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JUDICIAL INTEGRITY, CORRUPTION AND ACCOUNTABILITY IN SMALL COMMONWEALTH AFRICAN STATES

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‘We live in an era of greater public demand for accountability of the Judiciary. It is no longer considered a sacrosanct and inviolable haven of its occupants’.
(Justice Anthony Gubbay)²

‘We do not fear criticism, nor do we resent it’. (Lord Denning M.R.)³

Abstract: This article addresses some of the key challenges that judges in small states face in seeking to maintain judicial independence and uphold judicial integrity. It explores their appropriate reaction to public criticism of judgments, including the extent to which judges themselves and/or members of their family should use the media to respond to such criticism. The article then considers the appropriate response of judges to media allegations of judicial corruption and impropriety and argues, in particular, against the retention of the criminal offence of scandalising the court. A highly publicised dispute between two senior judges in Lesotho then highlights the importance of judges respecting the Values of ‘Integrity’ and ‘Propriety’ enshrined in the Bangalore Principles of Judicial Conduct.

Keywords: small states; Commonwealth Africa; judicial response to criticism; corruption allegations against judges by the media; offence of scandalising the court; upholding judicial integrity.

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³ *R v Commissioner of Police of the Metropolis ex parte Blackburn (No.2)* [1968] 2 QB 150 at 155

I. INTRODUCTION

In small states, members of the judiciary can face particularly difficult challenges in maintaining judicial independence and integrity.⁴ Close family connections, as well as educational, social and professional links can make judges, already few in number, particularly vulnerable to political and other pressures. Further, as Schofield points out:

‘... Much of a judge’s official social life in a small jurisdiction requires interaction with officials who are potential or actual litigants... [and] matters which are everyday occurrences in a larger jurisdiction are sensational news in a smaller jurisdiction’.⁵

It is against this background that this article examines four key issues which, whilst of general importance, are of special significance in small states:

1. The appropriate response of the judiciary (and others) to public concern and criticism over decisions in high-profile cases or threats to judicial independence;
2. The constitutional limitations on legitimate criticism of a judge and judicial accountability;
3. Judicial corruption and the circumstances (if any) in which the criminal law may be invoked to punish those who publicly criticise judges;
4. Maintaining judicial integrity and independence in ‘conflict’ situations between judges.

In doing so, the article will review, in particular, recent cases from four small Commonwealth African states.⁶

⁴ There are 31 ‘small states’ in the Commonwealth each with a population of less than 1.5 million.

⁵ Derek Schofield ‘Maintaining Judicial Independence in a Small Jurisdiction’ in John Hatchard and Peter Slinn (eds) *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* Cavendish Publishing, London, 1999, 73 at 79

⁶ Lesotho, Mauritius, Seychelles and Swaziland. The two other small states are Botswana and Namibia.

By way of introduction it is useful to set out briefly the key elements of judicial independence and integrity as they relate to the discussion. Judicial independence is enshrined in several international and regional human rights documents as well as in most national constitutions. It is one of the fundamental building blocks for good governance and as emphasised in the *Commonwealth Principles on Promoting Good Governance and Combating Corruption* (the Commonwealth Principles):

‘An independent and competent judiciary, which is impartial, efficient and reliable, is of paramount importance’.⁷

Thus with such independence comes the duty on the part of all members of the judiciary to adhere to the highest standards of integrity, service and commitment. The most authoritative document setting out international judicial standards is the *Bangalore Principles of Judicial Conduct* (the Bangalore Principles) which were endorsed by the member States of the UN Commission of Human Rights in 2003. As noted in the Preamble, the Principles are

‘intended to establish standards for ethical conduct of judges.... The Principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards’.

The Principles comprise a series of ‘Values’, two of which emphasize what people can and must expect from their judges:

- *Integrity*: ‘Integrity is essential to the proper discharge of the judicial office’
- *Propriety*: ‘Propriety, and the appearance of propriety, is essential to the performance of all the activities of a judge’

These values are often enshrined in a judicial code of conduct or ethics.⁸

It follows that a failure to observe such Values is rightly viewed as a matter of public concern and debate for, as Stephens has observed:

‘What ultimately protects the independence of the judiciary is a community consensus that such independence is a quality worth protecting’.⁹

⁷ Para 18

⁸ In fact the Principles were prepared with reference to a series of judicial codes of conduct: see the Explanatory Note attached to the Principles.

This is also emphasised in the *Commonwealth Principles (Latimer House) on the Three Branches of Government* (the Commonwealth Latimer House Principles):

‘The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies....’.¹⁰

As the following discussion highlights, in small states upholding these Values and Principles presents special challenges.

II. RESPONDING TO CRITICISM: JUDICIAL INTEGRITY AND ACCOUNTABILITY

In small states high-profile cases can place enormous pressure on judges to uphold the Bangalore Principles. The challenge and the appropriate response is neatly illustrated by the approach of the Court of Appeal of the Seychelles in *Azemia v Republic*.¹¹ This was an appeal against a murder conviction in a case which the court recognised:

‘... created a huge uproar and social revulsion among the community, resonating with a resounding call by the community for the perpetrator of the crime to be brought to justice...’.¹²

The Court of Appeal was faced with an unenviable situation. It found that the prosecution had ‘failed miserably in its duty to conduct a fair trial’¹³ and that the trial judge had ‘gravely erred’ in his summing up to the jury. As a result, whilst the

⁹Noted by Silvia Cartwright ‘The Judiciary: Qualifications, Training and Gender balance’ in Hatchard and Slinn (eds.), above at 39. See also the similar views in the International Commission of Jurists report *The Crisis of the Judicial Leadership in the Kingdom of Lesotho: Report of the High-Level Mission of the International Commission of Jurists in the Kingdom of Lesotho* ICJ, Geneva 2013 at 64: available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/Lesotho-Crisis-judicial-leadership-Publications-Mission-report-2014-ENG.pdf>

¹⁰ Principle VII (b)

¹¹ [2015] LRC 798

¹² Para 2

¹³ Para 21

judgment was not delivered with a *gaieté de coeur*¹⁴ the court was left with no option but to quash the conviction.

Fernando, JA giving the judgment of the court, set out the challenge for the court, emphasising the fact that:

‘... high profile criminal cases in a small jurisdiction like ours ... puts the judiciary under severe social pressure and puts it to its utmost test in having to maintain its impartiality [and] independence ...’.¹⁵

He added that this pressure was particularly acute in a case such as the present in which there was a trial by jury ‘since the ordinary citizens may not understand the technicalities of the legal process.’¹⁶

The response of the Court of Appeal to the understandable public and media concern over the decision to quash the conviction was to provide a spirited and reasoned judgment. In it the court went to great lengths to highlight some key basic issues relating to the judicial decision-making process in all cases:

- The key role of impartial and independent judges to discharge their duties and responsibilities properly and responsibly;
- The duty of the courts to uphold the principles of due process and the rule of law;
- The fact that people ‘desire and deserve’ a justice system that is ‘flawless’ at all levels and stages so that ‘lapses’ that go to the root of the system cannot be condoned;
- The constitutional and professional imperative for impartial and independent judges;

¹⁴ Para 22

¹⁵ Para 2

¹⁶ Para 21. Mr Azemia was held on remand for two years prior to his trial. Despite his successful appeal, the Court of Appeal ordered that he remain in custody (see para 26). In January 2015, the Supreme Court of the Seychelles ruled that the *autrefois acquit* rule did not apply and that he could be tried a second time. The decision was upheld by the Court of Appeal in *Azemia v R* [2015] SCCA 35.

- The need for every case before the court to ‘pass the test of utmost credibility and integrity according to the established principles of law’.¹⁷

The case also raises the more general issue as to how judges (and others) should respond to public and media criticism in controversial cases. As in the *Azemia* case itself, providing a fully reasoned judgment that is readily available both in hard copy and electronically is essential.¹⁸ Should judges go further? In 1998 Gubbay CJ in the Supreme Court of Zimbabwe suggested that:

‘Unlike other public figures, judges have no proper forum in which to reply to criticisms. They cannot debate the issue in public without jeopardising their impartiality’.¹⁹

This view requires further analysis. Today, the advent of social media and 24/7 news channels means that judges can face unprecedented scrutiny and criticism. In response, as a matter of confidence building judges should ‘embark on judicial outreach programmes to communicate to the general public the role and functions of the Judiciary’.²⁰ In doing so, it is good practice to enlist the support of, and work with, local media and civil society organisations.

In controversial and other significant cases, providing an explanation for their decision to a wider public audience is also necessary. There are several possibilities here. One is for a press release to accompany each major judgment which provides the public and media with a clear and digestible explanation of the reasons for the decision. By also making it available on social media, it can be widely circulated and

¹⁷ See paras 22-25. The same approach is also necessary when judges are faced with criticism from the Executive: see the discussion on the *Al-Bashir* case below.

¹⁸ Thanks to the development of the World Legal Information Institute, judgments from superior courts around the world are readily available on-line: see generally www.worldlii.org.

¹⁹ *In re Chinamasa* 2000 (12) BCLR 1294 at 1296 (Supreme Court of Zimbabwe).

²⁰ Commonwealth Plan for Africa 2005, Para 2.2.2

analysed.²¹ The Opening of the Legal Year address offers another avenue for a senior judge to comment publicly on any pressing matters affecting the judiciary, including responding to any criticism of judicial performance or decisions. Contrary to the view of Chief Justice Gubbay, another avenue is for judges to respond to public criticism/concerns through the holding of their own judicial press conferences. These now take place on a regular basis in an increasing number of jurisdictions and enable senior judges to respond publicly to concerns relating to particular cases as well as more general issues relating to the judiciary. Whilst entering into a public debate on a particular decision is not always appropriate, in cases of particular importance, senior members of the judiciary may feel the need to hold a special press conference. For example, in July 2015, the North Gauteng High Court in South Africa ruled that the President of Sudan, Omar al-Bashir, must not be allowed to leave the country, pending another hearing on as to whether he should be arrested and sent to the International Criminal Court.²² In fact President Bashir was permitted to return to Sudan and the High Court ruling was publicly criticised by senior South African government officials. In response, the Chief Justice held a press conference which was attended by other senior judges. In it, he expressed his concern about, and highlighted the danger of, unfounded criticism of the judiciary and, announced that senior judges had requested him to meet with State President, Jacob Zuma to discuss that matter.²³

²¹ A neat example comes from the 2012 press conference by the Lord Chief Justice of England and Wales, where the opening words of Lord Judge were ‘Anyone who wants to Twitter out, you are welcome to do so’.

²² *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others* [2015] JOL 33405 (GP)

²³ At the meeting, it was reportedly agreed that there ‘be care and caution exercised with public statements about and criticism of one another; and the ethos and values of the Constitution be promoted and the Constitution be protected and upheld’. See <http://www.bdlive.co.za/national/law/2015/08/28/zuma-judges-agree-on-mutual-respect>

The extent to which others can and should give public support to judges and to answer their critics is unclear. Certainly legal professional bodies have a duty to offer appropriate public support to the judiciary. The al-Bashir case provides an excellent example where all the legal professional bodies in South Africa publicly offered support to the Chief Justice and expressed their concern over the criticism levelled at the judiciary by members of government.²⁴

A sensitive situation arises when the defence of a particular judge comes from his or her own family members or close associates. This point was raised in an acute form before the Privy Council in *Hearing on the Report of the Chief Justice of Gibraltar*.²⁵ Here the Board was required to advise 'whether The Hon. Mr Justice Schofield, Chief Justice of Gibraltar, should be removed from office by reason of inability to discharge the functions of his office or for misbehaviour'.²⁶ In this case the family member in question was his wife, Mrs Anne Schofield. Mr Schofield was engaged in a long-running dispute with the Chief Minister over concerns about proposed constitutional changes that might impact negatively on judicial independence. Over a period of time Mrs Schofield gave a series of interviews to the local media in which, amongst other things, she accused the government of 'trying to discredit my husband' and 'trying to hound him out of office'.²⁷ Eventually, concern over the conduct of Mr Schofield himself led the establishment of an independent Tribunal by the Governor of Gibraltar which found that the Chief Justice was unfit to discharge the functions of his office and that this warranted his removal from office. The matter then came before the Privy Council.

One question for the Board was: '... to what extent, and in what circumstances, is a judge to be held accountable for the actions of his or her spouse

²⁴ See *Profession stands behind Chief Justice and judiciary in raising concern on attacks on the judiciary and the rule of law* [2015] DEREBUS 129. Available at <http://www.saflii.org/za/journals/DEREBUS/2015/129.html>

²⁵ [2009] UKPC 43. This was a referral under section 4 of the Judicial Committee Act 1833.

²⁶ Para 1

²⁷ Para 80

or other close relatives?'.²⁸ The majority of the Privy Council clearly viewed the conduct of Mrs Schofield with concern and referred to it as establishing 'a propensity on [her] part to take ill-advised action in support of her husband'.²⁹ Whether or not ill-advised, in the view of Lord Hope³⁰ Mrs Schofield was entitled to the 'freedom of her own opinions, her own way of expressing them and her own beliefs'. In principle, this is arguably the better view for the constitutional right to freedom of expression should allow a reasoned defence, however forcefully expressed, of individual judges by their relatives and friends.

However, this raises the further question as to whether a judge is responsible for the comments and activities of his or her relatives. In the Schofield case the issue was whether the Chief Justice was required to disassociate himself from the public comments of his wife. The Board was divided on the point. The majority emphasised the importance of judges disassociating themselves from critical public comments made by relatives. As regards Mr Schofield:

[d]issociating himself from his wife's actions and statements would have been an appropriate step to take in an attempt to avoid the implication that they had his approval, but the question would have remained, and does remain, as to how it was that his wife came to make public statements that were bound professionally to embarrass her husband if he was opposed to her doing so'.³¹

Lord Hope in his dissenting judgment took a different view, stating that:

'The days are long gone when a husband and wife were treated as one person in law and the husband was that person. It is not unknown for senior figures in public life to have spouses or partners who pursue their own careers and interests, in the course of which they may say or do things that

²⁸ Per Lord Hope at para 255

²⁹ Para 112. The Board recognised the right of Mrs Schofield to give evidence to the Tribunal if she so wished although in the event, she had chosen not to do so: see para 8.

³⁰ With whom Lord Rodger and Lady Hale agreed

³¹ Para 36

are controversial and embarrassing. Any difficulties that this may give rise to should be resolved between themselves, if they can be resolved at all, in private. Judges are not to be taken as supporting or endorsing their spouse's or partner's conduct if they do not publicly dissociate themselves from it. The law should recognise that they are independent actors and that the deeds of the one are not to be visited on the other'.³²

This is an important statement of principle. It is debateable whether it was advisable for the spouse of a senior judge to wage what was effectively an ongoing media campaign against the Government in defence of a perceived attack on that judge or judicial independence. In a small jurisdiction such as Gibraltar this action was inevitably going to achieve maximum publicity. However, once again the constitutional right of that person to do so is unquestionable and is subject only to the restrictions on the exercise of that right enshrined in the constitution.

Overall, arguably the days in which judges were required to 'suffer in silence' are over. It is now acceptable for judges to provide an appropriate public response to any criticism of their judgments or threats to their independence. Here local civil society organisations and the media can play a key supportive role. Similarly, whilst common sense might dictate circumspection on the part of relatives and friends of judges, the views of the minority in the Schofield case reflect the modern reality.

III. 'LEGITIMATE CRITICISM' AND THE ACCOUNTABILITY OF JUDGES

To maintain public confidence in the integrity of the judiciary, it is vital to have in place an effective system for ensuring judicial accountability. In this respect, the *Latimer House Guidelines for the Commonwealth 1998* (the Latimer House Guidelines) specifically state that 'Legitimate public criticism of judicial performance is a means of ensuring accountability'.³³ Such criticism, 'even if somewhat emphatic and unhappily expressed, is permissible as being the exercise of the freedom of expression'.³⁴

³² Para 257

³³ VI(b)

³⁴ Per Ogilvie Thompson CJ in *S v van Niekerk* 1971 (3) SA 711 (A) at 720

The scope of 'legitimate criticism' was considered in somewhat unusual circumstances by the Court of Appeal of Lesotho in *Prime Minister v Mahase*.³⁵ The facts of the case were straightforward. In April 2009, a group of dissidents attacked State House, a military base and other targets in Lesotho. One of the ringleaders, Makotoko Leretholi (ML), had previously been arrested in 2007 and held in police custody in connection with 'violence and armed attacks'. However he was granted bail by order of the respondent, Mahase J who was a serving judge of the High Court. ML then fled to South Africa where he 'joined forces with others to plan the attack on the Makoanyane Base and State House'.³⁶ In 2010, a Commission of Enquiry was established in Lesotho under the Public Inquiries Act to investigate the 2009 attacks. In its subsequent report it was critical of the decision by the respondent to grant bail to ML. In fact, as the Court of Appeal noted, the Commission did not have access to the full facts and 'overstated its criticism of that procedure in a manner that was unfair to the respondent'.³⁷

The full Report was laid before Parliament by the Prime Minister without the critical comments of the respondent being removed. The present case revolved around whether the failure of the Prime Minister to excise the critical passages breached the government's duty under section 118(3) of the Constitution of Lesotho to: 'provide such assistance as the court may require to enable them to protect their independence, dignity and effectiveness...'.³⁸ The court held that section 118(3) imposed a duty on the government to protect the 'dignity of the courts'. This meant that it was the 'institutional dignity of the judiciary that must be protected, not that of the individual judge'.³⁹ Accordingly section 118 was not aimed at 'protecting the

³⁵ [2014] LRC 742

³⁶ Para 7

³⁷ Para 12. A key extract from the report is found at para 10

³⁸ It was later conceded on behalf of the Prime Minister that he should have exercised his statutory power to refrain from tabling the disputed section of the report. It was also conceded that an order be granted to expunge the impugned material from official records: see para 14.

³⁹ Para 20

courts from criticism’ and that ‘judges are accountable for the manner in which they perform their duties’.⁴⁰

The court noted with approval the view of the former Chief Justice of Zimbabwe, Anthony Gubbay that ‘Accountability is also secured through a vibrant media and critical academia’. He added that both act as watchdogs and ‘... whenever a judgment is delivered which is contrary to constitutional values and adverse to the interest of society law academics and journalists must criticise it strongly...’.⁴¹ Echoing the words of Lord Denning (above), the court also emphasised that judges must accept that from time to time they may be subject to criticism as this is ‘fundamental to the democratic process’.⁴²

The judgment is undoubtedly helpful in its clarification of the scope of judicial accountability and the fact that judges must accept public and academic criticism. Of particular relevance to the following discussion is the court’s emphasis that, if considered necessary, any judge aggrieved by media criticism is free to pursue their ordinary civil remedies.⁴³ However, the question remains as to whether the criminal law is ever an appropriate vehicle to punish those who publicly criticise judges.

IV. JUDICIAL CORRUPTION AND THE CRIMINAL OFFENCE OF ‘SCANDALISING THE COURT’

Global concerns over judicial corruption are not new. In an effort to address the serious problem the United Nations Convention Against Corruption requires each State Party:

‘...without prejudice to judicial independence, [to] take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary’.⁴⁴

⁴⁰ Para 16

⁴¹ Justice Anthony Gubbay, former Chief Justice of Zimbabwe giving the Fifth M.P. Mofokeng Memorial Lecture noted by the court at para 16.

⁴² Para 20

⁴³ Para 20

⁴⁴Article 11.1

Such measures can include providing the public with a formal complaints mechanism overseen by a Judicial Conduct Committee or the like consisting of senior judges.⁴⁵ In circumstances where there is concern over systematic corruption and abuse of office within the judiciary, the government may feel it appropriate to take formal action to investigate the matter. For example, in Kenya the Judges and Magistrates Vetting Board was established by statute with the mandate to determine the 'suitability [of judges] to continue to serve in the judiciary'.⁴⁶ A key element of its work was that members of the public as well as a range of other stakeholders, such as the Law Society of Kenya and the Kenya Human Rights and Equality Commission were invited to submit complaints. As a result, the Vetting Board found that a significant number of senior judges were 'not suitable to continue to serve', albeit that none of the cases involved an overt finding of judicial corruption.⁴⁷

In small states in particular, local civil society organisations and the media play a key role in scrutinising the work of the judiciary and highlighting any perceived failings. After all, as noted earlier, it is these organisations which are likely to understand any family and other links between judges and politicians and other potential litigants. This may lead them to comment critically, rightly or wrongly, on judicial decision-making and other outside activities. However the extent to which criticism of the judiciary is protected by the constitutional right to freedom of expression has proved especially controversial in small states.

The Latimer House Guidelines state specifically that: 'The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate

⁴⁵ For example in Ghana the Petitions and Complaints Unit is established within the Judicial Service to receive complaints from member of the public against judges and staff of the Service.

⁴⁶ Vetting of Judges and Magistrates Act 2011.

⁴⁷ For a full discussion see John Hatchard *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* Edward Elgar, Cheltenham, 2014, 224 *et seq*

criticism of the courts'.⁴⁸ Even so, in some small African states the common law offence of 'scandalising the court' remains in force and in a number of recent cases courts have considered whether the offence is consistent with the constitutional right of freedom of expression. An appropriate starting point is the 1999 Privy Council decision in *Ahnee v Director of Public Prosecutions*,⁴⁹ an appeal from the judgment of the Supreme Court of Mauritius. The Supreme Court had convicted the journalist who had written an article in a daily paper *Le Mauricien*, which had contained allegations of improper conduct by the then Chief Justice of Mauritius and other senior judges concerning their handling of a particular case. Also convicted were the editor of the paper and its owner and publisher. The key issue raised was whether the offence of scandalising the court was inconsistent with the constitutional protection of freedom of expression. As in many other constitutions, this right is subject to qualification in respect of any law 'for the purpose of ... maintaining the authority and independence of the courts' and so long as it is shown to be 'reasonably justifiable in a democratic society'. In determining the latter point, Lord Steyn, giving the judgment of the Board, emphasised the need to take into account the size of the jurisdiction, stating:

'But it is impossible not to take into account that on a small island such as Mauritius the administration of justice is more vulnerable than in the United Kingdom. The need for the offence of scandalising the court on a small island is greater...'⁵⁰

He noted the narrow scope of the offence and concluded that 'the constitutional criterion that it must be necessary in a democratic society is in principle made out'.⁵¹ The constitutionality of the offence was confirmed.

In 2014 in *Dhooharika v Director of Public Prosecutions*,⁵² the Privy Council had the opportunity to re-consider the existence and scope of the offence of

⁴⁸ VI(b)(ii)

⁴⁹ [1999] UKPC 11; [1999] 2 AC 294

⁵⁰ At para 21

⁵¹ *Ibid*

⁵² [2014] 5 LRC 211

‘scandalising the court’ in Mauritius. In similar circumstances to those in *Ahnee*, the case involved the publication of articles by the appellant, the editor-in-chief of a local newspaper, *Samedi Plus*, which the Supreme Court of Mauritius found were ‘highly defamatory of the Chief Justice’ and that ‘Any reasonable reader would have concluded ... that the Chief Justice must have been guilty of serious wrongdoing’.⁵³ Accordingly Mr Dhoocharika was convicted of scandalising the court and sentenced to three months’ imprisonment and fined R300,000.⁵⁴

On appeal to the Privy Council, the Director of Public Prosecution supported the findings of the Supreme Court and contended, amongst other things, that ‘the administration of justice was more vulnerable in Mauritius than “in large and well established jurisdictions such as the United Kingdom”’.⁵⁵ Giving the judgment of the Board, Lord Clarke considered it inappropriate to depart from the decision in *Ahnee* and stated that ‘if the offence is to be abolished in Mauritius, it should be abolished by statute’.⁵⁶ As regards small states, Lord Clarke noted the views of Lord Steyn in *Ahnee* and commented that:

‘... although the Board would not now distinguish between small islands and larger territories merely on the grounds of size, it recognises that local conditions are relevant to the continued existence of the offence’.⁵⁷

It is unfortunate that the Privy Council in *Dhoocharika* was not prepared to revisit *Ahnee* and abolish the offence once and for all. As the later decision of the Swaziland Supreme Court in *Swaziland Independent Publishers (Pty) Ltd & Editor of*

⁵³ Para 18. It is not known whether any investigation into these allegations was ever carried out. However, they were referred to by the Court of Appeal of Lesotho in *President of the Court of Appeal v Prime Minister and Other* [2014] LSCA 1: see below.

⁵⁴ The owner and publisher of *Samedi Plus* were also prosecuted.

⁵⁵ Para 19

⁵⁶ The Board went on to consider the elements of the offence and made an important ruling in which the scope of the offence was strictly limited.

⁵⁷ Para 41

*the Nation v The King*⁵⁸ demonstrates, this reluctance only encourages the continued use of the offence in other small African states. The Swaziland case was yet another where a report in a local newspaper which was critical of the judiciary led to the prosecution for contempt of both the publisher and its editor. Again the issue revolved round the freedom of expression and restrictions thereon. In upholding the constitutionality of the offence, Maphalala, J in the High Court of Swaziland referred with approval to the views of Lord Steyn in *Ahnee* noted above.⁵⁹ That the size of the jurisdiction is a significant consideration is also inherent in the decision of the Supreme Court of Swaziland in the appeal where the court finds support from the case of *Dhoocharika*. Once again, the approach of the court focussed on the perceived damage to the administration of justice in a small jurisdiction caused by media criticism of the judiciary. This was said to be supported by the fact that the offence is 'known to the law of the 13 countries ... where it is still actively prosecuted' and it was 'not therefore, some local aberration peculiar to this Kingdom'.⁶⁰ As a result, the appeal against conviction was dismissed.⁶¹

Overall, for several reasons the recent decisions upholding the constitutionality of the offence of scandalising the court are deeply disturbing,

⁵⁸ [2014] SZSC 25. See the discussion below.

⁵⁹ [2013] SZHC 88 at para 95. The judgment was handed down prior to the decision of the Privy Council in *Dhoocharika*.

⁶⁰ Para 38. This was based on information referred to by the Privy Council in *Dhoocharika*.

⁶¹ Having condemned the writer of the article for his intemperate comments about a judge, Moore JA then provided his own final observation': 'Having plunged his contemptuous knife into the heart of the judiciary to its inglorious hilt, the author, as if infused with fiendish glee, could not resist the almost sadistic urge to give it one final twist by twice addressing the acting Chief Justice, whose office lies at the pinnacle of the judiciary of this Kingdom, by the title of "Your Worship"' (at para 77). Whether such a comment enhances the judiciary in the eyes of the public is debateable.

especially where it is said that the size of the jurisdiction or 'local conditions' make the need for the offence greater.

Firstly, it is curious that in none of the cases is any mention made of the vital importance of combating judicial corruption. In reality, this is the greatest threat to the administration of justice and not media criticism of judges, however harsh or intemperate. All jurisdictions, both large and small, face this menace and the concern is heightened by 'a tendency in some states to deny outright that any judicial corruption exists within them'.⁶² Whether they like it or not, judges and legislators must recognise that it exists and that it must be rooted out. It is this, more than anything else, that damages the judiciary and undermines the administration of justice in the eyes of the public.

Secondly, since 2000, in just 5 Commonwealth jurisdictions worldwide has the offence been successfully invoked.⁶³ Thus in the vast majority of states, both small and large, either the offence does not exist or it has fallen into disuse. It follows that, contrary to the views of the Supreme Court of Swaziland, in reality it is *maintaining* the offence that is some 'local aberration'.

Thirdly, where the offence is retained, a policy of non-prosecution must be adopted. An example of this good practice comes from events in Ghana in 2015 concerning the activities of an undercover reporter named Anas Aremeyaw Anas. According to media reports, over a two year period he secretly worked on a documentary which purported to show bribes being accepted by thirty-four judges, including twelve High Court judges. An attempt by one of the accused judges to have Anas committed for contempt of court was thwarted when the Attorney-General granted him immunity from prosecution.⁶⁴

⁶² See, for example, Resolution 1703 (2010) of the Council of Europe Parliamentary Assembly on 'Judicial Corruption' which deplores the fact that judicial corruption is 'deeply embedded' in many Council of Europe states: see para 8.

⁶³ See the Appendix to the *Dhoocharika* judgment.

⁶⁴ See *The Guardian* (UK) 24 September 2015: <http://www.theguardian.com/world/2015/sep/24/anas-aremeya-anas-ghana-corruption>

Fourthly, it is a ‘myth’ that the administration of justice in small states is more ‘vulnerable’ or that ‘local conditions are relevant to the continued existence of the offence’. Any justification for treating such states any differently is nowhere explored in the cases. Indeed to suggest that all such states fall into one category of perceived ‘vulnerability’ is to totally misrepresent the governance picture in such states. To emphasise, any such ‘vulnerability’ is far more likely to be the result of judicial corruption and abuse of office. It follows that local civil society organisations and media outlets play the key role in scrutinising the work of judges and the judiciary by investigating any allegations of corruption or other abuse of office and drawing these concerns to the attention of the public. It is precisely because they know, understand and can comment on the local situation that they are able to contribute significantly to upholding the requirement of UNCAC that States take steps to ‘... strengthen integrity and to prevent opportunities for corruption among members of the judiciary’. Such measures must surely include encouraging and facilitating local civil society organisations and media outlets to contribute to the strengthening of judicial integrity rather than seeking to silence them.

Fifthly, the use of the criminal law raises the danger of ‘selective prosecutions’, for example, where the offence is used as a tool to threaten or to silence political opponents and media critics or to prevent inquiries or criticism of pro-executive judgments which might indicate collusion between judges and politicians.⁶⁵ Again this is potentially a particular problem in small states (but certainly not limited thereto) where the offices of Attorney-General and Director of Public Prosecutions are often political appointments. There was no suggestion of this occurring in the *Dhooharika* case. Even so, it is worth noting that Mr Dhooharika’s conviction stemmed from his reporting of comments by a Mr Hurnam. Mr Hurnam himself gave a long and live national radio interview in which he made the same

⁶⁵ Indeed, this was seemingly the original basis for the development of the criminal offence: see Douglas Hay *Contempt by Scandalising the Court: A Political History on the First Hundred Years* (1987) 25(3) Osgoode Hall Law Journal 431. In the case of Lesotho, the International Commission of Jurists noted that ‘a perception of political influence in the appointment of judges already exists’. p.35

allegations as were reported in *Samedi Plus*. Yet whilst the dissemination of his views was made to a potentially much wider national audience, no action was seemingly taken against the broadcaster.⁶⁶

Finally, given the small pool of judges, it is also potentially places an unnecessary burden on other judges to hear and determine matters involving accusations against fellow judges and opens the judiciary to public concerns that such prosecutions are self-serving on the part of judges.⁶⁷

It is precisely because of these realities that protecting the freedom of expression in small states is so vital. Certainly, members of the media remain subject to criminal offences such as the bribery of judicial officers and incitement to hate crimes. Yet the continued use of the criminal law to stifle criticism of the judiciary is entirely unjustified. Further, there are also several realistic alternatives to dealing with allegations of media misconduct. As the Court of Appeal of Lesotho noted in *Prime Minister v Mahase*, the civil law is readily available to any judge who might wish to pursue their own civil remedies.

An additional safeguard might be to establish an independent body to investigate complaints against the media. Whilst some jurisdictions have established a separate 'media commission', in small states financial and other practical considerations mean such a mandate is probably best given to a national human rights commission or equivalent. In this way, the matter rightly becomes a strictly human rights issue.

It follows that legislators must consign the offence to history and if no action is taken, the courts must refuse to uphold the constitutionality of the offence of scandalising the court.

⁶⁶ This point was noted, albeit without comment, by Lord Clarke: see para 5.

⁶⁷ In practice, this problem may be partly off-set by the use of expatriate judges to hear such cases.

V. MAINTAINING JUDICIAL INTEGRITY AND INDEPENDENCE IN 'CONFLICT SITUATIONS'

Observing the Values of 'Integrity' and 'Propriety' set out in the Bangalore Principles is especially important in small states where public disputes between the judiciary and executive and between judges *inter se* are especially damaging and, as with allegations of judicial corruption, are liable to undermine public confidence in the administration of justice.⁶⁸

The background to, and the decision of, the Court of Appeal of Lesotho in *President of the Court of Appeal v Prime Minister and Others*⁶⁹ neatly illustrates both concerns. Here there had been an ongoing and widely reported dispute between the President of the Court of Appeal, Justice Ramodibedi, and the Chief Justice, Justice Lehohla, as to who was the more senior in the judicial hierarchy, the Constitution of Lesotho being silent on the matter.⁷⁰ Two incidents had caught the public attention and made headlines in the local media. Firstly, there was a bizarre event at the birthday celebrations of the King in July 2012. As recounted in the judgment of the Court of Appeal, 'the chauffeur-driven vehicles of the Chief Justice and the appellant were vying for preferential protocol treatment in a convoy leaving the venue of the celebrations. The vehicles executed dangerous manoeuvres nearly running down

⁶⁸ As the Commonwealth Plan of Action for Africa states: 'The independence of the Judiciary is a vital guarantee of a democratic society, and is built on the foundation of public confidence': para 2.2.2.

⁶⁹ [2014] LSCA 1

⁷⁰ As in the *Swaziland* case, this matter revolved around Justice Ramodibedi. That he held senior judicial offices in Swaziland, Lesotho and Botswana was not unexceptional but it seems unprecedented that a judicial officer in such circumstances should face the wrath of the media in two separate jurisdictions involving entirely separate allegations. It was also reported that in 2014 he had been subject to a month-long house arrest by the police in Swaziland on allegations that, among others, he had sexually harassed a female court employee: see *The Post* (Lesotho) 19 October 2015.

two bystanders in the process'.⁷¹ Secondly, matters came to a head when a special session of the Court of Appeal in January 2013 was cancelled largely due to the dispute between the two men as to which High Court judges should be appointed to sit in the appeal court. Justice Ramodibedi publicly blamed the Chief Justice for what had happened.

The public furore arising from the incidents led to a high-level International Commission of Jurists mission visiting Lesotho to investigate the matter.⁷² Their report *The Crisis of the Judicial Leadership in the Kingdom of Lesotho* (the ICJ report) is an in-depth account of the challenges to the maintenance of judicial independence and integrity in a small jurisdiction. In particular, the report highlights the damage that such disputes between senior judges has on the administration of justice and rightly emphasises the fact that: 'the public is not likely to have confidence in a judiciary that is led and behaves in this manner'.⁷³ It recommended that 'Prompt action must be taken against behaviour that is likely to bring the judiciary into disrepute in accordance with international standards The public is entitled to have steps taken against those who are entrusted with the administration of justice if

⁷¹ Para 4. A similar unseemly jostling for position took place between the Chief Justice of Gibraltar and Chief Minister of Gibraltar when the latter was given precedence in the grouping of those at the naval dockyard bidding farewell to the departing Governor. The Privy Council found that the Tribunal inquiring into his possible removal from office 'was justified in describing this as disgraceful behaviour, governed by pique that was inconsistent with the dignity of his office': see *Hearing on the Report of the Chief Justice of Gibraltar* (above) para 113.

⁷² The full background to the case is set out in *The Crisis of the Judicial Leadership in the Kingdom of Lesotho: Report of the High-Level Mission of the International Commission of Jurists in the Kingdom of Lesotho* International Commission of Jurists, Geneva, 2013, 12 *et seq.*

⁷³ At p.48. Value 4.1 of the Bangalore Principles states that 'A judge shall avoid impropriety and the appearance of impropriety in the judge's activities'.

their conduct falls below that expected of them. This is necessary to maintain public confidence in the judiciary.⁷⁴

The affair also raises some important matters relating to the relationship between the Judiciary and Executive. As the ICJ report also points out, 'it was most unfortunate' that the President of the Court of Appeal urged the Prime Minister and Minister of Justice to intervene.⁷⁵ This on the basis that as one of the three branches of government, protecting the independence of the judiciary is of paramount importance. Accordingly:

'... a judiciary that fails to resolve its internal issues and instead relies on the Executive to do so creates the perception that it is not independent and that undermines its independence. The judiciary as an institution and a coequal branch of government should be equipped with its own mechanisms for resolving its own internal problems'.⁷⁶

This makes the intervention of the Prime Minister into the dispute a matter of concern. In an effort to resolve the matter, he met with the Chief Justice who agreed to take early retirement. As the Court of Appeal noted:

'[The Prime Minister] then suggested to the appellant [Justice Ramodibedi] that he consider doing the same. The appellant took umbrage at the suggestion and expressed the view that this was an unconstitutional interference with his judicial independence'.⁷⁷

⁷⁴ At page 55. As regards the international standards, the Report refers specifically to Principles 17-20 of the *UN Basic Principles on the Independence of the Judiciary*, Section A(4)(q) and (r) of the *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa*; Principle VII (b) of the Commonwealth Principles, and Articles 27-31 of the *IBA Minimum Standards of Judicial Independence* (incorrectly cited as Minimum Standards of Judicial Conduct in the ICJ Report).

⁷⁵ At p.49

⁷⁶ At p.50

⁷⁷ Para 5. This is somewhat in contrast to his previous call for both the Prime Minister and Minister of Justice to intervene in his dispute with the Chief Justice.

As a result of this refusal, the Prime Minister then requested the King to exercise his powers under section 125(5) of the Constitution of Lesotho and appoint a tribunal to inquire into the removal of the appellant on grounds of misbehaviour or inability to perform the functions of that office. A lengthy list of allegations of misconduct provided as the grounds for impeachment. The appellant then brought an action for judicial review in the High Court arguing that on the basis of the *audi alteram partem* rule, he was entitled to make representations to the Prime Minister before any such request was made. The application was rejected and the case came before the Court of Appeal.⁷⁸ Here again the appellant argued that the decision of the Prime Minister to request the appointment of a tribunal of inquiry had been vitiated by non-compliance with the rules of natural justice.

The case raises two interlinked issues namely, the procedure for removing a judge and whether a judge has the right to make representations prior to the initiation of the removal process. As regards the former, the Commonwealth (Latimer House) Principles emphasise the need to provide 'proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of the independence of the judiciary...'.⁷⁹ In this regard the constitutional arrangements in Lesotho were unsatisfactory. In essence the Prime Minister was the only person who could request the establishment of a tribunal of inquiry and, once s/he had done so, the King was required to accede to the request.

The argument for a right to make prior representations to the Prime Minister was based on the view that a judge may be subject to unsubstantiated accusations which could be effectively addressed by him or her if given the opportunity. Further, as the Court of Appeal noted, 'a judge's reputation will inevitably be tainted by the appointment of a tribunal of inquiry into allegations of serious misconduct or incompetence against him or her'. Yet whilst the strict requirements of the *audi alteram* principles were not complied with, the Court of Appeal applied the more

⁷⁸ The quorum consisted of three expatriate judges. The use of such judges in apex courts in Lesotho, Swaziland and Botswana is commonplace given the relatively few cases that reach these courts.

⁷⁹ Para VII)(b)

flexible ‘procedural fairness’ test i.e. ‘whether in all the circumstances of the case the procedure that preceded the impugned decision was unfair’.⁸⁰ In the instant case, the court held that the Prime Minister’s decision did not affect the appellant’s tenure as President of the Court of Appeal and therefore the only potentially adverse effect of the decision was to the appellant’s reputation. In this regard, most of the allegations against him were in the public domain, including those mentioned in the ICJ report and the widely reported conflict with the Chief Justice.⁸¹ The appeal against the High Court’s dismissal of the appellant’s application was thus rejected.⁸²

The Lesotho affair provides two key lessons for judges. Firstly, the acrimonious and highly public dispute between the two senior judges highlights the responsibility of all members of the judiciary to observe and uphold the Values enshrined in Bangalore Principles. In this respect ‘Integrity’ requires a judge to ‘ensure that his or her behaviour is above reproach in the view of a reasonable observer’. Further, ‘the behaviour and conduct of a judge must reaffirm the people’s faith in the integrity of the judiciary’.⁸³

In addition, an effective code of judicial ethics and conduct is required ‘as a means of ensuring the accountability of judges’ and which contains a procedure for dealing with such disputes internally in accordance with the relevant international standards.⁸⁴

Secondly, as regards the protection of judicial independence, it emphasises the importance of ensuring that the Constitution addresses all the key issues relating to judicial independence, including ensuring that the decision to refer a judge to a

⁸⁰ Para 20

⁸¹ As the court noted, this was a very different situation to the case of *Rees v Crane* [1994] UKPC 4a in which a tribunal to investigate the removal of a judge had been established without the judge being given any information as to the reasons therefor or any opportunity to make prior representations.

⁸² Justice Ramodibedi later resigned as President of the Court of Appeal of Lesotho.

⁸³ Value 3.1 and 3.2

⁸⁴ LH Principle V).l.

tribunal is not left solely in the hands of the Executive and that a judge has the right to make representations regarding the possible establishment of a tribunal.

VI. CONCLUSION

Whilst the Bangalore Principles and the Commonwealth Principles are of general application, the cases considered in this article highlight the fact that members of the judiciary in small states can face special challenges in seeking to uphold judicial independence and integrity. They also provide a number of important lessons.

Firstly, public and media scrutiny of judicial decision-making and judicial conduct is especially acute in small states. As Fernando, JA put it in *Azemia v Republic*,⁸⁵ the result is that: 'high profile criminal cases in a small jurisdiction like ours ... puts the judiciary under severe social pressure and puts it to its utmost test in having to maintain its impartiality [and] independence ...'. Whatever that pressure, it is vital that judges uphold judicial integrity and independence.

Secondly, accepting criticism of their judgments is part and parcel of the job of judges and as Lord Denning has put it: 'We do not fear criticism, nor do we resent it'. However, judges do not now need to 'suffer in silence' but, where appropriate, may take the opportunity to respond to public and media criticism.

Thirdly, the Commonwealth Principles rightly state that: 'The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts'. There is no justification to retain the criminal offence simply because the matter arises in a small jurisdiction or due to 'local conditions'. It is the problem of judicial corruption and abuse of office in any jurisdiction that is the key reason for the administration of justice to fall into disrepute. Retaining the offence is therefore a 'local aberration'. Of course, as Lord Carswell has commented: 'There may be a point beyond which [judges] should not have to lie down and put up with the slings and arrows' but as he added 'there are other ways of dealing with it than this offence'.⁸⁶ For those judges aggrieved by media/public criticism, as the Court of

⁸⁵ See note 11

⁸⁶ House of Lords Debate (UK), 2 July 2012, c561

Appeal for Lesotho rightly pointed out in *Prime Minister v Mahase*, the courts are always available for them to pursue their ordinary civil remedies. Alternatively, as such criticism involves the constitutional right to freedom of expression and limitations thereon, a human rights commission (or media commission) can hear and determine complaints.

Finally, judges themselves must earn and retain the respect and support of the public and the media. Value 4.2 of the Bangalore Principles is particularly relevant to those in small states:

‘As a subject of constant public scrutiny, a judge ... shall conduct himself or herself in a way that is consistent with the dignity of judicial office’.

Disputes *inter se* must be dealt with internally and the antics of the two senior judges in the Lesotho case simply highlights the fact that it is the judges themselves who are sometimes responsible for bringing the administration of justice into disrepute.