Judicial Education and Judicial Independence:
Paper given at the 2021 Commonwealth Law Conference
Nassau, The Bahamas, 6 September 2021

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The link between judicial education and an efficient judiciary is, one hopes, obvious. But in order to ensure judicial independence, contemporary wisdom has it, judicial education should also be in the hands of the judiciary. Absent such control, there is a risk that judges may be indoctrinated by interested actors and their independence compromised. To put it more bluntly, that they might become government stooges.

Recent declarations on judicial independence explicitly make this connection. The Commonwealth Magistrates and Judges' Association 1994 Victoria Falls Proclamation 'For an Independence Judiciary Through Judicial Education' refers to:

> *the vital role of an independent judiciary in realising the Commonwealth vision of a just and progressive society, and of the value of judicial education in securing and strengthening such a judiciary.*

The Victoria Falls Proclamation also indicates that one of the purposes of judicial education is to educate judges about what judicial independence means, and states that:

> *Provision of formal and informal instruction for judges and magistrates in the performance of their duties, in their responsibilities as independent adjudicators, and in the laws and procedures which they are required to apply is an essential element in a modern and fair legal system.*

The 2003 Commonwealth Latimer House Principles provide that:

> *A culture of judicial education should be developed.*
>
> *Training should be organised, systematic and ongoing and under the control of an adequately funded judicial body.*

The Organization for Judicial Training's 2017 Declaration of Judicial Training Principles states that: 'Judicial training is fundamental to judicial independence, the rule of law, and the protection of the rights of all people.' Indeed, the subject was even addressed by the late, great Tom Bingham:

> *It is* [he said] *… 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* [in England and Wales].

Some critics, however, have been more sceptical about judicial control of judicial education. Two issues in particular have been highlighted.

1) Judicial control of education often justified on basis of expertise as well as need to protect independence. But judges are not pedagogues (and their view of what judging does, or should, entail are often untheorized), nor are they particularly representative of society. So they may not know either what they should be teaching or how best to teach it. For this reason, some jurisdictions have sought to integrate other voices into discussions about judicial education, as with the 'three pillars' approached adopted in Canada which considers input from judges, academics and the community.

2) Another danger unmitigated by judicial control of judicial education is regulatory capture. This is defined as 'the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself.' Indeed, even if other voices are integrated into discussions, the danger exists that they might seek to subvert the process to privilege their interests over the general interest.

Such concerns have recently been raised in England and Wales with regard to the Equal Treatment Bench Book.

The Equal Treatment Bench Book is a publication of the Judicial College, the body which exercises the Lord Chief Justice of England and Wales' responsibility for judicial education under the 2005 Constitutional Reform Act. According to the book's foreword,

> *It is used, daily, by the Judiciary of England and Wales. It is referred to in their training courses and commended by the appellate courts. It is admired and envied by judiciaries across the globe.*

According to its Introduction, the Bench Book seeks to build on judges' understanding of the fundamental principles of fair treatment and equality embodied in the judicial oath. 'It is not intended to be prescriptive, but simply to inform, assist and guide.' However, the Introduction also states that: 'Although the Bench Book does not express the law, judges are encouraged to take its guidance into account wherever applicable.'

It is fair to say that the Bench Book, at 561 pages, is a rather 'baggy monster'. It covers a range of issues and is often expressed at a high degree of generality. For example, it includes quite a number of statements such as that '[l]ack of eye contact can appear

evasive, bored or disrespectful by some cultures, but indicative of respect by others', which is interesting as far as it goes but perhaps rather lacking in specificity.

Controversy has recently arisen, however, about the Bench Book's Chapter 12 on trans people. Trans people's rights and their interaction with women's rights are issues which have moved up the political agenda in recent years in the UK. I am not going to address the merits of the dispute. Nor am I going to opine on whether, as a recent paper published by the UK think tank Policy Exchange argued, 'the Equal Treatment Bench Book needs urgent revision'. But what I do want to do is discuss a couple of issues that its use in the recent Forstater case highlights.

The claimant in Forstater had been a consultant with the respondent, the Centre for Global Development. When her consultancy agreement was not renewed by the respondent Ms Forstater brought a claim against it for belief and sex discrimination. She argued that the relationship had come to an end because she had expressed 'gender critical' opinions: in particular, that sex is immutable, whatever a person's stated gender identity. As the t-shirt worn by some gender critical campaigners says, their view is that 'trans women are men'. Ms Forstater argued that her views were a philosophical belief and that she had been subject to subject to direct discrimination because of them, or had suffered indirect sex discrimination because such views were more likely to be held by women than men.

At first instance, the Employment Judge held that her belief was not a philosophical belief protected by the Equality Act 2010 because it was not worthy of respect in a democratic society. The Employment Appeal Tribunal, however, thought otherwise. Ms Forstater's gender-critical beliefs, the EAT considered, were widely shared and did not seek to destroy the rights of trans persons, and so did not fall within the category of beliefs outside the protection of the Equality Act, which only included beliefs the expression of which would be akin to Nazism or totalitarianism. Consequently, the EAT remitted the

matter to a freshly constituted Tribunal to determine whether the treatment about which the claimant complained was because of or related to her belief.

Both the Employment Judge and the Employment Appeal Tribunal relied heavily on the Equal Treatment Bench Book to set out the factual matrix of the case. As Employment Judge Tayler said in his judgment: 'Women and transgender people often face serious discrimination and violence. The commentary in the Equal Treatment Bench Book provides a useful summary'. The Employment Judge also stated:

> *Many trans people are happy to discuss their trans status. Others are not and/or consider it of vital importance not to be misgendered. The Equal Treatment Bench Book notes the TUC survey that refers to people having their transgender status disclosed against their will.*

Choudhury J's judgment in the Employment Appeal Tribunal referred to:

> *The regrettable reality for many trans persons, however, is that something which most take for granted - the sense of self and autonomy in identity - is under constant challenge and attack. As stated in the Equal Treatment Bench Book…*

The judge then went on the quote four paragraphs from the Equal Treatment Bench Book.

It is also argued that the Bench Book's treatment of the issues is reflected more widely in both judgments. This reliance has been criticised on the basis that the Bench Book is (or should be) 'a guide to helping judges hear cases fairly… not a guide to the underlying facts about any particular minority.' Fundamentally, the argument was that reliance on the Equal Treatment Bench Book led to a pre-judging of the issues in the case (although it will be noted that the two tribunals disagreed in their conclusions).

In addition, it has been argued that 'the language and concepts used in the Bench Book… closely resemble those used by some campaigning groups', with Stonewall and the Gender Identity Research and Education Society being specifically mentioned. It is undoubtedly the case that publications by Stonewall are, among others, referred to in the bibliography to the chapter.

Whether the authors simply relied on publications by Stonewall or whether Stonewall (or, indeed, any other organisation) was consulted, and thus involved, in the drafting of the Bench Book is unclear. In the wake of the Employment Tribunal's decision in Forstater, the Law Society Gazette reported that:

> *The Judicial College declined to identify the external experts and organisations that assist in training and formulation of policy. 'It is not necessary or in the public interest to make public the names of all those involved in this work,' it said.*

Attempts using the Freedom of Information Act to discover whether particular organisations have been involved in judicial training have been similarly unsuccessful. Responses have stated that:

> *Judicial training is provided by the judiciary, which is not a public body for the purposes of the FOIA… and requests concerning training materials, the content of training for the judiciary, the providers of training and the names of judicial office holders who attended specific training events are therefore outside the scope of the FOIA.*

It is, however, a matter of public record that in 2019 the organization Gendered Intelligence (which describes itself as a 'registered charity that exists to increase understandings of gender diversity and improve trans people's quality of life') delivered 'trans awareness' training to judges of the Employment and the Asylum and Immigration Tribunals. As the Policy Exchange paper points out, Gendered Intelligence, together

several other trans rights groups, is currently bringing judicial review proceedings against the Charity Commission for registering the LGB Alliance (a 'gender-critical' campaign group) as a charity.

So although the controversy focused largely on whether the Equal Treatment Bench Book accurately reflects the law and the facts concerning trans people, it raised wider issues.

1) The status of materials provided in the course of judicial education, and in particular, the degree of authority ascribed to them. The Equal Treatment Bench Book says it is only guidance but seems to be treated as authoritative source. One might ask whether this appropriate.

2) The contribution of organisations external to the judiciary in the production of such materials and the extent to which such contributions should be publicly acknowledged. In both cases one might extend the question to cover judicial education more widely.

Judicial independence is not only about the independence of the judiciary as a branch of government. It is also about the independence of the judge as decision-maker. Judges are, of course, bound by precedent, however that might apply to them. But the way to correct a judge's mistakes on the law or the facts of a case is through the appeal process, not by the application of other forms of pressure or influence.

This was made clear in a recent letter sent by the Private Secretary to the Lord Chief Justice of England and Wales in a letter sent to five MPs who had sent a group letter to Lady Justice Thirwall, Senior Presiding Judge for England and Wales, and Mrs Justice Sharp, President of the Queen's Bench Division. The letter expressed concern about how another judge, Mrs Justice Whipple, might decide an application before her for the release

of pre-sentencing character references given in a trial she had presided over, and was copied to that judge.

The reply stated that:

> *It is… improper to suggest that senior judges should in some way intervene to influence the decision of another judge. The independence of the judges extends to being free from interference by judicial colleagues or superiors in their decision making. Judicial independence requires that the senior judiciary, and the two judges to whom you have written, can play no role in influencing the way in which another judge, in this case Mrs Justice Whipple, conducts a case.*
>
> *Judges must be free to make their decision independently of pressure or influence from all, including legislators.*

When then does judicial education trespass on the independence of the individual judge? That is a nice question (not least because education is always about socialisation) but, crucially, it is not one answered by putting judicial education in the hands of the judiciary.