

REFLECTIONS ON CONTINUING JUDICIAL LEARNING

Author: The Rt Hon Lord Justice Bernard McCloskey, Chairman, Judicial Studies Board for Northern Ireland

Overview

This paper offers a Northern Irish perspective on the subject of continuing judicial learning and education, together with some broader reflections of more global application. Except where otherwise indicated any views expressed are those of the author.

The Inalienable Judicial Duty

The starting point in Northern Ireland ('NI') is that continuing judicial learning is a contractual duty. It is contained in an express provision of the terms and conditions of appointment of every judicial office holder. This requires judges '... to attend conferences and courses organised by or on behalf of the Judicial Studies Board on subjects relevant to the work they do'.¹

Bearing in mind the tenets and full implications of the doctrine of the separation of powers, the duty of continuing judicial learning is also readily identifiable in the judicial oath of office. The person who swears, or affirms, the oath to '... do right to all manner of people after the laws and usages of the Realm ...' will scarcely be equipped to discharge this solemn promise if he or she is not in command of the relevant laws, the skills of judgecraft and other important insights as these evolve from time to time. Having regard to the constitutional setting of the judicial oath of office, it is tenable to suggest that the judicial duty of continuing learning is of constitutional stature. Moreover, given that the judicial oath of office is enshrined in statute, the judicial duty of continuing learning may also be viewed as a statutory one.² Furthermore, it is clear from the *Statement of Ethics for the Judiciary in Northern Ireland*, which enshrines the *Bangalore Principles of Judicial Conduct* that one of the six key values, 'competence and diligence', sounds directly on this question. In paragraph 7 of the *Statement*, it is noted that the pursuit of this value requires, *inter alia*, that every judge '... take reasonable steps to maintain and enhance the knowledge and skills necessary for the proper performance of judicial duties'. It is a further aspect of the rule of law that the quality of the courts should not be variable or inconsistent and that every member of the judicial cohort be properly equipped to deal with matters coming before them with equal levels of diligence, knowledge and competence.

Given the foregoing, the judicial duty of continuing learning is readily identifiable as an important aspect of the rule of law. It is also, of course, closely linked to individual personal conscience. It must be seen as a delible aspect of the privilege of judicial office. It is also a duty owed to one's judicial colleagues and, hence, a critical facet of the duty of judicial collegiality. One of the most obvious ways of performing this duty is by attendance at relevant seminars and lectures, particularly those arranged by any agency with judicial education responsibilities. However, it is generally held throughout the common law world

¹ Standard terms & conditions of appointment.

² section 19 of and Schedule 6 to the Justice (Northern Ireland) Act 2002.

that the duty is not confined to simply attending organised seminars and lectures. Rather it embraces appropriate self-learning. Furthermore, it seems unexceptionable to suggest that the quality, to be contrasted with the volume, of activities of the foregoing kind is a critical characteristic.

Judges should be aware that issues of training are regularly the focus of our political representatives and questions are raised from time to time in the Assembly about judicial training. Thus in recent months, there has been a Written Assembly Question about the training of Lay Magistrates in handling search warrant applications; and a question from a Justice Committee member on what information The Judicial Studies Board for Northern Ireland ('JSB') is providing to the judiciary in relation to the new domestic abuse offence.

A More Global Perspective

At the Commonwealth Law Conference 2021 ('CLC'), senior judges from around the world considered the duty of continuing judicial education to be of such obvious and fundamental importance that none of them was able to identify the *precise* source thereof in their respective jurisdictions. It was simply a given, something which no one can plausibly contest. Discussions focused on *inter alia* the direct nexus between the duty of continuing judicial learning and the constitutional doctrines of the rule of law and the independence of the judiciary. This discrete subject has the following ingredients. By these doctrines, judges are required to constantly maintain the highest standards of accountability. This has both individual and institutional dimensions. Given the nature and scope of the powers that are conferred on every newly appointed judge, public trust and confidence are essential. The maintenance of this public confidence and trust is fundamental to the efficacy and proper functioning of the administration of justice. In this way, the rule of law is protected and promoted. This analysis highlights, with some emphasis, that inadequate discharge of the individual and institutional duty of continuing judicial learning, in common with unacceptably delayed judgments, positively undermines the rule of law by eroding public trust and confidence in the judiciary. It also damages judicial collegiality. Furthermore, it inflicts reputational damage on the judicial organisation as a whole.

One striking theme emerging was that of the duty of continuing judicial learning and the duty to provide expeditious judgments being (a) of equal importance and (b) at the apex of all judicial duties. No one could plausibly dispute, of course, that every judgment must fundamentally satisfy the kite mark of *quality*. But is *excellence* an immutable requirement? In the real world, there is frequently a balance to be struck between quality and expedition. Attainment of the most elegant prose must sometimes be sacrificed. Furthermore, how can one find time for continuing learning under the pressures of unremitting hearings and judgment writing?

Another of the discrete subjects on the agenda at the recent CLC was that of judicial disciplinary measures. None of the senior judges who contributed to the presentations and deliberations demurred from the view that a failure to discharge the duty of continuing learning or that of producing expeditious judgments can in principle give rise to disciplinary (or comparable) action against the defaulting judicial office holder. This tool is especially sharp in certain countries of the civil law tradition. While in practice the Chief Justice or appointed presiding judge of the relevant tier should be able to oversee this by informal mechanisms, this topic is a challenging one and there is no single, universal model or solution. It would benefit from further research and debate.

As the foregoing demonstrates, the conduct of every member of any judicial organisation in these matters, and others, has repercussions for all other members of the organisation and the institution of the judiciary itself.

At the CLC there was also some NI support for the practice in certain jurisdictions of the legal profession having *some* say (eg by simply expressing views) in the training and continuing learning of judicial office holders – or, indeed, active joint judicial/profession events (as in the NI Chancery Court event in February 2021). Should there be informal consultation with appropriate representatives of the Law Society and the Bar Council as well as greater engagement?

The British Islands: A Snapshot

The JSB has gathered information on the arrangements for continuing judicial education in the three neighbouring jurisdictions of Ireland, Scotland and England/Wales. While the mechanics in all four jurisdictions differ, the common denominator is the underlying judicial duty. This information makes clear that, as in NI, the duty of provision and oversight ultimately rests with the presiding judge of the judicial organisation or, as the case may be, the presiding judge of individual chambers/tiers. In some of the jurisdictions, there are minimum training requirements. In none of the jurisdictions is there any suggestion that compliance with these requirements constitutes full discharge of the judicial duty in question. Notably, completion of post-training evaluation questionnaires is viewed as a discrete facet of the judicial duty in play. It is clear that all four British Isles jurisdictions view continuing judicial learning as a matter of greater importance than ever before. This is linked to *inter alia* the ever-increasing complexities of the law and the requirement to manage courts in ways that reflect and preserve important societal values in regard to eg diversity, equality and the treatment of vulnerable complainants/witnesses, among other things. It is also based on the expectations of the public and the legal profession.

Enter Lord Bingham

I gladly borrow the *ipsisima verba* of Lord Bingham of Cornhill:³ In the context of his discourse on judicial independence, he said the following:

Although it is not very long since the need for judicial education and training in this country came to be recognised, I doubt whether anyone now questions the potential benefits to be gained. Such programmes no longer need to be disguised as ‘judicial studies’ to make them acceptable. Indeed, one of the most potent concerns provoked by Lord Wolff’s proposals is whether adequate funds will be forthcoming to provide the training for which the new procedures will call. It is, however, as I would suggest, essential, if judicial education is to promote the end of judicial independence, that control of the content and form of such education should rest squarely in the hands of the judges themselves and such agencies as they may employ, as it now does. It is obvious that if control of the education and training of judges did not rest in the hands of the judges themselves, but in those of the executive, it would become possible for judicial independence to be subverted and not

³ Lord Bingham, *The Business of Judging: Selected Essays and Speeches: 1985-1999* (OUP 2011) 17.

promoted. It would, in short, become possible for the state to instruct judges how they should decide cases ...

The Judicial Studies Board discharges an ever more important function; but it has no function more important than the protection of judicial autonomy in this field ...⁴

Notably, Lord Bingham made these observations in the context of his discourse on judicial independence, while the second, and related theme is judicial control over their continuing education.

The Judicial Studies Board for Northern Ireland (NI)

It is clear from the relevant provision in the terms and conditions of judicial appointment that the Chief Justice of NI has a leading role to play in the matter of continuing judicial learning. This is readily linked to section 12(1A) of the Justice Act, whereby the Chief Justice holds the office of 'President of the Courts of Northern Ireland and (is) Head of the Judiciary of Northern Ireland'. The duty is more specifically expressed in section 12(1B)(c): 'As President of the Courts of Northern Ireland (the LCJ) is responsible ... for the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of Northern Ireland within the resources made available by the Lord Chancellor ...' There is nothing to suggest that the aforementioned duty cannot be discharged, as a minimum in substantial part, via the mechanism of the JSB and the arrangements pertaining thereto and by other mechanisms. In this respect, the JSB is pivotal in the Northern Ireland arrangements.

The Board of the JSB is responsible for overseeing training for all judicial tiers. The services which the JSB provides to the NI judiciary are:

- Programmes of induction training for newly appointed judges;
- An annual programme of judicial training to include a mixture of workshops and seminars;
- To approve funding for attendance at non-JSB events;
- To evaluate all training provided and make alterations and improvements as required;
- To maintain and develop effective working relationships with the training bodies of other jurisdictions; and
- To approve the provision and maintenance of Bench Books and other guidance materials for the judiciary.

Attendance at and participation in JSB organised events

The Chief Justice has the responsibility for ensuring attendance at and participation in JSB organised events at every judicial tier (see above). This is a responsibility which in principle is delegable eg to a Lord Justice of Appeal as regards the senior judicial tier (the Court of Judicature), and the presiding judges of other judicial tiers.

Some NI judges may be unaware that the JSB maintains individual judicial training records. These are based on, firstly, the registration signature of judges at events. The individual

⁴ *ibid.*

judicial record will also include information about attendance at external events – seminars and conferences etc. In some instances, the JSB may have no information about such attendances. Thus judges must be proactive in this respect. It is unclear whether, as a matter of law, judicial training records would be subject to FOIA disclosure. Even if there were some legal basis upon which such disclosure could be resisted, the question of whether it would be politic to do so would require careful reflection. Recently, the JSB has proactively attempted to secure the views and proposals of judicial office holders on topics for training and learning. While this is not especially novel, finding an effective mechanism for doing this has proved elusive. Other mechanisms are being actively explored. The JSB is nothing if not flexible in the matter of how it discharges its responsibilities. Closer interaction between the Board and the judicial office holders that it serves would be welcome. Sectoral leadership judges have a responsibility in this respect. One of the elephants in the room is that of compulsory continuous judicial learning. Finally, in the NI JSB system, the importance of completing the feedback forms circulated following every training event cannot be over-emphasised. This is of fundamental importance to the efficient and efficacious operation of the JSB and, hence, vital to the discharge of the Chief Justice's statutory duty and the performance of the individual duties of every judge.

There are few saints occupying judicial office. This is the indelible mark of Cain. However, the typical judicial office holder is a person of high integrity and strong commitment to the values and standards discussed in this paper. Complacency is one of the arch enemies of the rule of law. So please disagree with any or all of the foregoing text. But kindly do not opt to do nothing – in your courts, judicial associations, social/community/religious/sporting/student/ recreational activities and groupings et al. The sustained value and vigour of the rule of law depend on all of us in every aspect of our lives.