EDITORIAL

The Conference Just Ended

This December 2019 issue of the *Commonwealth Judicial Journal*—volume 24, number 2 that is—comes hard on the heels of a remarkably successful CMJA Conference in Port Moresby, Papua New Guinea. The September conference was exceedingly well-attended and those who were present for it enjoyed a warm welcome from the PNG judiciary and the citizens of Port Moresby generally. It is clear that the people of PNG justly enjoy a reputation for being extraordinarily hospitable. The CMJA extends a big thank-you to all involved in the planning and delivery of the conference programme in Port Moresby, which was a well-organised and fruitful forum for discussion, with sessions led by knowledgeable speakers that touched on many subjects of great importance to judges and magistrates across the Commonwealth.

The Conference Next Year

Before leaving the subject of conferences, allow us to give you, our readers, a gentle nudge to open up your digital or paper calendars and save the dates *now* for the upcoming CMJA Conference. (We all know how quickly our calendars can fill up.) In 2020—the year that begins the CMJA's next auspicious half-century—we will be meeting in Cardiff from 13th to 17th September.

Who could ever question the CMJA's wisdom in selecting Cardiff as the next conference venue at such an important juncture in the association's history? Readers may recall that the UK Supreme Court convened for the first time in Cardiff for important hearings this past July; thus, in choosing that location for its conference next September, the CMJA finds itself in good company.

As an ancient city, Cardiff has had the Welsh judiciary stitched into its colourful history from very early times. Indeed, the origins of the Great Court of Sessions in Wales (which exercised jurisdiction over serious criminal offences there until 1830) can be traced to the same 1542 statute under which Wales became a full and equal part of what eventually became the UK, *and* under which Cardiff itself was formally incorporated—that is, the Law in Wales Act 1542 (or *Y Deddfau Cyfreithiau yng Nghymru 1542*). So... don't forget to mark your calendars.

What Awaits You in this Issue

The December 2019 issue of the *Commonwealth Judicial Journal* offers content that cuts across a wide range of relevant subjects. Several of the articles were drawn from presentations made (either in person or by video link) by distinguished speakers at the CMJA Conference in Port Morseby in September. But before getting to those substantive articles, we first pause to remember Justice Charlie Quin of the Cayman Islands, a stalwart supporter of the CMJA and a vigorous contributor to many of its initiatives over a period of many years. Dr Karen Brewer, the CMJA's Secretary-General, has penned a warm and affectionate obituary of Justice Quin that immediately follows this editorial.

Justice Daniel Musinga of the Kenyan Court of Appeal provides an encouraging report on the jurisprudence that has begun to develop in his country over the almost-decade that has passed since the enactment of Kenya's new Constitution in 2010. Mr Kwara Giriwa explains how the justice system in Papua New Guinea is making use of advances in technology to address a pressing need to reduce case congestion and drive inter-agency co-ordination. In an article based upon a presentation given in Brisbane in 2018, Chief Justice Anthony Smellie of the Cayman Islands also muses about inter-agency coordination, reminding us that the development of improved court-based approaches to managing criminal justice must be accompanied by synchronised efforts between courts and other service providers within society, particularly where youth criminality is concerned.

At the Port Moresby conference, Dr Ei Sun Oh canvassed a number of distinguished attendees and presenters from many Commonwealth countries, seeking their views on the question of whether the time has come for the abolition of the offence of blasphemy from the statute books in their respective jurisdictions. Perhaps not surprisingly, no unifying consensus was found

to exist. Their differing responses and rationales for them make for interesting reading. Dr Anna Dziedzic, a newly minted PhD graduate of the Melbourne Law School, examines the practice of some Pacific Island states which make use of foreign judges to bring their complements of judicial officers up to a workable number. She explains that while the practice brings many benefits to the otherwise under-resourced states which employ it, it also carries potential problems.

Judge Laurie Newhook has been a judge of the Environment Court of New Zealand since its inception and in his article he outlines the legislative foundation upon which New Zealand's unique and progressive approach to environmental protection rests, summarising the Environment Court's role as one component of a comprehensive regime for planning, environmental regulation and environmental protection within New Zealand.

And last, but by no means least, we acknowledge the hundredth anniversary of the publication of *The Digest* (formerly known as the *English and Empire Digest*), a venerable resource for generations of students-at-law, barristers, solicitors, magistrates and judges across the Commonwealth. The Rt Hon Lady Arden of Heswall DBE, PC, Justice of the UK Supreme Court, and the Hon Michael Kirby AC CMG, Justice of the High Court of Australia (1996–2009) and President of the Court of Appeal, Solomon Islands (1995–1996), have written fitting and illuminating tributes to celebrate the centenary of *The Digest* and the foundational place it has occupied over the last century, and still occupies to this day, in the common law world.

Other Developments Worthy of Mention

Turning now to more substantive subject matter, mention must be made in this editorial of developments unfolding around the Commonwealth—not all of them positive—which have attracted the CMJA's attention and concern, given the association's commitment to the promotion of the rule of law and judicial independence in the justice systems of all Commonwealth nations.

Funding of the Judiciary in Kenya

The CMJA monitored developments when the Kenya judiciary's budget was cut earlier this year.

The Chief Justice, David Maraga, found it necessary to release a public statement on 4 November 2019 in relation to the threat to cut the budget of the Kenyan judiciary by 50%. In that statement the Chief Justice referred to a 'developing crisis in the Judiciary concerning budget cuts'. He did so in part to dispel confusion created by misleading information on the funding of the judiciary and court system that has recently been circulating within the country. We consider this controversy to be of sufficient importance that we have decided to devote a substantial portion of this editorial to it.

That the funding restraints faced by the Kenyan judiciary are truly severe appears to be incontrovertible. And this is not just the perception of the judiciary itself. In its August 2019 *Memorandum to the Building Bridges to Unity Task Force*, the Kenyan Judicial Services Commission (which includes judges, magistrates, advocates, the Attorney General, lay members and a nominee of the Public Service Commission) reports that, as a percentage of the country's entire national budget, funding for the judiciary in Kenya has declined as follows:

- in 2016/2017: 0.99%
- in 2017/2018: 0.69%
- in 2018/2019: 0.43%
- in 2019/2020: 0.44%

Moreover, those declines have come at a time, the commission comments, when 'there has been a notable upsurge in the number of cases being filed in courts, and a corresponding demand for the establishment of courts in all parts of the country, much of it devolution-driven'. This has prompted the commission to recommend to the Kenyan government:

> *…that the Constitution be amended to provide that the Judiciary budget should be not less than 3.5% of the total national budget (not revenue). This provision should be similar to Article 203 (2) that guarantees county governments a minimum allocation of 15%. [at page 11]*

Chief Justice Maraga's public statement contains an accessible and eloquently worded primer on the tri-partite system of government to which Kenya has subscribed, constitutionally—a system of government within which, in his words:

> *…the people of Kenya have delegated the exercise of [the sovereign] power [belonging to the people of Kenya] to the three Arms of Government, that is, the Judiciary, the*

> *Legislature and the Executive as well as to the Independent Commissions established under the Constitution.*

The Chief Justice goes on to refer in his public statement to the inescapable constitutional truth that for the different arms of government to function properly, they 'require to be reasonably funded,' citing various sections of the Constitution in support. The principle that lies behind that assertion is clear. Again, in the Chief Justice's own words:

> *…in all democratic states governed by their respective Constitutions,* ***constitutional power is constrained power.*** *The Judiciary is entrusted with the duty of safeguarding and enforcing constitutionalism. As a result, full autonomy and independence of the Judiciary is guaranteed. This is to enable the Judiciary to function without any interference. [emphasis in original]*

As is common in other constitutional democracies, the Kenyan judiciary is from time to time called upon to exercise declaratory and other powers which frustrate the intentions of the executive or legislative branches of government. However, as is less common (though certainly not unheard of) in other constitutional democracies, Kenya is arguably starving its judiciary of the funding that it needs in order to play its constitutional role. As Chief Justice Maraga expresses it (acknowledging a point also made recently by the Kenyan Judicial Services Commission quoted above), there is 'serious underfunding of core judicial functions' at a time when the volume of the judiciary's workload is rising steeply. While salaries have been spared, development and recurrent expenditures have been reduced by 50% in the course of fiscal limitations that the Chief Justice considers amount, in some instances, to 'deliberate attempts to undermine the Judiciary'. Strong words indeed.

In a press release that was issued in April this year, the World Bank noted that Kenya's economic outlook for 2019 'remains stable amid threats of drought'. It projected that the country's GDP would grow by 5.7% in 2019, fractionally down from 5.8% in 2018. (These figures compare favourably to those for Canada, for example, where growth in 2019 is estimated to be only 1.6%. Similarly, growth for the UK in 2019 is estimated at only 1.4%. In those statistics, both countries lag behind Kenya.)

Given those figures, it is difficult to accept any suggestion that insufficient government revenues overall are the problem in Kenya that necessitates deep cuts to funding for the judiciary. Resources are not 'scarce' there and, as the 2017 *Report of the First Study Commission of the International Commission on Judges* states:

> *…[W]here resources are scarce, it should be the judiciary who decide on budget allocation and that the judiciary should work to efficiently manage resources and improve the quality of its workload without inappropriate interference from other branches of government.*

The language used in the Chief Justice's public statement is forceful and virtually unprecedented. It is regrettable that any nation's most senior judicial officer should find it necessary to speak so plainly and pointedly to the population at large about government action that, it is contended, interferes with the judiciary's ability properly to fulfil its function.

It hardly needs to be said that government funds comprise a finite resource and that no branch of government in any constitutional democracy, including the judiciary, is entitled to have access to limitless operating monies without any expectation that those monies will be spent prudently and accountably. However, there is no place in a properly constituted democracy for executive or legislative action that effectively prevents or compromises the ability of the judiciary to provide the corrective oversight that it is constitutionally mandated to provide, especially when questions regarding the lawfulness of government action are submitted to the courts for adjudication. (For a survey of some of Kenya's recent judicial history touching upon such disputes, see the fascinating and inspiring article by Justice Daniel Musinga, of the Kenyan Court of Appeal, published in this issue.)

We are pleased to report that on 8 November the CMJA received notification that the Kenyan government had reversed its decision on the budget of the judiciary. However, the systemic effects of underfunding that were identified by the Kenyan Chief Justice in his statement—resulting from a process that he says amounts to the *de facto* economic 'strangling' of the judiciary in his country—raise concerns as this is not a unique situation around the Commonwealth where states profess to honour, protect and promote the rule of law. The CMJA is currently working on supporting judiciaries that face such challenges and will be developing a set of guidelines on this.

Zambia's Constitutional Amendment Bill 2019

Much ink has been spilled of late with respect to Zambia's Constitutional Amendment Bill 2019 and, in particular, the provisions within it that, if enacted, would fundamentally change the criteria governing when judges can be removed from office. Changes are also planned with regard to the composition of the body that makes such removal decisions.

One commentator, Paul Tsunga, Africa Director of the International Commission of Jurists, stated in a recent ICJ press release:

> *The ICJ implores the President of Zambia and the Zambian legislature to ensure the alignment of all constitutional amendments with international human rights standards on the independence of the judiciary, the rule of law and the separation of powers.*

Similarly, in *ConstitutionNet*, an online publication of the International Institute for Democracy and Electoral Assistance, Prof Cephas Limina entitled his recently posted article: 'Zambia's proposed constitutional amendments: Sowing the seeds of crisis?'

Under Zambia's current Constitution, the criteria for the removal of judges from office are set out in clear and relatively conventional language. That is, there must be evidence of: '(a) a mental or physical disability that makes the judge incapable of performing judicial functions; (b) incompetence; (c) gross misconduct; or (d) bankruptcy.' Under the proposed amendment, the wording of criterion (a) would be replaced with 'legally disqualified from performing judicial functions'. Moreover, instead of remaining with the present Judicial Complaints Commission, the jurisdiction to remove judges from office would be shifted to a new tribunal to be appointed by the President.

There is reason to be concerned that with such vague wording (where the conduct potentially leading to 'legal disqualifi[cation]' is not specified and where the credentials of the individuals comprising the new tribunal are also not specified), judicial independence and the separation of powers in Zambia could be the casualty of the proposed constitutional amendments.

Other worrisome changes would see the removal of senior administrative rankings within the Supreme Court and Constitutional Court judicial hierarchy and the repeal and replacement of a provision that specifies that a minimum of 11 judges must be appointed to sit on each of those courts.

The CMJA—together with the Commonwealth Lawyers Association, the ICJ, Lawyers Rights Watch Canada, the International Bar Association's Human Rights Institute, Judges for Judges and the Southern Africa Litigation Centre—is a signatory to a Combined Statement raising concerns about the implications of Zambia's Constitutional Amendment Bill 2019 for judicial independence and the rule of law in Zambia. In it, the signatories give definition to those concerns and call upon the President of Zambia and the legislature there to '…ensure that the proposed Constitutional changes are in line with international human rights standards on the independence of the judiciary and the separation of powers.'

Readers interested in learning more about the troubling situation in Zambia may access the Combined Statement online via:

https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=faad248d-c531-4ec2-9636-9e02afd745e8

On a Lighter Note

It is our duty at the *CJJ* to identify and comment upon distressing developments as we see them unfolding. We must raise our voices from time to time in support of our brother and sister judges and magistrates who stand to be affected by such adverse developments and we must call for action to remedy perceived wrongs—action that is consistent with the core values we all cherish. This editorial, unavoidably, has had to dwell somewhat heavily upon that kind of sombre subject matter.

But, despite all of that, there must be room left for *some* light humour. And, indeed there is. We leave you with a photograph of a sign seen this November on a Vancouver city sidewalk. (To our knowledge, no contempt proceedings have been taken or are contemplated.)