now very different. Three key differences can be identified. The first is the contrast between the importance of the *dossier* in the French system and the importance of oral evidence in the English and Welsh system. In France, the contents of the *dossier* are the evidence. Other than the *partie civile* and the defendant, eye witnesses do not come to the trial. What is said at trial is far less important than the contents of the *dossier*. In England and Wales, the jury do not see the contents of written statements made by witnesses. Unless agreed by defendants, all evidence has to be given orally at trial. The result is that English and Welsh trials are far longer, commonly lasting days or weeks. On the other hand, our system allowing guilty pleas, made orally in court, avoids the need for trials in many cases.

The second difference is the question of who decides guilt or innocence and the way in which it is done. For us, the jury constitute a fundamental protection of our democratic liberties. It may be argued that their failure to announce their reasons in open court is a weakness, but the way in which judges sum-up the law and the evidence should ensure that

juries do reach reasoned verdicts. There is also a perception that juries do, generally, "get it right". In France, there are juries in the *cour d'assise* where *crimes* (the most serious offences punishable with sentences of over ten years, such as murder, rape, terrorism offences etc) are tried. There, juries of six people retire with the presiding judge and two judicial assessors. In the *tribunal correctionnel*, there are no juries. In general, culpability and sentence are decided collectively by three judges.

The third key difference is the role in France of the *procureur* and the *juge d'instruction*. Like the judges who try cases and perform other judicial functions (e.g. as j*uge de liberté et détention* or *juge d'application des peines*), they are all *magistrats*. The French judicial career as a *magistrat* may begin at a relatively young age, after studying at the *Ecole Nationale de la Magistrature*. Thereafter, a *magistrat*, during a life-time's career, may perform different functions e.g. as a *juge d'instruction*, as a *procureur*, and as a *présidente de correctionnelle*. One year, a *procureur* may appear in court as a prosecutor. The next year, s/he may be trying a similar case as a judge. At court, *juges d'instruction, procureurs* and trial judges all have offices in the same building. In court, the *procureur* sits at the end of the same bench as the trial judges. From an English common law perspective, where the Crown Prosecution Service and the judiciary are two completely separate entities, that raises issues as to the independence of the judiciary. The French response is that there are sufficient checks and balances to preserve independence – e.g. the right of appeal from decisions of the *juge d'instruction*.

There are undoubtedly very different approaches to law, but some of the theoretical bases are not as far apart as one might think. One of the key differences since Napoleon's time has been the common-law ability of English and Welsh judges to make law on the one hand and French codification on the other hand. It can though be argued that codification is far less of a difference than is often perceived. British Acts of Parliament have replaced or codified much case law and we now have our own procedural code, the Criminal Procedure Rules. Another key difference is the supremacy of the French *dossier*. Although I have no doubt that our tradition of the hearing of oral evidence will remain paramount, we are moving towards a situation where the English and Welsh police, the Crown Prosecution Service and the courts will share one common file. The introduction of the digital Common Platform is imminent.

There are also many common factors which are bringing our legal systems closer. Over the last fifty years English and French society, and hence the problems faced by our judicial or penal systems, have converged. When I first visited Paris in 1968, French cars were very different (e.g. the Citroen 2CV and DS), French clothing was far more stylish and French food far more tasty. Although Citroen, Renault and Peugeot still make cars, they are almost indistinguishable from the silver or grey cars one sees throughout Europe. With regards clothes, throughout the world, everyone wears jeans. And we now enjoy the benefits of French cuisine in Britain. The very different legacies of two world wars have receded into history. As post-colonial powers, our two countries share many common factors; the financial constraints of modern society; the benefits and challenges of immigration; and the threat of terrorism. In the field of law, we share the effect of the European Convention on Human Rights (especially Article 6, the right to a fair trial) and, at least for the moment, European Union regulations and directives. Our police forces, prosecutors, lawyers and courts face similar issues of lack of resources, over-work and lack of morale. Our prison systems are equally over-crowded.

There is undoubtedly considerable pressure upon French judges. I was told that there are too few judges. Some judges are forced to sit late into the evening. Delays in some cases coming to trial are longer than in England and Wales. On the other hand, there are considerable benefits from greater collegiality – not just because French judges often sit in panels of three, but also, since judging is a life-time career, due to the camaraderie fostered during their original training in the *Ecole Nationale de la Magistrature*.

One aspect of the *stage* which I found fascinating was the opportunity to watch other judges judging. It is over twenty years since I appeared in court as an advocate. Apart

from a period when I appraised deputy district judges, during my time as a judge, I have rarely seen any other judges judging. As a tutor judge for the Judicial College, I have helped devise and train on several courses fostering judicial skills (*Craft of Judging, Business of Judging* and *The Judge as Communicator*). So judicial skills, especially communication skills, are of particular interest to me. Watching hearings during the *stage* reinforced the importance not only of judges listening (arguably one of the key judicial skills) but also giving the appearance of listening. Similarly, it reinforced the importance of good communication – of judges explaining in clear and simple language what was happening and what would happen. In France, judges speak directly to defendants, rather than to their advocates, far more. If a defendant is not in custody, communication is enhanced by the proximity of the defendant to the judge. The lecturn used by the defendant may be only a couple of metres from the judge, whereas in England and Wales, the dock is often far away, at the back of the courtroom. The proximity means that the character of the defendant (both strengths and weaknesses) is far more apparent. There is no doubt that the defendant is an individual human being, not just another defendant, in the distance, on the far side of the court room. How many English or Welsh judges would be comfortable sentencing a defendant who is directly in front of them, only a couple of metres away?

One issue which became obvious to me during my *stage* was the over- representation of first, second and third generation immigrants in the French criminal justice system. Of the 91 suspects or offenders I saw at first hand during my *stage*, I estimate that 74 were first, second or third generation immigrants (81%). Although I have no statistics, and although the numbers are not so stark in the United Kingdom, there is a similar over-representation of black and minority ethnic defendants and prisoners in the British criminal justice system. Although immigration is overwhelmingly a positive factor, bringing many benefits to western society, this is clearly a matter of concern, one which I raised with some of my French colleagues. My conclusions are that the over-representation of black and minority ethnic defendants is predominantly a male problem. Women feature very little in the criminal justice system. Emigration may lead to the breakdown of families. It is possible that, before migration, there may be stricter controls both within the family and society, than in the (so-called) "liberal" west. After migration, many fathers are absent or present poor role models. Young people, just as those from a western background do, may reject traditional values. Arguably, we in the West face an absence of a prevailing new morality to replace the decline in religion. Added to that, our media create unrealistic expectations of wealth, where fabulously rich football stars and reality TV stars become role models. Added to that are problems of poverty and unemployment, which in both our societies, are more prevalent among black and minority ethnic communities. In France, they face a greater likelihood of being housed in *banlieus* which lack good schooling and perhaps the same facilities or work opportunities as inner cities. There is also a greater likelihood that the police, both in France and the United Kingdom, will stop, search and arrest young black and minority ethnic men.

There is no doubt that we face similar challenges, both in France and in the United Kingdom, but these are problems which our court systems alone cannot solve. They are problems for society.

These are personal reflections. They do not in any way represent views of Ministry of Justice or HM Courts and Tribunals Service. The stage was supervised by Mme Michèle AGI. The day-to-day arrangements were made by Mme Sylvie BOGE. They gave generously of their time. I am extremely grateful to them for their warmth and generosity and to all the other French judges who assisted me.

OROZCO V ATTORNEY GENERAL (COMMONWEALTH LAWYERS ASSOCIATION AND OTHERS, INTERESTED PARTIES)
10 August 2016
Belize Supreme Court [2016] 4 LRC 705
Benjamin CJ

The claimant, a homosexual man, challenged the constitutionality of s 53 of the Criminal Code to the extent that it applied to anal sex between two consenting male adults in private. Section 53 provided '[e]very person who has carnal intercourse against the order of nature with any person … shall be liable to imprisonment for ten years'. On its face this provision was gender neutral and there was no known statutory or clear judicial definition of 'carnal intercourse' or 'against the order of nature'. However, it was clear that it included anal intercourse between consenting male adults. An expert report recorded a small number of arrests each year, but gave no indication that any of the persons arrested were female. A number of interested parties intervened in the proceedings, including the United Belize Advocacy Movement ('UNIBAM'), of which the claimant was the executive president, and three Belize church bodies ('the Churches'). The claimant contended that the criminalisation of the free expression of his sexuality violated his rights to dignity and privacy, guaranteed by s 3(c) of the Belize Constitution, his rights to equality and equal protection of the law guaranteed by s 6(1) and his right to freedom of expression guaranteed by s 12. He further claimed that the law contravened his right under s 14(1) not to be subjected to arbitrary interference with his privacy. Section 14(2) imported the limitation in s 9(2) that the law could make reasonable provision in the interests, among other things, of public morality and public health. The claimant produced evidence that men had reported to UNIBAM their fear of prosecution under s 53 of the Criminal Code, that gay men were reluctant to report violence or rape because of fear of lack of protection from the police and that many sexually active gay men shunned testing and treatment for HIV and AIDS because of the stigma and discrimination against gay men which was reinforced by the criminalisation of consensual sex between gay men. The Churches questioned whether the clamant had standing to bring the claim on the basis that he had failed to show that he was likely to be prosecuted and also, with the respondent, invoked the doctrine of the separation of powers to assert that the question raised was properly one for the legislature rather than the court.

HELD: Declaration made that s 53 of the Criminal Code contravened ss 3, 6, 12 and 16 of the Constitution of Belize to the relevant extent and order made that s 53 should be read down not to apply to consensual sexual acts between adults in private.

(1) Section 20(1) of the Constitution gave a person alleging that his fundamental rights and freedoms under the Constitution had been or were likely to be contravened the right to seek redress. As the claimant had shown that prosecutions for breach of s 53 of the Criminal Code were in fact brought, however few, it was plain that by continuing to engage in sexual activity in breach of s 53 he ran the risk of prosecution. Therefore the claimant had the requisite standing under s 20 to bring the claim for constitutional redress.

(2) Although the Constitution itself reflected the separation of powers, the court could not evade the jurisdiction vested in it by the Constitution to interpret and apply the constitutional provisions protecting fundamental rights, without recourse to public opinion or religion or adjudicating on any moral issue. The role of the court was a salutary one and fundamental to preserving democracy.

(3) The right to human dignity was a free-standing right under s 3 which, under s 20, was enforceable by the court, unlike similar provisions in earlier Caribbean

constitutions, which informed the other rights from which the concept emanated. It was not an easy concept to define, but it was harmed by unfair treatment premised on personal traits or circumstances which did not relate to the individual needs, capacities or merits, and it was harmed when individuals were marginalised, ignored or devalued. The criminalisation of all gay men who expressed their sexuality by engaging in anal intercourse degraded and devalued them in violation of s 3(c) of the Constitution. It also contravened the right of freedom of expression, one of the pillars of a democratic society, guaranteed by s 12.

(4) Personal privacy, protected by arts 3(c) and 14(1) of the Constitution, emanated from the concept of human dignity. The issue was whether the interference with the claimant's privacy was justifiable under s 9(2) on the grounds of public health or public morality. The public health limitation failed on the evidence; on balance the evidence before the court was that the retention of s 53 of the Criminal Code in relation to males engaging in anal intercourse hindered rather than helped HIV and AIDS testing and treatment. On the question of public morality, from the perspective of legal principle, the court could not act on the majority view or what was popularly accepted as moral. It had to be demonstrated that some harm would be caused if the proscribed conduct were unregulated. No evidence had been presented as to the real likelihood of such harm. The references to the supremacy of God in the Preamble to the Constitution did not import any specific religious perspective, but rather acknowledged the historical origins of the fundamental rights in natural law and that rights were derived from sources beyond the state and its laws.

(5) Notwithstanding its gender-neutral language, the evidence demonstrated that s 53 of the Criminal Code was discriminatory in its effect and no evidence had been adduced to show that such discrimination was justifiable. The claimant had shown that he had been rendered a criminal by virtue of his homosexuality. By reference to authority under the International Covenant on Civil and Political Rights 1966, to which Belize was a party, and to s 65 of the Interpretation Act, the word 'sex' in s 16(3) of the Constitution extended to sexual orientation. The claimant had been discriminated against on the basis of his sexual orientation by virtue of s 16(1) and (3) and there was an ongoing violation of his right under s 6(1) to equality before the law and the equal protection of the law without discrimination.

(6) As an existing law in 1981 when the Constitution came into force, under s 21 of the Constitution s 53 was protected for a period of five years from being held to contravene any fundamental right; that period having elapsed, the Supreme Court could exercise its power under s 134(1) to make such 'modifications … as might be necessary' to bring s 53 into conformity with the Constitution. Therefore it was declared that s 53 infringed ss 3, 6, 12 and 16 of the Constitution to the extent that it applied against carnal intercourse against the order of nature and it was ordered that the following words be added to s 53: 'This section shall not apply to consensual sexual acts between adults in private'.

Under art 144(2) and (3) of the Constitution of the Republic of Ghana 1992 appointments to the Superior Courts (the Supreme Court, Court of Appeal and High Court), were made by the President 'acting on the advice of the Judicial Council', and in the case of the Supreme Court also 'in consultation with the Council of State and with the approval of Parliament'. By art 153 the Judicial Council consisted of the Chief Justice as chairman, three senior judges, the Attorney General, other legal figures including two representatives of the Ghana Bar Association, and four laymen appointed by the President. Article 128(4) required appointees to the Supreme Court to be 'of high moral character and proven integrity' and to have 15 years' standing as lawyers. The plaintiffs in three separate actions, the Ghana Bar Association, a journalist and a legal practitioner, issued writs against the Attorney General and the Judicial Council seeking declarations that the Constitution required the President not only to seek the advice of the Judicial Council but also to follow that advice when appointing judges of the Superior Courts. The plaintiffs claimed that in the past Presidents had not acted fully on the advice of the Judicial Council when appointing Supreme Court judges, and that the Judicial Council for its part had violated its constitutional duty to give advice to the President for appointments to the Superior Courts and to ensure that its advice was given effect, by taking steps, including court action, to require the President to act on its advice. The defendants accepted that the President had on occasion chosen some nominees put forward by the Judicial Council but rejected others.

HELD: Writs dismissed.

(i) The cardinal principle on which appointments were made to the Supreme Court under art 144(2) of the Constitution was based on the common law principle that, as well as being professionally competent, a judge ought to be impartial and be capable of being regarded as such by the public, which was exemplified by the requirement in art 128(4) that appointees to the Supreme Court be 'of high moral character and proven integrity'. It was also important that judges were independent and were seen to be independent in discharging their duties. Article 144 was therefore to be construed so as to ensure that as far as possible the image of justices of the Supreme Court was one of 'indubitable impartiality'.

(ii) The purpose of the three-tier appointment process in art 144(2), of advice of the Judicial Council, consultation with the Council of State and approval of Parliament, was part of the constitutional checks and balances under the separation of powers, which was designed to insulate the appointment process against excessive executive control and inter-meddling and to act as a restraint on the President's power of appointment and prevent improper appointments.

(iii) The President was required to seek the advice of the Judicial Council and consult with the Council of State in the appointment of Supreme Court judges, but the opinions and advice of the Councils were not binding on the President. The President, as the appointing authority, was not obliged to appoint a person recommended by the Judicial Council but, on the other hand, he could not go outside the recommendations of the Judicial Council when making an appointment to the Superior Courts. Moreover, the Judicial Council, the Council of State and the President were required by art 296 not to be arbitrary, capricious or biased, whether by resentment, prejudice or personal dislike, and to act in accordance with due process of law when carrying out their respective constitutional duties to advise, consult and appoint Superior Court judges.

Per curiam. Per Dotse JSC. The constitutional provisions satisfy the international principles adopted by the Commonwealth in the Latimer House Principles on Judicial Appointments (2004).

BOOK REVIEWS

Law and War: Magistrates in the Great War
Jonathan Swan
Pen & Sword Books, 2017,
ISBN No. 9781473853379

In *Law and War: Magistrates in the Great War*, Swan provides a detailed and fascinating window into the impact of wartime legislation on the lives of ordinary people – housewives, landlords, neighbours, shopkeepers, etc. – and intertwines this with the development of the magistracy during the Great War.

Although the office of justice of the peace can be traced back to 1361 in the reign of King Edward III, the magistrates' court as we understand it today developed from the reforms to the system of summary justice which began in the middle of the nineteenth century. The outbreak of World War I in 1914 and Parliament's frantic work to enact emergency legislation in the form of the Defence of the Realm Act, 1914 (DoRA), however, brought a new dimension to the work of the courts. The war required a shift in legal thinking, from one based around 'the enemy within' (the Stuart rebellions, the English Civil War, etc.) to deal with a nation at war and for the first time in a century facing a genuine prospect of invasion.

Swan undertakes meticulous research to document the main focus of this book, namely the experience of ordinary people and their interactions with the law and courts during and in the immediate aftermath of the war. In Chapter 7, for instance, the author describes how alcohol abuse was several orders of magnitude greater than anything seen today. Magistrates soon found that their existing licensing powers insufficient, which led to the enactment of the Intoxicating Liquor (Temporary Restrictions) Act, 1914. Sensitive to the fears of prohibition and the influence of the abstinence campaigners, the government used the theme of 'efficiency' to justify and promote a new attitude to alcohol consumption, and a new and separate Defence of the Realm (Liquor Control) Act, 1915 created the Central Control Board to oversee and coordinate the patchwork of orders in place around the country.

Another theme which is explored in this book is the rise of probation as an innovative and alternative sentencing option. Swan notes that, initially, the sentencing options available for magistrates were largely limited to fines or imprisonment. The latter was much more widely used, particularly for fine defaulters. In 1907, probation was very much an innovation and magistrates were still learning how to use it effectively. However, the war brought about a profound change in social conditions, in particular with respect to women and families. Youth crime increased rapidly, variously attributed to the absence of fathers and male teachers on military service, mothers absent on munitions work, and the subversive influence of the cinema. Given the limited sentencing options at the time, magistrates increasingly turned to the use of the relatively new option of probation.

Throughout the book, Swan presents a picture consisting of a patchwork of emergency legislation emerging as a reaction to the war, and discusses its impact on ordinary individuals. These include regulations under DoRA, such as the lighting regulation which had more impact on the community than any other, and brought thousands of people into court. But it also includes other legislation, such as the Aliens (Restriction) Act, 1914 and its role in the internment of tens of thousands of enemy aliens, following the sinking of the *Lusitania* by a German submarine in early 1915 and subsequent public disorder. The author concludes that the 'great unpaid' could be considered causalities in this war, because the legislators failed to impose order, enacted some poorly-drafted legislation, and responded weakly to the threats and challenges faced by British society at the time.

Aldo Zammit Borda
Editor

Judicial Accountability in the New Constitutional Order
Ed. Jill Contrell Ghai,
ICJ Kenya, Nairobi, 2016
ISBN 978-9966-958-69-3

This collection of essays is published pursuant to the mandate of the Kenya section of the International Commission of Jurists to develop, strengthen and protect the principles of the rule of law and of the independence of the judiciary. As Dr Willy Mutunga, Chief Justice of Kenya 2011-2016, recalls in his Foreword, when he took office he found an institution that was designed to fail, frail in its structures, socially uprooted, thin on resources, low in self-confidence, unprofessionalised and overwhelmed by the Executive. This volume, ably edited by Professor Jill Cottrell Ghai, measures the progress made in ensuring the accountability of the judiciary under the 2010 constitutional order through contributions from seven distinguished Kenyan academics and practitioners (and from Professor Cottrell Ghai herself). The first chapter examines the place of judicial independence and accountability under the current constitution. Chapter two provides an overview of the Kenyan judiciary, recording progress since 2011, but also admitting that in 2016 the judiciary remained one of the least trusted institutions in the country mainly because of lingering cases of alleged corruption. However, it is noted that a 'remarkable' 41% of High Court judges are women, a statistic which puts some Commonwealth jurisdictions to shame. The next four chapters analyse various mechanisms of judicial accountability –the Judicial Service Commission (including a valuable comparative analysis of the composition of Commonwealth African JSCs), internal mechanisms such as the Judicial Training Institute (including an account of normative underpinnings such as the Bangalore and Latimer House Principles), the Judiciary Code of Conduct and Ethics (including lessons from other jurisdictions) and accountability to Parliament and to Independent Commissions. In a concluding chapter, Professor Cottrell Ghai looks at other means of accountability, for example, through the profession, academic comment and the media. The chapter considers the scope of judicial immunity from criticism, a topic controversial in many jurisdictions. The application of the offence of scandalising the court and of the *sub judice* rule in cases where there has been press criticism of court proceedings appears somewhat capricious in Kenya. Professor Cottrell Ghai observes that the press generally are not well informed about the workings of the legal system. However, she notes wryly that a judge who in open court accused the media of 'skewed reporting' of court proceedings subsequently faced dismissal for favouring a party to the very proceedings in which he had made that comment.

Although this book focuses on the Kenya judiciary, the contributions are enriched by a comparative perspective and the issues raised are very relevant to all our Commonwealth jurisdictions. This true in particular of Professor Cottrell Ghai's conclusion:

> 'There is a wide variety of mechanisms and forces that may help keep the individual judge or magistrate in line with appropriate standards, and the institution focussed on service to the people. It is not at all clear how effective the mechanisms are, nor how much attention the judiciary pays them. The fault is by no means all with the judiciary. There are sectors of civil society, as well as academic lawyers who could do much more to critique the judiciary and its work in constructive ways.'

Peter Slinn
Chair of the Editorial Board

CMJA CONFERENCE

24-28 SEPTEMBER 2017

Bank of Tanzania Conference Centre

Dar-Es-Salaam TANZANIA

www.cmja.biz

"Building an Effective, Accountable and Inclusive Judiciary"

Registrar Now

to avoid disappointment

www.cmja.biz