Institution: BRUNEL UNIVERSITY (H0113)

Unit of Assessment: 20 – Law

Title of case study: Challenges to long-established judicial accountability norms

1. Summary of the impact (indicative maximum 100 words)

Olowofoyeku's research on judicial accountability challenges long-established norms in the Anglo-American legal traditions. These challenges have been recognised by judicial authorities at the highest levels and have influenced and informed practitioner and judicial debates on the matter. While no changes have yet been made to the law as a result of this research, the limits of the current principles, as highlighted in Olowofoyeku's research, particularly in respect of the flaws of the common law construct of the informed observer, have been confronted and recognised by judges in their decisions, and also by practitioners.

2. Underpinning research (indicative maximum 500 words)

Olowofoyeku's research has focused on the general question of "who judges the judges?" It endeavours to balance the demands of judicial independence with the requirements of judicial accountability. It has postulated that the balance in many cases is unduly tilted towards independence, at the expense of accountability, and that remedial measures are required. His monographs "*The Law of Judicial Immunities in Nigeria*" (Spectrum, 1993), and "*Suing judges*" (Oxford, 1993) were the first major outputs of this research, and were followed by further outputs in scholarly journals and edited collections. These outputs focused on judicial accountability via liability, and argued that the long-established norms of absolute judicial immunity were unjustifiable.

Olowofoyeku's research extends the accountability agenda to issues of judicial bias and impartiality. Again, it unearthed fundamental flaws in the established norms. So in 2000 (*Public Law*), Olowofoyeku uncovered the flaws in the common law principle of automatic disqualification for bias, both as a general principle of judicial accountability, and, more particularly, as extended by the House of Lords in the *Pinochet* case. Subsequently, in two journal articles in 2006 (*Public Law*, and *Singapore Journal of Legal Studies*), he challenged the approaches of the US Supreme Court to judicial recusals within the Court, and suggested different approaches. In a 2009 article (*CLJ*), he examined the modern approach of the House of Lords to judicial bias, and challenged the common law's main construct in this area – the interposition of the "informed observer". He argued in favour of a return to the discarded approach of the House of Lords in *R v Gough*, in which the reviewing court personifies the reasonable person. In a 2012 article (*AJICL*), he challenged aspects of the recusal law of the East African Court of Justice, a sub-regional court that sought to extend the common law judicial bias jurisprudence into the sub-regional space.

The outputs presenting Olowofoyeku's research are substantial, original, scholarly, pieces which have been and are still being cited widely in the academic literature. The research has also been cited by legal practitioners and judges. For example, the 2000 *Nemo iudex* article was cited in De Smith's Judicial Review (6th edn., 2007, p.515); by The Rt. Hon. Dame Sian Elias, Chief Justice of New Zealand, in "*Impartiality in Judging and the Passions of Mankind*" (Address Given to The Singapore Academy of Law, 3 November 2004); and by academics (e.g., Stephen Tierney, *Constitutionalising the role of the judge: Scotland and the new order* [2001] Edinburgh Law Review, 49-72, at 57; Simon Atrill, *Who is the "fair-minded and informed observer"? Bias after Magill* [2003] CLJ 279-289, at 288. It was identified as one of the significant articles of 2000 by Nicholas Bamforth, *Significant Academic Articles of 2000* [2001] 6(3) JR 180–187, at 181.

In addition to citations in academic literature, the 2009 article has been cited in Halsburys Laws of England, 2009 Annual Abridgement, and by practitioners (e.g., Holly Stout (2011); Philip Havers QC and Alasdair Henderson (2011)).

3. References to the research (indicative maximum of six references)

- OLOWOFOYEKU, A, *Sub-regional Courts and the Recusal Issue: Emergent Practice of the East African Court of Justice* (2012, African Journal of International and Comparative Law, 20(3), pp 365-387). http://dx.doi.org/10.3366/ajicl.2012.0041

- OLOWOFOYEKU, A, *Bias and the Informed Observer: A call for a return to Gough* (2009, Cambridge Law Journal, pp 388-409). http://dx.doi.org/10.1017/S0008197309000373
- OLOWOFOYEKU, A, *Regulating Supreme Court Recusals* (2006, Singapore Journal of Legal Studies pp 60-85). Accessible via http://bura.brunel.ac.uk/handle/2438/417
- OLOWOFOYEKU, A, *Subjective Objectivity: Judicial Impartiality and Social Intercourse in the US Supreme Court* (2006, Public Law pp 15-34).
- OLOWOFOYEKU, A, *Accountability versus Independence: The Impact of Judicial Immunity*, in Canivet, G., Andenas, M., and Fairgrieve, D., Independence, Accountability and the Judiciary (pp 357-383 (London, BIICL 2006)).
- OLOWOFOYEKU, A, *The nemo iudex rule: the case against automatic disqualification* (2000, Public Law, pp 456-475).

4. Details of the impact (indicative maximum 750 words)

Impact on Practitioners;
The 2009 article has influenced practitioner debate, particularly on the issue of the utility of the "informed observer" in cases of apprehended bias. Holly Stout (11 King's Bench Walk) cited the article thus; '*Indeed, one academic, having listed over some three lengthy paragraphs all the characteristics that judges have said should be imputed to the fair-minded observer, has observed: "If one were to attempt to describe the attributes of the Archangel Michael, one could not do much better"*', and then proceeded to highlight the difficulties of this construct, mirroring many of Olowofoyeku's arguments.

Similarly, Philip Havers QC and Alasdair Henderson (1 Crown Office Row), noted that it was increasingly becoming apparent that the concept of the "fair-minded and informed observer" is a difficult one to apply in practice. Referring to Olowofoyeku, they noted that "*Other commentators have conducted a far more exhaustive analysis than is possible here of the flaws in the concept*", and explicitly adopted Olowofoyeku's critique.

Thus Olowofoyeku's critique of the informed observer and identification of the construct as one that is seriously flawed have been accepted and adopted as the new received wisdom on the issue of bias by practitioners in the field of public law.

Impact on judicial reasoning and decision-making;
The "*Bias and the Informed Observer*" article (2009) was cited by the High Court of Australia in *British American Tobacco Australia Services* (2011). French CJ analysed the development of the test for apprehended bias in the UK and Australia, and (at [36]) completed that analysis with a reference to Olowofoyeku's "critique of the fair-minded and informed observer in Olowofoyeku 'Bias and the Informed Observer …".

French CJ (at [48]) accepted Olowofoyeku's argument that interposition of the fair-minded lay person by the common law could never disguise the reality that it is the assessment of the court dealing with a claim of apparent bias that determines that claim. In so doing, French CJ took a direct quotation from Olowofoyeku's 2009 article, viz., '*In the end, despite the pitch on objectivity and the view that the apprehensions of bias must have an objective basis, it is the opinion of the reviewing court on this issue that matters*.'

Subsequently, French CJ referred to Olowofoyeku's "*view that the judicial construct of the informed observer no longer provides a reliable guide to decision-making on the issue of apparent bias*". His response to this argument by Olowofoyeku was that "*the utility of the construct is that it reminds the judges making such decisions of the need to view the circumstances of claimed apparent bias, as best they can, through the eyes of non-judicial observers. In so doing they will not have recourse to all the information that a judge or practising lawyer would have. It requires the judges to identify the information on which they are to make their determinations.*" French CJ conceded, in line with Olowofoyeku's arguments, that "*it is necessary to be realistic about the limitations of the test*", but felt that the test "*retains its utility as a guide to decision-making in this difficult area*".

Olowofoyeku's research has informed judicial decision-making at the highest level, and has

brought to the minds of very senior judges (and, by extension, legal practitioners, litigants, and law students) the point that long-established common law principles are susceptible to serious contestations.

Issues of judicial bias and recusals are topical globally, and decisions of the High Court of Australia are influential throughout the common law world. Recognition and acceptance by the High Court of Australia of Olowofoyeku's research in this area, first, as having helped to shape the development of recusal law, and, secondly, as having strongly challenged the main construct (the impartial observer) of common law legal systems in this area, extends the reach of the impact to virtually the entire English-speaking world. In spite of French CJ's view that the "impartial observer" test retains its utility, Olowofoyeku's work has forced courts to confront this large chink the armour of the common law and to accept that the erstwhile received common law wisdom is assailable. It has also helped to improve awareness and understanding of the hitherto hidden tensions and difficulties inherent in a construct that had long remained uncontested.

5. Sources to corroborate the impact (indicative maximum of 10 references)

- *British American Tobacco Australia Services Ltd v Laurie and Others* [2011] HCA 2, at [36] and [48]
- Holly Stout (**11 King's Bench Walk**) "*Bias*" [2011] 16(4) Judicial Review 458–482, at 461
- Philip Havers QC & Alasdair Henderson (**1 Crown Office Row**) *"Recent Developments (and Problems) in the Law on Bias"* [2011] 16(2) JR 80–93, at 82.