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EDITORIAL

This *Journal* has readers throughout the Commonwealth, judges and magistrates who serve in very different conditions and exercise many different types of jurisdiction. That range of experience and interests is well reflected in this issue.

Since the last issue went to press, Mrs Justice Georgina Wood of Ghana has joined the small but very distinguished band of female Chief Justices. We offer her our congratulations and publish a Profile of her in this issue. From another part of Africa, Justice Leona Theron's paper gives a very personal account of the struggle of South African women first to join the legal profession and then to serve in the judiciary.

Specialist jurisdictions such as commercial courts do not often get a mention in the *Journal*. In this issue, we make up for that omission with three related pieces, all from the CMJA's Toronto conference. One, from Cyprus, examines the case for such courts, and we then have two case-studies from very different parts of the Commonwealth, Uganda and Ontario.

Court delays and 'the adjournment culture' featured in the cases noted in our last issue, and Judge John Phillips now gives an account of the success achieved in England and Wales in dealing with this problem, but also noting the criticisms some approaches attract.

We have two papers from the Caribbean. Justice Adrian Saunders' address on the development of human rights jurisprudence in that region is of some general importance. It raises the issue whether the clear cultural differences between different regions of the Commonwealth must inevitably preclude a shared understanding of human rights. Or, putting the same question another way, whether there are truly international norms for human rights decisions or a need for a considerable 'margin of appreciation' at the regional level. Drugs courts have become a feature of a number of legal systems, and in the second paper from the Caribbean, Justice Williams provides a very clear analysis of the practical workings of those established in Jamaica.

To complete the remarkable geographical coverage in this issue, we print an account by Fred Field of the work of magistrates in South Australia, with especial reference to work involving aborigines.

Judicial independence is a constant theme of the CMJA and so of this *Journal*. Lord Phillips of Worth Matravers CJ gave an address on this topic to the Commonwealth Law Conference in September. It was particularly interesting for its account of the tensions which arose in England between the judiciary and the Government, tensions which have not yet been fully resolved. A related issue, about ministerial criticism of judicial decisions, arose recently in Scotland, where the Lord Justice General rebuked the Lord Advocate for publicly asserting in the Scottish Parliament that the decision of a judge in a murder trial was wrong. The Latimer House guidelines wisely observe that 'While dialogue between the judiciary and government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence'.

As this issue was being prepared for publication, news came of the much more serious assault on judicial independence in Pakistan with the declaration of a state of emergency and the purported dismissal and replacement of the Chief Justice and other Supreme Court judges and the detention of many leaders of the Bar. We shall watch events with much concern.

On a personal note, it was my privilege recently to be present at meetings in London of law ministers, attorneys-general and senior officials of Law Ministries from many parts of the Commonwealth. The CMJA was much in evidence at those meetings and our Executive Vice-President contributed a paper. The discussions revealed the continuing vitality of Commonwealth co-operation, both at the official level and in the range of partner bodies of which the CMJA is one. I was reminded once again of the enormous value of direct personal contact with those from very different regions of the Commonwealth. Challenges vary, resources even more so, but the common devotion to the Rule of Law is a great strength.

The Editor welcomes contributions of previously unpublished work, such as articles, reviews, essays. Contributions, ideally no more than 3,000 words, should be sent to the Editor, Commonwealth Judicial Journal, c/o CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX.

The views expressed in this Journal are not necessarily the views of the Editorial Board, but reflect the views of individual contributors.

PROFILE

The Honourable Mrs Justice Georgina Theodora Wood
Chief Justice of the Republic of Ghana

The appointment of the Hon Mrs Justice Georgina Wood as Chief Justice of Ghana is a very significant, indeed historic, event. It is the first time in the history of Ghana that a woman has occupied this post, which, in the hierarchical order, makes her only the fourth citizen of Ghana, after the President, Vice President and the Speaker of Parliament. She was awarded the Star of the Order of Ghana, the highest national award, in July 2007.

Mrs. Justice Wood was born on 8th June 1947. She studied Law at the University of Ghana and after graduating from the Law School, began her working life as a Public Prosecutor with the Ghana Police Service where she served for two years. She then moved to the Judicial Service of Ghana in 1973 as a District Court Magistrate. She gradually realised that service on the Bench was very onerous and challenging, and therefore made a silent resolution ‘to ride at the very crest of the howling waves’.

Her exceptional rate of work, her commitment, dedication and output were soon recognised. She was elevated to the Superior bench of Ghana as High Court Judge in 1986. In 1991 she was appointed to the Court of Appeals, and (after declining an earlier offer) was elevated to the highest court of the land, the Supreme Court, in 2002. In the following year, she agreed to serve also on the Supreme Court of the Republic of The Gambia, (another West African sovereign State). In 2006 what became known as the Georgina Wood Committee was set up to investigate allegations of drugs-related bribery of senior police officers.

Mr Justice Mensah Quaye of the Ghana Court of Appeal has written that many years ago he was much struck by the way a young circuit judge whom he encountered conducted judicial business. That he himself became a judge owed much to the impression she created. The circuit judge was the future Chief Justice Wood.

She has taken a particular interest in ADR (alternative dispute resolution), leading the Ghana Judicial Service’s Committee on ADR and co-authoring a manual on ADR for The Gambia. At the parliamentary hearing which led to the unanimous confirmation of her appointment, she promised to pay close attention to judicial integrity and ethics (through sustained human



resource development and training in particular); she saw this as the backbone of any credible or trustworthy institution.

The Chief Justice has a keen interest in judicial education. She herself attended courses at California State University and the International Law Institute of Georgetown University and is anxious to extend the work of the Judicial Training Institute. She hopes to see it recruiting a faculty made up primarily of members of the judiciary. ‘There is no better way of improving your own knowledge than teaching others. Teaching compels you to research and it also builds confidence’. In an interview given to the Commonwealth Judicial Education Institute she spoke of a general complaint about the delays encountered by those who access the courts. An increase in litigation, which she sees as a by-product of development, had not been matched by a corresponding increase in resources, and therefore the building of more court houses and the appointment and retention of more judges was a priority issue.

She summed up her priorities as continuing the work of her predecessor, the late Chief Justice G. K. Acquah under the theme ‘Access to Justice’ but with a sub-theme: ‘Entrenching judicial integrity and capacity’ The vision she has is of building a trustworthy and credible judiciary with a commitment to timely, efficient and effective delivery of justice, fuelled by a passion for integrity.

GENDER EQUALITY: A SOUTH AFRICAN PERSPECTIVE

*The Hon. Justice Leona Theron, Acting Justice of Appeal, Supreme Court of Appeal, South Africa.
A paper from the CMJA conference in Bermuda, 2007*

First some background information about South Africa, so that you can place what I say in context. Questions about South Africa were posted on a tourism website, some of which were very funny. An American asked 'Will I be able to see elephants in the street?' The answer that was posted was 'it depends on how much you have been drinking'. Another asked: 'Will I be able to speak English most places I go'. And the answer that was posted was: 'Yes, but you will have to learn it first'.

The 2007 mid-year population of South Africa is estimated at 47.9 million, of which 24.3 million (51%) are female. 21% of women over the age of 20 are illiterate. There are 11 official languages in South Africa. We use two languages as languages of record in court, namely English and Afrikaans and use is made of interpreters for the other languages. The province that I hail from, KwaZulu/Natal, has the largest share, about 21%, of the population. Life expectancy is estimated at 49 years for males and 52 years for females.

The next one is a very frightening statistic. The estimated overall HIV-prevalence rate is 11%. The HIV positive population is estimated at 5.3 million.

The seat of Parliament is in Cape Town. The seat of the Supreme Court of Appeal is in Bloemfontein. The Supreme Court of Appeal is the highest court in the land on questions of fact and non-constitutional matters. The Constitutional Court, which sits in Johannesburg on Constitution Hill, is the highest court in the land on all constitutional matters.

The seat of the Constitutional Court is steeped in history. In 1893 a high-security prison was built in Johannesburg. A few years later, the building of a series of forts around it strengthened the establishment and gave it military capacity. The complex became a notorious prison known as the Johannesburg Fort. Hundreds of thousands of people were jailed there, including famous figures such as

Mahatma Gandhi and Nelson Mandela. The prison was closed in 1983, leaving a scar on Johannesburg's metropolis, a bleak reminder of our painful past. It is unusual for a court to be built on the site of a prison, yet the Constitutional Court's judges deliberately chose the Old Fort, for the very reason of its history.

August is women's month in South Africa. Women's month is celebrated as a reminder of the contribution made by women to society, the achievements that have been made for women's rights, and to acknowledge the difficulties and prejudices many women still face. The history of women's month is traced back to 9 August 1956, when twenty thousand women from all over South Africa staged a march on the Union Buildings, to protest against the pass laws. Previously pass laws had only applied to men and the government wanted to extend this to women. Pass laws restricted black people to be in certain areas only and they could only be in so-called white areas if they had a reason to be there such as for work and then only at certain times as well. And when the government wanted to extend this to apply to women the women revolted and that is when the women's campaign began.

The legal profession and judiciary

In South Africa, the legal profession and the judiciary is male dominated. In each of the 9 provinces there is a High Court headed by a Judge President. There is not a single woman Judge President in the country. These Judges President make up the leadership of the judiciary and there are no women represented at this level. This is indicative of the fact that women are not represented and fully integrated into decision-making structures.

There are currently approximately 2,000 advocates (barristers) practising in South Africa. Of these only 17 women have attained the status of senior counsel while there are 358 male senior counsel. Of the 2,000 practising

advocates approximately 300 are women. Women only make up 19% of practising attorneys (barristers) in South Africa. Why is this so? Why are women so under-represented in the legal profession? A large part of the answer to that question is to be found in our history.

That is why I need to very briefly take you through that history. The legal profession only opened up for South African women in 1967.

Historically, both black and white women have been subordinate to men in South Africa. Married women were subject to the marital power of their husbands. This was changed in 1984 when the husband's marital power was abolished. African women were perpetual minors and lifelong wards of men, either their fathers, husbands, and in their absence, they were wards of their own sons. They could not marry, or bring an action in court without the consent of their male guardian.

The position of African women remained unchanged until very recently, about three years ago, when two young girls took a case to the Constitutional Court challenging the law of primogeniture. The Constitutional Court, in the case of *Bhe v The Magistrate Khayelitsha* (2005 (1) SA 580 (CC)), held that the exclusion of women from inheritance on the grounds of gender was a violation of the Constitution. The court found that it was a form of discrimination that entrenched past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order. The Court held, further, that the principle of male primogeniture also violated the right of women to human dignity guaranteed by section 10 of the Constitution because it implied that women were not fit or competent to own and administer property.

Women's entry into the legal profession

The early 1900s saw the beginnings of the struggle for women to be admitted into the legal profession. Mahatma Gandhi was the first attorney to register a woman, Sonja Schlesin, as an articled clerk. When she tried to register her articles of clerkship with the Law Society, her application was rejected on the basis that a woman could not practice as an attorney. She took her case to court but lost there too.

In 1912 a young woman in Cape Town applied to be admitted as an attorney. When the Law Society refused, the matter went to court and the judge held the view that a woman should not appear as an advocate on behalf of another person. The judge in fact said that women should shroud themselves in modesty. The judge also said that, going back to Roman law, it is evident that the practice of an attorney is the exclusive preserve of men. A former chief justice wrote in a law journal that women's entrance into the profession was incompatible with the idea of motherhood and only when a female was incapable of exercising the functions of motherhood should she be allowed to enter the legal profession.

It was only in 1923, more than a decade later, with the passing of the Women Legal Practitioners Act, that women were allowed to enter the profession. And it was only in 1967, not so long ago, that the first black woman was admitted as an attorney.

Challenges facing women as mothers are the same in all professions; it is no different in the legal profession. A few years ago in Britain, a survey was conducted amongst professional women, asking them what they needed most; what would make their lives easier?. Do you know what the majority of the professional women's response was? They said they needed a wife. And I can understand why. Women have two jobs. Being a mother and a wife is a full-time job in itself. When there is no bread or milk at home, who are they going to call? When they forget their sports kit or gym costume at home, who are the children going to call?

A personal history

I will now tell you my story. Under the apartheid regime I was classified as 'coloured'; coloured means a person of mixed race. I went to a school with other coloured children. I lived in a coloured township. I was born to a poor coloured family. Both my parents had not completed high school. Not many black people from my parents' era completed high school. That was not because they were poor academically; it was forced upon them through economic circumstances, as their parents could not afford to keep them at school. Once they reached the age of 16, they had to leave school and find employment to help support the family financially. My mother had no trade. She worked as a cashier for a large department

store. My father worked in the construction industry. The construction industry did not offer secure and permanent employment; it was seasonal and linked to booms in the economy. When my father was unemployed, I remember him going to cut grass and work as a gardener in a white community not too far from where we lived.

Growing up as a young child, I didn't know what it was to have running water or a bathroom in our house until I was about 13. That was when my father decided to leave the building industry for something a bit more permanent. He became a building supervisor for the local municipality. The main attraction for the job was the permanence and the fact that he got a flat to live in. That was the first real house we had. Prior to that, we lived in rooms as tenants of people who had big properties. The building that my father had to supervise was part of the Government's low cost housing. There were three high-rise blocks of flats, each block housing over 100 families. As in most low cost housing schemes, crime, abuse of alcohol and drugs, and domestic violence were rife. As you may know, South Africa is the rape capital of the world. A statistic we are not proud of.

I was fortunate to receive a bursary as well as a loan from the bank to help towards my studies. From the age of 16, I worked every school and university holiday in order to pay for my university expenses. When I got to university, I had three part-time jobs. Over the weekends I worked as a cashier with my mother. In the evenings I worked at the law library at the university and during my free time in the day I would tutor other students. And I can tell you I have not stopped working. I found that I always had to work twice as hard as my male counterparts, by reason of my youth, my gender and my race. It was very difficult being the first black woman judge in KwaZulu-Natal. I can tell you I was not welcomed with open arms. There were even articles in the media questioning my age and my experience.

I was the second woman and first black woman to be appointed judge in the province. There was no provision for washroom facilities for women judges. There were washrooms for judges and then there were washrooms for secretaries.

My story is not too different from that of many other women of my era. It was a struggle just to survive each day. In fact, even though my life was difficult, I am sure there are women who did not have the opportunities which I had. I can also understand why women may be reluctant to stay and progress in the legal profession. Being in practice and on the bench is extremely demanding and one must be willing to make sacrifices.

There are two incidents which stand out in my mind of times when I felt really guilty about the demands which my job made, often at the expense of my family, particularly my children. My daughter was 18 months old, when she fell ill suddenly. My husband took her to the doctor as I was in court that day and it was only during the lunch adjournment that I discovered that she was on the operating table undergoing emergency surgery. I remember a second incident a few years ago when my daughter was about five years old and had a concert at school. My husband was out of town and I was in court. My daughter asked if the driver, who used to pick them from school, would be able to attend the concert. If her mum and dad can't make it, OK for the driver to be there, just as long as someone is there. You can't imagine how bad I felt.

Appointment of judges

Pre-1994, judges were appointed by the President of the country. However, it was widely known that the President was merely a rubber stamp and that the Minister of Justice was in fact responsible for appointing judges. In 1994 there were 165 judges, comprising 160 white males, 3 black males and 2 white females.

Since 1994, the Judicial Service Commission, which is chaired by the Chief Justice and comprises judges, members of the legal profession and parliamentarians, is tasked with the appointment of judges. Vacancies are advertised and public interviews are held. In terms of our Constitution, the Judicial Service Commission is enjoined to have regard to the need for the judiciary to broadly reflect the racial and gender composition of South Africa.

Transformation

Many may ask why the need for transformation? Why should the judiciary be transformed?

The post-1994 Constitutional order replaced a régime whose oppressive laws had caused untold harm to the majority of South Africa's people. Many black South Africans were subjected to forced removals, detention without trial. The laws were devised to keep black people oppressed and in a position of subservience. The courts were drawn into the process of enforcing apartheid and they had to interpret and apply laws which sustained discrimination and oppression. In the eyes of the people who were subjected to these unjust laws, the courts were part of the system of oppression. Our Deputy Chief Justice Moseneke recently said:

'Justice had a white unwelcoming face with black victims at the receiving end of unjust laws.'

It was thus necessary, with the advent of democracy, that measures be introduced to improve the image of the courts. A judiciary that reflects the diversity of its people is sure to enrich the courts.

There are now 207 judges, comprising 89 black male judges, 83 white male judges, 20 black female judges and 15 white female judges. From being less than 2% black in 1994, the judiciary is just over 50% black. More importantly, of the 53 new judges appointed since 1994, 89% of them are black. While the picture for race representation has improved considerably, gender equity has not been adequately addressed and has lagged behind. Only 17% of the judiciary is female.

In the Lower Courts, out of the 1,779 Magistrates, 467 are women. However, there are only four female Regional Court Presidents out of 10, 50 Regional Magistrates out of a total of 274 and 6 Chief Magistrates out of 23.

Sexism in the Judiciary

Sexism is rife in the legal profession in general and in the judiciary. Our Constitution provides for the establishment of the Commission on Gender Equality. The Commission is an independent statutory body and its mandate is to promote respect for gender equality and the protection, development and attainment of gender equality. As a result of numerous complaints received by the Commission, they conducted in 2005 an investigation into discrimination in the legal profession. The results indicated a blatant gender bias in the legal profession; negative attitudes of male

lawyers towards their female counterparts; women were not taken seriously in many instances and not accepted as equals; that an 'all boys club' as well as an 'old boys club' still existed in the legal profession. The allocation of work was also skewed. Many women were exclusively allocated family law matters. This institutional bias is a major cause of disempowerment and inequality, and needs to be dealt with effectively if gender equality is to be achieved.

In a number of instances, women who were being interviewed for judicial appointment were asked questions that would not be asked of their male counterparts. For example, a woman who had young children was asked how would she be able to make adequate arrangements for the care of her children while she was at work. In another interview, a candidate who was based in New York had made herself available for appointment on the Constitutional Court. The Judicial Service Commission was obviously impressed with her and one Commissioner asked how she could be persuaded to return to South Africa even if she was not appointed to the Constitutional Court. Another Commissioner suggested that she 'get a boyfriend here'.

An openly gay judge made herself available for promotion. At the interview, she was asked how her male colleagues related to her and whether the fact that her partner was a woman was not a 'hindrance'. The same judge was also asked how she got along with her male colleagues. Her response was that she got along well with most of them although some of them were sexist. To which another Commissioner asked flippantly 'Sexy or sexist'.

In each of these instances I have referred to, not once did any of the other Commissioners interject and say that the question asked was out of order.

Current issues

I want to deal very briefly with two current issues in the media facing women generally. The first is the headscarf issue and the second is the question of women being allowed to wear pants in a certain part of Durban.

'AXED MUSLIM WOMAN KEEPS HEADSCARF - AND JOB'. That was a newspaper headline. A Muslim social worker at a Worcester prison, was dismissed after

Correctional Services found she had ‘flouted departmental policies’ by wearing a headscarf with her uniform. For religious reasons, she also refused to tuck in her shirt. Muslim women are required to cover their hair and dress modestly.

The matter was taken to the Commission for Conciliation, Mediation and Arbitration (CCMA), where it was referred to the Labour Court but settled before it could go to court. In terms of the settlement reached, the woman is to be paid her salary in full from the date of her dismissal and is to return to work wearing ‘civilian clothing’ and proposals to amend the dress code were to be made within six months.

‘WOMAN CAUGHT WEARING PANTS MADE TO PARADE NAKED’ (*The Citizen*, 10 August 2007). Women found wearing trousers in T Section in Umlazi, Durban, risk being stripped to their underwear, having the offending clothing set alight and being barred from living in the area. A ‘men’s committee’ in the area had passed a resolution that women are not to wear pants in that neighbourhood because it was against their tradition and culture.

It is ironic and shocking that such dehumanising and degrading behaviour is being visited on women on the eve of Women’s Month, which all peace and freedom loving South Africans will be celebrating as we take stock of the numerous struggles that women have waged to end sexual and racial discrimination.

The reality is this: women still face prejudice. Women in 1956 were protesting against carrying passes and now, 51 years later, women have to protest for the right to wear pants!

Conclusion

Though we celebrate the achievements in our country since 1994, we all know that this is not enough. We still have a long way to go. The new South Africa may be a much better place for me, and professional women like me, and other women who are gainfully employed, but the simple reality is that most South African women do not yet have either the resources or the capacity to effectively change their lives for the better.

We have a lot to look forward to in South Africa. And a lot of it is positive. Just a few months ago our Chief Justice made an announcement that no effort will be spared to produce a judiciary that is effective, competent and fully transformed in

terms of race and gender. At the beginning of this year the Chief Justice, together with the Minister of Justice, introduced, as part of the process to address gender inequities in the judiciary, a project designed to fast-track women for judicial appointment.

Positive developments have been the establishment of South African Women Lawyers Association and the South African chapter of the International Association of Women Judges. These are organisations which are in a position to speak on behalf of women. The IAWJ has been involved in a number of community outreach activities and encourages judicial activism of its members in a number of areas. The IAWJ has been particularly active in the fight against domestic abuse, and is also involved in the fight against HIV/AIDS and education of its members in this regard.

I am pleased to note that one of the aims of this conference is to continue the CMJA’s work in promoting gender and human rights awareness in the judicial field. How can that be achieved? I have a few suggestions:

- exchange information and encourage networking among women in the legal profession;
- conduct research on women and their developmental path in the legal sector;
- encourage and support women to conduct research, write and publish in order to influence jurisprudence and legal policy;
- participate in public dialogue, constantly reinforcing a gendered perspective;
- work closely with civil society, government and the corporate sector, and establish forums on issues relating to women’s rights under the law, access to justice and the transformation of society.

Each of us has a role to play in ensuring the integration of women in the legal profession through the creation of an enabling environment for women. We each need to examine our own conduct. We need to be involved in educating and sensitising our colleagues and the legal fraternity in general on issues regarding gender and race. Women leadership in the judiciary should be supported and encouraged. I want to say to each one of us today: Let there be equality for all and let it begin with me.

THE NEED FOR COMMERCIAL COURTS

*Justice Takis Eliades, Supreme Court of Cyprus
A paper from the CMJA's triennial conference in Toronto*

Commerce, which involves mainly the exchange of commodities on a large scale, is closely connected with the growth of civilization. It has been said and very rightly so, that 'commerce begins where civilization begins' and in the ever growing expansion of commerce and the need to settle mercantile disputes, Commercial Courts played a significant role.

In England the first Commercial Court was set up in 1893, but until the early stages of the 18th century there were no principles of general application. The founder of the English commercial law, which formed part of the common law, was William Murray, a Scotsman, later Lord Mansfield, who was born in 1705. Like all other Scotsmen he was not well received in England at the time. As Lord Denning puts it in his book *What next in law?*

*Scotsmen now dominate us in most things.
We no longer resent it. But people did in
the time of William Murray.*

Lord Mansfield studied the courts' decisions in commercial law and formulated the principles of the law of insurance, bills of exchange and cheques. Today by virtue of the provisions of the Supreme Court Act 1981, the Commercial Court constitutes part of the High Court, with jurisdiction to try claims relating to the transaction of trade and commerce. The court has a discretion to depart from the prescribed procedure and the rules which govern the admission of evidence, when the parties consent or where the interests of justice demand it. It can be said that the Court has been successful because it has established a reputation for easy access and speed in completing the hearing of cases within a short time.

The case for commercial courts

Historically, specialised courts appear as a reaction to limit expanding case-loads. It is generally accepted that delay in the determination of disputes leads to unfairness. So where there is a surge in a particular branch of the law (e.g., labour disputes, patents and family

matters) the establishment of specialised courts offers a quick solution.

Two basic reasons justify the establishment of Commercial Courts.

The first reason is the significant complexity which is a frequent feature of commercial cases. Developments in the high-technology world move much faster than developments in the judicial system, presenting judges with complicated issues that were unthinkable some years ago. For example the recent case in the United States concerning music services Nabster and MP3.com, and the case of a hacker magazine which revealed computer codes that could be used to copy DVD movies, have raised new and difficult questions about how existing copyright and intellectual property rights are affected by the Internet services.

The second reason is the effect which the commercial cases have on the economy. The impact of court decisions in the business area affects many in society, including employees, shareholders, creditors, suppliers, business people and companies. It follows that it is particularly important to the state economy and to the hundreds, if not thousands, who are directly or indirectly affected by a court decision in a commercial case, that such cases must be handled quickly, correctly and efficiently.

What type of commercial court?

The question as to what type of cases must be assigned to a Commercial Court is not easy to answer. The jurisdiction of a Commercial Court may include the carriage of goods, banking and financial cases, arbitration, competition, tax cases, bankruptcy cases and so on. It may be said that the jurisdiction of the Court may depend on the size of the Court, the different types of economic activity, and the prevailing disputes in the region.

Benefits and drawbacks

The benefits and drawbacks of establishing a Commercial Court may be summarized very briefly as follows:

(a) Benefits

(i) *A more effective process*

A judge who will be examining commercial disputes will be familiar with the established law and procedure in this specialised area, which will inevitably shorten trials. As judges are devoted to particular types of cases, they develop expertise, knowledge and experience enabling them to perform their duties more quickly and accurately than those who are faced with commercial cases only occasionally.

(ii) *Consistency in decision-making*

The comprehensive understanding by a specialist judge of the established law and procedure in commercial law may result in a greater consistency in the decision-making process, indicating at the same time to litigants a more predictable outcome of the proceedings. Specialist judges are more efficient and confident in what they are doing and the quality of their judgments is better.

(iii) *Reduced caseloads*

There is no doubt that a Commercial Court will reduce the caseload of other overburdened courts.

(b) Drawbacks

(i) *Isolation of judges*

The establishment of a Commercial Court may result in the isolation of judges, as the Commercial Judge will be devoted to the application of a particular branch of the law, away from the development of general law.

(ii) *Overlap*

There is always a possibility that there will be an overlap of specialist areas into other fields of law. For example, in a case concerning the carriage of goods, questions may be raised of a contractual or tortious nature. In such situation a non-Commercial Judge would be more appropriate to deal with the case. A commercial case may also raise serious constitutional problems as in the *Retrofit* case, where the Supreme Court of Zimbabwe decided against the government telecommunications monopoly, so allowing private cell phone

companies to operate. The reasoning behind the decision was that the ban on the private provision of telecommunications services violated the freedom of speech in the country's Bill of Rights. Considering that constitutional challenges concerning the violation of human rights are usually taken by the High Court of the land, difficulties concerning overlapping jurisdiction can be expected to arise.

(iii) *Geographical problems*

The establishment of Commercial Courts, sitting mainly in one town, will usually require long-distance travel for litigants, witnesses and lawyers, something which will inevitably lead to the increase of costs.

A comparative reference

Commercial Courts are becoming a common feature in Europe, in the United States, in Africa and other countries.

In Europe, the Commercial Court has become popular since the mid 1970s. *France* has specialised courts of commerce (*tribunaux de commerce*). *Germany* has a specialised commercial chamber (*handelskammern*) in each regional court of general jurisdiction (*landgericht*). *Austria* has specialised Commercial Courts that they may be either independent Commercial Courts (*handelsgerichte*) or may be established with other courts of general jurisdiction. *Spain* has created since 2004 twenty-four Commercial Courts with four of them sitting in Madrid, and *Ireland* created a Commercial Court in 2002 which has been equipped with the latest in high technology, i.e. digital audio recording, video conferencing and electronic evidence from CDs and DVDs and from counsel's laptops.

In the *United States* Commercial Courts have become an important feature of the legal system during the past 50 years. On a *federal* basis, the United States has created the US Bankruptcy Court, the US Claims Court, the US International Trade Court and the US Tax Court. At a state level in *Delaware* there has been a Court of Chancery for the last 200 years. In *New Jersey* there are Chancery Courts in each county. In *Illinois* there are Chancery Courts with general equity jurisdiction which try commercial issues. In *New York* since 1993 there have been four successful 'Commercial Parts' (or departments) in

Manhattan, and since 1995 a Commercial Division in New York. In *North Carolina* there has been a Business Court since 1995 and in *Wisconsin* since 1994.

The successful example of the above Courts has induced other states to consider the idea of establishing Commercial Courts in their regions and steps are now being taken for the introduction of Commercial Courts in *California, Florida, Massachusetts, Colorado, Michigan, Minnesota, Mississippi, Ohio, Pennsylvania* and *Texas*.

It can thus be seen that although the movement towards specialised Commercial Courts in the US is in its early stages, the concept is becoming very popular as these Courts have proved functional and highly successful. In fact several surveys which have been conducted on Commercial Courts show that the empirical

results were very positive and there was no adverse criticism in the jurisdictions where they have been established.

Commercial Courts have been successfully established recently in various other countries in Africa, like Ghana, Uganda, Kenya, Tanzania and Zimbabwe, as well as in Ukraine and Russia.

Conclusion

In conclusion, considering the increasing complexity of commercial issues and the vast advancements in technology, it can be said that specialised courts to adjudicate on commercial matters are essential because they will improve the institutional infrastructure of a market economy by providing quick and consistent decisions, and they will reduce the case-load of other courts.

DOROTHY WINTON TRAVEL BURSARIES FUND CONTRIBUTIONS WELCOME

This fund was set up in the name of the first Secretary of the Association who died in October 2003. Dorothy's time as the first Secretary of the Association was a very happy one and she was very concerned that justice (and support for justices) should be available to poor and rich nations alike.

"She had considerable knowledge of the Commonwealth, a genuine interest in its people and she was prepared to travel extensively to promote the Association, being especially concerned that people from the less well developed countries should be able to play a full part." Stated Brenda Hindley, former Editor of the CJJ.

The CMJA and the family of Dorothy Winton want to thank those who have already contributed to the this fund and which was used to assist participation of three magistrates from Malawi, Uganda and the Solomon Islands at the CMJA's 14th Triennial Conference.

The Bursary will be used to assist participation of judicial officers to attend the Triennial Conferences of the Association. In future

Contributions to the Bursaries should be made (by cheques drawn on a UK bank, bank transfers- making clear what the transfer is related to or bankers draft **made payable to CMJA**) and should be sent to the Commonwealth Magistrates and Judges Association at Uganda House, 58 Trafalgar Square, London WC2N 5DX, UK.

Please remember that as a registered charity, the CMJA can reclaim tax paid by UK tax payers. If you include your name and address (eg on the back of the cheque), we can send you the form to fill in for gift aid purposes - a simple declaration and signature.

COMMERCIAL COURTS: A CASE STUDY FROM UGANDA

*Justice Geoffrey Kiryabwire, Judge of the Commercial Division, High Court of Uganda.
Extract from a paper at the CMJA triennial conference in Toronto.*

Over the last decade or so, common law jurisdictions are increasingly establishing Commercial Courts as part of their courts of record, especially at the High Court level. In most common-law jurisdictions court work is done in separate divisions so the concept of High Court Divisions is not new. In East Africa, for example, traditionally there were 2 divisions of the Courts, the civil and criminal divisions. For purposes of defining the work, all non criminal work was deemed civil work. That gave the civil division a wide latitude of jurisdiction to handle what was deemed civil work. Matters related to tort, land, family, contracts, company, financial institutions, intellectual property and many others all came up before the Civil Judge.

The current trend, as part of the process of judicial reform taking place in many jurisdictions is to create specialised divisions that can deal more specifically with these subjects hence the establishment of Commercial Courts to deal with commercial disputes.

The Commercial Court in Uganda

The history of the Commercial Court in Uganda is no different from other jurisdictions that have established commercial courts. The establishment of the Commercial Court in Uganda as a division of the High Court was a direct recommendation of the 1995 Justice Platt Commission of Inquiry Report on 'Delays in the Judicial System'. During its hearings, the commission received views from the business community in Uganda. Some of the major concerns were that the Courts at the time were unable fully to appreciate specialised commercial disputes or to handle such cases in an efficient and expeditious manner. These concerns were raised in the mid 1990s when the business landscape in Uganda was rapidly changing as a result of the government-driven programmes of liberalisation and privatisation of the economy. This had led to a shift of emphasis from state to privately owned businesses which placed greater expectations on the judicial system.

Uganda was probably the first country in Africa to create a commercial court. The President of Uganda, during a nationwide address on the 26th January, 1995 charged the judiciary to put in place measures to facilitate investors in their court disputes. The Ugandan judiciary then started to reorganise itself with a view to creating a commercial division of the High Court. On 20 June 1996, the then Chief Justice, W.W. Wambuzi, issued Legal Notice No 5 of 1996, entitled 'Constitutional Commercial Court (Practice) Directions 1996', creating the Commercial Division of the High Court as a Commercial Court with the aim, set out in the Notice, of 'delivering to the commercial community an efficient, expeditious and cost-effective mode of adjudicating disputes that affect directly and significantly the economic, commercial and financial life in Uganda'.

The Commercial Court began its work but did not get its distinct character until 15 January 1999 when it moved to separate premises from the High Court and, more importantly, started its own independent registry.

The role of the Commercial Court in economic development

It is not easy to measure the role that the Court has played in the economic development of Uganda. However, I would like to discuss this role from two perspectives. The first from an attempt to provide an efficient, expeditious and cost effective mechanism for the resolution of disputes and second, based on feedback from surveys.

The first role for the court has been to be proactive. Historically, Judges had seen their role as umpires in the disputes and rarely descended into the dispute arena, but the Legal Notice establishing the court provides that 'the procedure in and progress of a commercial action shall be under the direct control of the commercial Judge who will, to the extent possible, be proactive'.

The control of judicial proceedings by the Commercial Judge eliminates adventurism by

counsel and improves efficiency. One indicator that this initiative is bearing fruit is that the average number of adjournments before a case is completed has greatly reduced. In the case of the commercial court based on the half year results for 2006, these have been brought down to an average of 5 adjournments with some judicial officers having as low an adjournment rate as 1.

In addition, all cases brought before the Court have to go through a rigorous case management procedure called scheduling. This has been made possible by an amendment to the Uganda Civil Procedure Rules which introduced a new order 10B that requires all cases to be scheduled and take account the possibility of using Alternative Dispute Resolution (ADR). Case scheduling allows for better efficiency and allocation of judicial time to any particular case. Priority can, therefore, be given to cases which are better prepared to go to trial as opposed to handling cases on a first come and first serve basis, which was the procedure in the past.

Further, the court has improved on access to justice for its users by converting itself into a multi-door court house. This is by adding ADR through mediation to the services it provides. This is made possible by the appointment of an in-house Mediation Registrar, who handles disputes before they are placed before a Judge. The Court also launched a Mediation Pilot Project where disputes are forwarded to an ADR provider known as the Centre for Arbitration and Dispute Resolution (CADER). This also gives parties an opportunity to try out mediation before the case comes for trial.

Another initiative that the court has put in place is the creation of a Court Users Committee (CCUC). The CCUC meets quarterly and acts as a forum where the court and the court users can evaluate the work of the Court. This allows the court to make quick responses to any matter of concern.

The improvement of court room technology, especially the recording of court proceedings and e-based legal research is another initiative of the commercial court. Most courts in Uganda still record evidence by long hand writing and this has made the process inefficient.

The construction of a custom built commercial court house that can better facilitate the activities of the courts has also been one of the many initiatives of the commercial court.

Many court houses in Uganda pre-date independence and are not easily adapted to suit new initiatives like IT and a multi-door court house. Custom built court houses have gained popularity in Africa where many countries share the Ugandan experience of having very old court houses. As a result of this Tanzania, Kenya and Ghana have all dedicated special court houses to the commercial court.

Last but not least, is the creation of statistical records to track the work of the Court, its Judges and other personnel. In this regard a data base called Computerised Case Administration System (CCAS) has been developed to generate the required statistics. This allows for greater transparency and accountability within the court.

Closely associated with this, the court also in November 2001 conducted an independent baseline survey of its court users perspectives of the court and how it affected their cases and businesses. Key indicators used in the survey were returns of cases filed and completed in the court; the number of cases pending in the court; the time taken to process the cases; the number of adjournments per case; user perceptions of corruption; and user satisfaction (including gender responsiveness).

A follow-up survey of August 2004 showed a general improvement on all key indicators. Results of the follow-up survey showed a 64% increase in registered cases; a 60% increase in court efficiency (disposal rate); an average case adjournment rate of 4.93; and a drop in the corruption perception from 27% to 26%. This is a relatively low perception with no actual reported case of corruption.

Clearly these indicators showed improvement at the court and increased confidence of the court users/business community in its work. A key finding of the follow-up survey showed;

‘Best practices have been instituted at the Commercial Court. Cases are handled expeditiously and in a business sensitive manner which has yielded high levels of satisfaction amongst the business community’.

The commercial court is constantly trying to be innovative and to adopt best practices to ensure that its objective and role is fulfilled hence contributing to investor confidence, in promoting sound business practices and the resultant economic growth.

EFFICIENT COURT ADMINISTRATION: THE TORONTO COMMERCIAL LIST

*The Hon Mr. Justice James M. Farley, Ontario Superior Court of Justice.
A paper from the CMJA's Toronto conference.*

The Toronto Commercial List was set up in 1991. It has as its foundation insolvency and bankruptcy matters plus creditors remedies; in addition the List will deal with corporate, tax, pension, securities and other complex commercial litigation. Depending on the economic cycle, insolvency may fluctuate between 15 to 35%; the basket clause allows the Commercial List to fill its immediate schedule in times of light insolvency demands. What has worked (and not worked) for us in Toronto may be of assistance to other jurisdictions. But I wish to stress that each jurisdiction will have to establish its own practice to suit its own individual needs.

Absent unusual circumstances which would have to be justified to the court, there is no reason why general commercial litigation cannot be completed within 3 years of its initiation. Indeed I would think that the ideal average should be in the 1 and ½ year range. I make that observation fully acknowledging that there are commercial cases in our court system where counsel on both sides have engaged in deep pocketed litigation with the result that the cases are still ongoing after 10 years. This would be 'autopsy' litigation where it is not truly important that the case be tried with any immediacy.

However where one is dealing with 'real time' litigation where a decision is urgently required so that the parties can make ongoing plans and decisions, then the time horizon has to be foreshortened to meet the requirements of the particular circumstances. I give you the example of the Schneider public company takeover case where the multiple claims were made in late January 1998, pleadings were completed, production of documents took place and oral discovery made with the trial taking place in April and my 80-page decision being released on 10 May 1998. Insolvency matters, inherently chaotic, are ultra real time litigation as value is eroding as the days, sometimes hours, pass. Frequently insolvency

matters are therefore dealt with in total, start to finish in a matter of days or a few months.

Trials and the Trial Requirements Memorandum

If required by the supervising judge, the particulars of a Trial Requirements Memo or specified parts thereof must be completed and approved by the supervising judge (or designate) a week or more before the appointment to schedule the trial, although in complex and lengthy cases we will 'pencil in' target dates so that counsel may have some assurance that they will have their trial date for forward planning purposes - not only for that particular case but the rest of one's caseload.

The Memo provides a general outline of what remains to be dealt with in the case (we assume that counsel will be able to resolve some of the issues and that others may become 'non-issues'). If the matter is not all that complex, it may be determined that a full-blown Memo is not required, but rather a streamlined one. While counsel have been living with the case intensively and extensively over a period of time, it is important to recognise that the trial judge's first contact with it will be the Memo. Thus it is helpful to set out who the various 'cast of characters' are and how they fit into the case. Similarly there should also be a bare bones non-contentious chronology. Compendiums of the agreed exhibits are to be prepared for delivery to the court a week or so before the trial commences. It is best practice to do this on a joint basis, together with a compendium of the expected law. If at all possible, this should be on an expurgated basis of only the relevant passages of documents, statutes and cases.

Key to scheduling is the witness milestones: what witnesses will be called and how long is it anticipated that each will be in direct and cross-examination. This process will also allow for determining whether the evidence of any particular witness is necessary or whether that

evidence can be agreed upon in whole or in part. As a rule of thumb, we have found that a focussed trial using these methods is likely to last no more than half the time of a ‘regular’ trial. Preparation of the Memo is often an invaluable aid in settling the ‘unsettled’ case. Similarly we can determine on a preliminary basis whether proposed expert witnesses will be helpful. Reports of experts in any event have to be circulated well in advance so that no one is caught by surprise.

Case Conferences

Case conferences may be booked for any time during the litigation process. I distinguish a case conference from a formal motion; the latter deals with a matter on a formal basis with a decision being made by the judge while the former deals with matters rather informally, usually in chambers, so that all ongoing aspects of the litigation may be canvassed with directions being given by the judge with a view towards streamlining and expediting matters, but all the while ensuring that no one is being denied justice. ‘10 minute’ matters are dealt with between 9:30 a.m. and 10 a.m. in chambers by as many of the then sitting judges as are required. They are designed to deal with mechanical matters on a quick and timely basis. However these 9:30 a.m. appointments are quite important for two additional reasons – firstly, they allow for early contact with a judge who may independently or on request explore the possibility of settlement and how that might be facilitated and secondly, in real time litigation, counsel are able to have ‘immediate’ access to a judge to determine what sort of a schedule should be imposed to meet the practical deadline imposed by the circumstances.

It may be that the plaintiff unrealistically wishes the trial to be the day after the claim is made; similarly the defendant may wish it to be the ‘week after never’. If counsel are not able to come to an agreement on scheduling of all events, then the judge will be able to direct what is reasonable at the case conference. Frequently the judge will caution counsel that they are being too aggressive with their schedule and that they should allow more slippage time; this is especially so when faced with either ultra busy or relatively inexperienced counsel. I would emphasise that we are a ‘scheduled court’, not a ‘hurry up court’.

It should be noted that aside from matters involving bankruptcy and insolvency, going on the Commercial List is a voluntary decision of counsel. Even if the matter does not commence in the Commercial List, a subsequent application for transfer may be made by all sides or just one side; this frequently happens (even on a joint basis) when the litigation gets bogged down in the regular list. While there are some senior commercial litigators who seem to wish to avoid the Commercial List, I think it fair to observe that the regular attendees on the List are the recognised leaders of the commercial bar. Further it seems to be regarded as an obligation of honour by counsel (whether they represent the plaintiff or the defendant) to have the matter dealt with in the Commercial List where there is a reasonable assurance that the case will be dealt with in a timely fashion by an experienced judge who has an interest in the field, but in the usual fair and even-handed basis that all matters are to be dealt with in any area of the court.

Less experienced counsel come to the Commercial List for a variety of additional reasons: from gaining the experience of litigating on the List, to stumbling on it and thinking that the judge will wave a magic wand that will resolve the case so that counsel need not do much work. I would think that approximately 85% of our work involves ‘recidivists’; 15% involves ‘accidental tourists’.

Scheduling

Being a scheduled court, we guarantee that when a matter is booked, it will be dealt with on the scheduled date(s). However, implicit in that is that the start date for one trial is the day after the finish of the previous one. Hence you will appreciate the practicality of the witness milestones in the Trial Requirements Memo. We will build in as much flexibility to that as circumstances and practicality allows. To date we have had the relatively few matters which go into overtime and are interrupted and continued at the next available free time. Sometimes with counsel who have a justified reputation for inaccurate time estimates, we have to build in even more (unannounced) slippage room.

There is constant juggling going on between the dynamics of erupting real time litigation which must be ‘immediately’ squeezed in and the relief of settlements plus the unfortunate

situations where because of truly unforeseen circumstances, a matter has to be adjourned. Where there is no Commercial List case available to fill the void created by a settlement or adjournment, then that freed up Commercial List judge will be released to the regular list provided that that judge does not have an outstanding reserve decision which needs to be released on an urgent basis. If there is more work than available judges because of an emergency matter or an urgent carryover, then the judge's day becomes a little longer (but recognising that this approach can only govern for a short time, otherwise the judge will lose effectiveness). Sometimes one of the judges who have Commercial List experience but not so assigned for that 6-month period may be freed up by the Regional Senior Judge to deal with an overload situation. So far in the 15 years of operation of the Commercial List we have had nimble footwork making good luck.

Much of our work in the Commercial List in Toronto is dealt with on a 'paper' application basis so that when the matter comes into court, the judge will have the benefit of a record (the material filed by both sides together with a factum (or skeleton) of the facts relied on and the law plus a case book (with page references and highlighted)). Where an issue will be affected by credibility, we will have appropriately brief *viva voce* examination of the witness; in this way (using a hybrid application/trial), court time can be minimised.

It is also important to ensure that counsel are recognised as officers of the court and in that capacity they are obligated to be responsible to the court as well as their clients.

Case Management

Case management can take the form of the court adopting a 'hands on' approach to selected cases with periodic joint reports to ensure that they keep on a reasonable track - usually a timetable agreed between the parties which is accepted by the court (in case of failure to agree, the court will direct what is reasonable in the circumstances). Alternatively it can take the general form of statutorily mandated time lines by which certain functions must be accomplished. Since there is ready access to the court with a 9:30 appointment, the Commercial List operates on a *laissez-faire*, hands on basis.

Scheduling of trials and other court attendances is always a difficult task. Litigation of any nature, but particularly commercial litigation and insolvency proceedings, does not lend itself to a production assembly line approach. Each case will have its differences and unforeseen aspects. Then too there is the question of cases settling, often, perhaps far too often, on the eve of trial. Experienced counsel and competent court administrators/schedulers will be able to closely predict how long cases are likely to take and whether they are likely to settle and when. Ideally the court scheduler should be a person of acknowledged integrity so that counsel are confident to advise on a confidential basis their own view of whether a case will settle (note, this is the experience of the English Commercial Court).

A most important factor in achieving settlement in cases on an institutional basis is the availability of a judge and a courtroom. If the momentum of the court system is that court dates are met, then the system will work smoothly including a high level of settlements. If the momentum is negative, then the system will start to break down because of overload and backlog accumulation; cases will not settle; the public and litigants/counsel generally will lose confidence in the court system.

Ways to Resolve Disputes

In the course of human (and business) events there is always the chance that parties will disagree. How are those disagreements resolved? Must every dispute have to be adjudicated by a judge? Clearly not! If a court had to rule upon every point of contention between litigants, then not only would the court system break down and fail, but also business and commerce would suffer because of cost, delay and uncertainty. Certainty of prevailing conditions has always been a foundation for any business decision. If business decisions are impeded, then trade and investment will diminish. If so, then the economy of the nation will suffer and its people will have to make do with a lower standard of living than would otherwise be achievable. The Commercial List therefore encourages negotiation (the oldest form of ADR) and mediation.

The question remains as to why they settle and when they settle. A settlement when the parties have a high degree of comfort as to the circum-

stances of the case (including the facts related to the other side and its positions) and the law which is applicable to such a case is the best type of settlement. However a settlement when there are substantial material unknowns is not likely to be satisfactory. When that settlement is combined with any one or more of the following elements: a party or a material witness dying or becoming mentally incapacitated; a party becoming bankrupt; or a party becoming so frustrated at the expense, delay and uncertainty of a lawsuit that the litigation is eventually abandoned, then it is the worst type of settlement. A successful law and court system will promote the best type of settlement and attempt with all reasonable effort to minimise the worst type. But I would emphasise that it is not necessary to know ‘everything’ about the case before settling. No one in the ‘real world’ operates on that principle. Therefore over exhaustive discovery is not the answer; focused discovery though is of great assistance.

Real Time and Autopsy Litigation

Any successful court system must be able to respond in a timely fashion to the litigation demands upon it. This is especially so of what we term ‘real time’ litigation, as opposed to ‘autopsy’ litigation. Real time litigation is where the outcome of the litigation will have a material impact upon how the parties conduct themselves during and after the litigation and it is important that a decision be rendered as soon as practicably possible.

A good example of this would be litigation involving an insolvent business. In an insolvency, value of the enterprise will quickly evaporate over time (e.g. the organisational, distributorship and/or business reputation with customers’ goodwill). If a business is to be reorganised thereby preserving to the maximum that value, then litigation affecting that reorganisation must be dealt with forthwith and not be put in a chronological lineup with autopsy litigation. Autopsy litigation is where it is not that important that a case be tried in court ‘today’, 3 months or 3 years from now. The functioning court system will balance the needs of both types of litigation on a general or overall basis. If absolute speed is essential and a real time case cannot be accommodated on that schedule, then it is

conceivable that that might be achieved by resorting to arbitration.

The Commercial List

The Commercial List, operating as a subdivision of our Superior Court of Justice has a roster of five judges sitting at any one time (out of a pool of a dozen or so qualified judges) who have corporate/commercial experience. They deal with both real time and autopsy cases including insolvency matters, shareholder and other corporate litigation, intellectual property disputes and other commercial litigation of a more complex nature. The Commercial List has enjoyed a good reputation amongst lawyers and clients.

How does the Commercial List operate? Perhaps half of our work is conducted by utilising a paper application or a paper motion with affidavits, cross-examined on if necessary outside court with a transcript being available (including the hybrid using some limited *viva voce* examination in court where credibility is key to an issue). In this way a matter can be dealt with in anywhere from (usually) one or two hours to one or two days depending on the complexity of the case, the number of issues and the number of sides involved. There is a focus on relevance – the first and necessary hurdle in the question of admissibility of evidence. If it’s not relevant, it is not admissible (and not a question of as some would have it the weight to be given to the evidence). This is true for both the paper application and any trial work.

We have emphasised the importance of continuously canvassing settlement. As a result of the views of some like-minded judges concerning ADR and some fortuitous elements, the Commercial List was the ‘midwife’ for the province-wide mandatory early mediation requirement in Ontario. A pilot project supervised by the judges of the Commercial List achieved sufficient voluntary (but encouraged) participation success that the government mandated that in all civil litigation (outside the Commercial List and a few other exceptions) the parties were to retain a trained mediator for a 3 hour session to see if a mediated settlement could be achieved within 3 months of the action being started. It remains to be seen if this *mandatory* initiative is as successful in the long run as the *voluntary participation* pilot project was since if litigants voluntarily

subscribe to a mediation session, they are already half way to an overall resolution.

Litigation Culture

Then too, there is the question of litigation culture. If the lawyers have restricted their skills to being courtroom lawyers, then there likely will be a lack of any meaningful communication which may lead to an early, less costly and more effective resolution. In some communities this may be seen as an inefficient and ineffective way for a lawyer to serve his client; in others the atmosphere may have degenerated down to a battle of egotistical gladiators. I think much is to be said for proper training in dispute resolution at the legal institutions and schools and for the encouragement by the judiciary and bar associations in this regard. Focus on the real issues in dispute is always important. Examination of the other side prior to trial along with production of that side's documentation should be sufficient to avoid trial by ambush but not so extensive as to result in litigation by avalanche (with the crucial documentation buried in irrelevant material).

Where both parties are well financed, is there any problem with allowing them to engage in 'endless' deep-pocketed litigation? Perhaps not, but at trial it means that they will inappropriately use up time which other cases could more appropriately utilise, and aside from the immediate trial considerations, it will send out a wrong signal and encourage others to engage in such tactics. Where one of the parties is not as strong as the other financially, there may be a tactical attempt to win a battle of attrition. The court system should be set up in such a way to control and avoid this. Wars are won by strategy, not tactics.

The formal court system may also assist resolution of matters before reaching the trial stage. Institutional encouragement to explore one of the ADR options is helpful. So are case conferences with a judge to review the status and anticipated progress. Case management milestones provide a calendar by which certain events must be concluded unless the court allows an extension for sufficient reason. It may be that a case may turn on a particular issue which can be determined by the judge on a summary judgment motion earlier on: see *Ashmore v Corp. of Lloyd's* [1992] 2 All ER 486 (H.L.). This case also emphasises that

counsel owe a duty to the court not to advance ten bad points in the hope that the judge will determine one good point out of them.

In common law jurisdictions the judiciary are able to rely on inherent jurisdiction to ensure that a case proceeds not only as 'justice dictates' but, as well, as 'practicality requires'. In non-common law jurisdictions it is helpful for the governing legislation or code to provide some equivalence to inherent jurisdiction so that a judge has the requisite discretion to deal with matters not directly covered by the legislation or code, but in a judicial way to ensure that justice is done.

In the end result no matter which option has been chosen to resolve the dispute, no objective person having been informed of the essential particulars of the case should be surprised by the result. If that result is achieved then one would have to conclude that the objective of rendering justice had been achieved. Then there is the question of timeliness.

How does one get the message out? Firstly there is the experience that counsel get as, over time, they return to the Commercial List and so become familiar with its emphasis on thinking ahead and self-discipline. The Practice Direction (which as you will see reiterates a common sense and fair to all sides approach with an emphasis on communication) is published as part of our official court reports; it is also included in all the annual books on Rules of Practice. In addition, Commercial List judges are frequently asked to speak at bar education programs. When the List was started, we offered to have a judge attend lawyers meetings held within a law firm (or group of firms) at the lunch hour or after court closed. Finally we have an active Commercial List Users' Committee (bar, bench and administration) which meets every two months; it also hosts an annual educational and social get together of List judiciary, counsel and insolvency practitioners.

Does It Work?

The reaction of the business community to the Commercial List has been almost uniformly positive and laudatory. Commercial cases - whether real time or autopsy - are decided on a timely basis by experienced interested judges. These judges appreciate the need for business certainty and forward planning and implemen-

tation. We are aware of numerous instances where the clients have insisted that counsel (who may not in certain instances be looking forward to the discipline of the Commercial List) put the case on the Commercial List - and this applies to both plaintiff and defendant. As discussed previously, the bar is generally enthusiastic about the operation and availability of the Commercial List. We attempt to be as responsive to the needs and changes as possible. In this regard we have the advice of a Users' Committee; in addition any counsel may make their views known to that Committee and to the bench on an ongoing basis. We also have the good fortune of having in general a very able and cooperative Commercial List recidivist bar.

In every bed of roses, there are thorns. What problems have we encountered in the Commercial List otherwise not alluded to? Let me dispose of an obvious possible difficulty. If the matter is dealt with effectively, efficiently and expeditiously by the trial court in the Commercial List, might this be frustrated if the matter is appealed? Fortunately our appeal courts have recognised the desirability of making certain that game playing is kept to a minimum. Even in past years where the regular backlog in the Court of Appeal was approaching four years, that court would deal with appeals from the Commercial List on a 'forthwith' basis.

For example, in the *Schneider* case I have referred to, the appeal was perfected and then heard in August with the decision being rendered in October 1998 and within the last year insolvency matters have been handled within one or two weeks after immediate appeal. Counsel and parties appreciate that they cannot derail the process by going to a tactical appeal. I would also suspect that appropriate deference is shown to the experience and expertise of the Commercial List

judges when they are operating in their 'family' area.

We are best at a mix of paper applications and short trials (of no longer than 2-3 weeks). Where the trials take mega weeks, we tend to get as bogged down as the regular list - except that the cases will likely only take half the time to try. One practical problem which plagues all parts of the court is where there is a multi party case so that there is likely a large number of experienced counsel participating. In the *Schneider* case we had 7 sets of parties with 23 gowned counsel (and who knows how many present in mufti). Scheduling those trials, even on a spaced out basis is a delicate task. Of course, during the preparation of those cases, experienced (and expensive) counsel are able to lay off that 'mundane' (but ultra important task) on juniors. The problem with that is that the juniors are not in a position to resolve the case and often have difficulty in conceding on various points and issues.

Important for a Commercial List operation is a skilled and dedicated court office. This office must ensure that the judge has all the material on a timely basis and that matters are properly scheduled. That office should be able to assess counsel and cases as one would handicap a horse race.

Does the Toronto Commercial List work? I believe that I can safely confirm that it does. It does not produce miracles. It needs a lot of care and attention. It requires the assistance of counsel, counsel who recognise that it is in their clients' and their interests to cooperate to ensure that the list runs smoothly (Commercial List recidivists are to be applauded). But it has a good - and I believe rightly deserved - reputation. Other areas of the court - both geographically and subject matter - have made varying attempts to initiate a similar process, many of which have had positive results.

REDUCING DELAY IN THE CRIMINAL COURTS OF ENGLAND AND WALES

His Honour Judge John Phillips Director of Studies, Judicial Studies Board

Delay in the administration of criminal justice is seldom if ever constructive. Evidence may be lost altogether, with accompanying prejudice to the prosecution or the defence. Memories will certainly fade. Witnesses will become increasingly reluctant to attend court. The proceedings will hang over the defendant for longer than is necessary or fair. Their cost will increase. Satellite litigation in the form of applications to stay the proceedings as an abuse of process on the grounds of delay will flourish, occupying court time which should be used to try cases on the merits.

Delay is a problem which the English and Welsh criminal courts have tried to tackle in recent years with some, though certainly not complete, success. In broad terms they have managed to bring about a culture change in criminal case management: excessive control of the litigation by the parties has given way to robust management by the court. In specific terms the Criminal Procedure Rules 2005 (SI 2005/384) are the vehicle by which the culture change has been achieved.

At the same time there has been a growing tendency towards 'administrative justice', by which I mean the making of judicial or quasi-judicial decisions outside the courts. The availability of cautions and penalty notices, for example, has been progressively extended by statute. Whilst these schemes undoubtedly free up court time for other more serious cases a danger may arise from the lack of procedural safeguards which the courts would otherwise guarantee.

If the criminal courts are more efficient than hitherto the reason undoubtedly lies in improved case management but it may also lie in the fact that a growing number of cases are being dealt with by alternatives to prosecution. This article examines both aspects of the matter. I should like to thank Brioni Allcorn for doing the background research for this article. Her help has been invaluable but the responsibility for any errors is mine.

The trend towards active case management

The Court of Appeal began to emphasise the need for active case management some time before the Criminal Procedure Rules came into force, thereby encouraging and contributing to the culture change I have described. Sir Igor Judge, now the President of the Queen's Bench Division, addressed the issue in characteristically trenchant terms in *Jisl* ([2004] EWCA Crim 696):

The starting point is simple. Justice must be done. The defendant is entitled to a fair trial: and, which is sometimes overlooked, the prosecution is equally entitled to a reasonable opportunity to present the evidence against the defendant. It is not however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they like, or for that matter, as long as counsel and solicitors or the defendants themselves think appropriate. Resources are limited. The funding for courts and judges, for prosecuting and the vast majority of defence lawyers is dependent on public money, for which there are many competing demands. Time itself is a resource. Every day unnecessarily used, while the trial meanders sluggishly to its eventual conclusion, represents another day's stressful waiting for the remaining witnesses and the jurors in that particular trial, and no less important, continuing and increasing tension and worry for another defendant or defendants, some of whom are remanded in custody, and the witnesses in trials which are waiting their turn to be listed. It follows that the sensible use of time requires judicial management and control.....

The principle therefore, is not in doubt. This appeal enables us to re-emphasise that its practical application depends on the determination of trial judges and the co-operation of the legal profession. Active, hands on, case management, both pre-trial and throughout the trial itself, is now

regarded as an essential part of the judge's duty. The profession must understand that this has become and will remain part of the normal trial process and that cases must be prepared and conducted accordingly...

Jisl and other cases like it fired a warning shot across the bows of judges, magistrates and the professions alike. The Criminal Procedure Rules later provided judges and magistrates with the means to fulfil their new case management duties.

The Criminal Procedure Rules 2005

In September 2001 Lord Justice Auld published his *Review of the Criminal Courts of England and Wales*. He made many recommendations aimed at improving their practices and procedures, one of which was that there should be a single procedural code for all criminal courts. Whilst the government did not implement all his recommendations it did implement this one. Section 69 of the Courts Act 2003 states that there are to be rules of court governing the practice and procedure of the criminal courts, that they must be both *simple and simply expressed* and that they are to be made by a committee known as the Criminal Procedure Rules Committee. The committee, chaired by the Lord Chief Justice, has since made the Criminal Procedure Rules 2005, which came into force on 4 April 2005. Thus the trend towards active case management and the development of the case management rules themselves coincided.

The rules have been described as a 'massive exercise in consolidation' in that they bring together under one umbrella a number of sets of existing rules and arrange them in structured form. There are, however, two parts of the rules which are new: part 1 entitled 'The Overriding Objective' and part 3 entitled 'Case Management'. According to part 1, the overriding objective of the rules is that criminal cases be dealt with justly. There is no surprise there. Part 1 goes on to elaborate what 'justly' means and it includes dealing with the case 'efficiently and expeditiously' and 'in ways which take into account the needs of other cases'. Part 1 also requires any participant in a case to inform the court and all parties of any significant failure to take any procedural step required by the rules or any direction of the court. This applies whether or not that participant is responsible for the failure so that a

participant has a duty to 'shop' not only other participants but also himself.

The references in part 1 to case management foreshadow the more detailed provisions of part 3. Part 3 imposes a duty on the court to further the overriding objective by actively managing the case and states what active case management includes, for example 'discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings'. It imposes a corresponding duty on the parties actively to assist the court in managing the case. Part 3 also contains the court's case management powers, which are expressed in the widest possible terms:

'.....the court may give any direction and take any step actively to manage a case unless that direction or step would be inconsistent with legislation, including these Rules.'

The court may give a direction on its own initiative or even without a hearing. It may also specify the consequences of failing to comply with any direction it has given.

The power to specify the consequences of failing to comply with a direction raises the question of enforceability. What sanctions does the court have at its disposal in order to enforce its directions? None are set out in the rules and in fact there are remarkably few. The court can, I suppose, summon the offending party before it to explain the reason for the default, a sanction which seems to depend mainly on the character of the judge or magistrate for its effectiveness. Otherwise the most likely sanction is an order for costs. An order for costs against a defendant will rarely be effective since few have the resources to pay. An order for costs against a legal representative of a party, known as a 'wasted costs' order, may be made in certain circumstances. However, the procedure for making these orders has become extremely technical, resulting in protracted satellite litigation which most judges and magistrates prefer to avoid.

Despite the lack of sanctions the Criminal Procedure Rules have in my view been comparatively successful in reducing delay. The parties have for the most part complied with the duty imposed on them actively to assist the court in managing the case: co-operation of this kind has diminished though not extinguished the need for sanctions.

Applying the Criminal Procedure Rules 2005

As foreshadowed in *Jisl* the Court of Appeal has generally supported judges where they have sought to apply the principles of active case management. I give some brief examples. In *K* ([2006] EWCA Crim 724), the court made it clear that the case management powers in the rules enabled a judge to deal with issues of disclosure preliminary to trial by way of written submissions and to limit the length of those submissions: the judge was not bound to allow oral submissions at all on the issues in question.

In *Chorley Justices* ([2006] EWHC 1795 (Admin)), the Administrative Court criticised a defendant charged with a summary offence for failing to identify his defence at an early stage but instead attempting to ambush the prosecution at trial. Lord Justice Thomas said:

‘The days of ambushing and taking last-minute technical points are gone. They are not consistent with the overriding objective of deciding cases justly, acquitting the innocent and convicting the guilty.’

And in *Butt* ([2005] EWCA Crim 805), the Court of Appeal stated that, whilst it should not be a routine feature of trial management for judges to impose time limits for evidence in chief or cross-examination of witnesses, they were fully entitled and indeed obliged to do so where counsel indulged in prolix or repetitious questioning: the entitlement to a fair trial was not inconsistent with proper judicial control over the use of court time.

There have of course been cases going the other way, cases in which courts have espoused their case management responsibilities with such enthusiasm that, according to the Court of Appeal, the fairness of the proceedings was at risk. Such cases are in the minority and the message from the higher courts and the rules themselves is clear: ‘Get on with it’.

The discount for a guilty plea and *Goodyear* indications

According to the Criminal Procedure Rules dealing with a case justly includes, as I have said, dealing with it efficiently and expeditiously. There have been two other recent developments in the criminal law which have increased the number of cases disposed of without a trial, the first relating to reduction in

sentence for a guilty plea and the second to judicial indications of sentence.

The courts have always discounted sentence for a guilty plea but different courts tended to have different understandings of the purpose of the reduction and the extent of any reduction given. This inconsistent approach caused uncertainty, making it difficult for a lawyer to advise his client accurately about the likely discount in the event of a guilty plea. The Criminal Justice Act 2003 established the Sentencing Guidelines Council which is chaired by the Lord Chief Justice. Section 170 of the Act states that the function of the Council is to frame sentencing guidelines, meaning ‘guidelines relating to the sentencing of offenders, which may be general in nature or limited to a particular category of offence or offender’. The Council has since framed several guidelines, one of which is entitled ‘Reduction in Sentence for a Guilty Plea’.

The guideline works by reference to a sliding scale: the nearer the trial gets the less the discount. Thus if a defendant indicates a willingness to plead guilty at the ‘first reasonable opportunity’ the recommended discount is one third. It becomes one quarter after a trial date is set and only one tenth at the door of the court or after the trial has begun. In this way the system encourages early guilty pleas and enables a lawyer to give his client a more reliable estimate of the likely sentence. There are, however, those who argue that the discount given for a plea on the trial date is so low that it discourages late pleas altogether: ‘I might as well have a trial’.

If this guideline represents only a clarification of existing practice the concept of *Goodyear* indications is new. Before *Goodyear* was decided judges were not permitted, with one exception, to indicate the sentence they were minded to impose. The exception was that it was permissible for a judge to say that, whether the defendant pleaded guilty or not guilty, the sentence would or would not take a particular form (*R v Turner* [1970] 2 QB 32). It was thought that an indication of any other kind might amount to court-imposed pressure to enter a guilty plea.

In *Goodyear* ([2005] EWCA Crim 888), the Court of Appeal relaxed this practice, though within a detailed and structured framework. A judge may now give an advance indication of the

maximum sentence he would impose if a plea of guilty were tendered at the stage at which the indication is sought. The indication ceases to have effect if, after the defendant has had a reasonable opportunity to consider it, he declines to plead guilty. Lawyers now frequently ask judges to give these indications and, provided there is no uncertainty about the acceptability of the proposed plea or its basis, judges are often willing to do so. There is no doubt in my mind that the introduction of this procedure has reduced the number of cases that go to trial.

Only the Crown Court is permitted to give a *Goodyear* indication. The Criminal Justice Act 2003 contains a statutory scheme enabling magistrates' courts to give indications of sentence but the provisions have not yet been implemented.

The progress of a case to trial in (1) the Crown Court and (2) a magistrates' court

What is the effect of these procedural reforms at the coalface? I will try to summarise how the system works in practice, first in relation to a Crown Court trial and then in relation to a magistrates' court trial.

Whilst committal proceedings have been abolished in relation to indictable-only offences (i.e. offences triable only by the Crown Court) they have not yet been abolished in relation to other classes of offence and in those cases a committal for trial must still take place. Active case management starts with the committal proceedings since at that point the magistrates' court fixes the date of the plea and case management hearing in the Crown Court (PCMH), gives directions designed to ensure that that hearing is effective and commits the defendant for trial. Thus the magistrates' court gives directions which apply to the Crown Court part of the proceedings. Front-loading the case in this way encourages early identification of the real issues and of the evidence which is (and is not) necessary to deal with them.

Generally speaking the PCMH is the only other hearing before the trial starts. The PCMH judge therefore sets a trial date and gives a comprehensive set of directions designed to ensure that the trial itself is effective. The guidance given to the PCMH judge and the parties includes the following:

'The public and all those concerned in or affected by a criminal case have a right to expect that the business of the courts will be conducted fairly but also efficiently. Delays cost money and adversely impact on the quality of justice. The PCMH offers the best, and often the only, opportunity for the judge properly and effectively to manage the case before it is listed for trial. Other hearings – formerly called 'mentions' – are expensive and should actively be discouraged...An effective PCMH is therefore vital.'

The PCMH is the last occasion on which the defendant is likely to receive maximum credit for a guilty plea and is also the opportunity for him to ask for a *Goodyear* indication if he wishes to do so. It is therefore an important hearing, not merely a procedural exercise. As for timescales, the target is that no more than 16 weeks should elapse between the committal for trial in the magistrates' court and the beginning of the trial in the Crown Court. In my experience the target is met in most standard cases, though in many more substantial ones it is not.

It might be said that, before the introduction of active case management, the Crown Court suffered from an adjournment culture. This affected the magistrates' courts too since the average number of hearings per case was five or six and the average time from charge to disposal was 21 weeks. The government has sought to tackle this problem by introducing a programme called 'Delivering Simple Speedy Summary Justice' or 'DJSSS'. The programme involves no new law but instead aims to simplify court procedures. The expectation is that, if a defendant pleads not guilty and the case is to proceed to trial in the magistrates' court, the court will hold a case management hearing there and then. The trial date will be fixed and directions given to ensure that the trial will be effective, compliance with the directions being monitored by the court and the parties as the case progresses. This new scheme has been piloted in four areas and has led to a significant reduction in the number of pre-trial hearings and in the time between the first hearing and the trial, with the result that it is now being implemented nationally. There has been no change in the law but a noticeable change in culture.

Administrative justice: simple cautions and conditional cautions

Administrative justice is a convenient term to describe the disposal of cases out of court and it takes three main forms, the simple caution, the conditional caution and the penalty notice, though for those aged 17 and under reprimands and final warnings replace cautions.

The simple caution has been a well-known feature of the criminal law for well over 30 years: for example, no less than 266,000 were issued in 1999. They are a non-statutory disposal for adult offenders governed by Home Office Circular 30/2005, paragraph 6 of which sets out their aim:

- (i) to deal quickly and simply with less serious offences;
- (ii) to divert offenders, where appropriate, from appearing in the criminal courts; and
- (iii) to reduce the likelihood of offending.’

The circular goes on to state the criteria to be applied in deciding whether a simple caution is an appropriate disposal. These include the seriousness of the offence, where the public interest lies, the views of the victim, whether there is sufficient evidence of the suspect’s guilt and whether he has made a clear and reliable admission of the offence (either verbally or in writing). The decision whether to administer a caution must be referred to an officer of at least the rank of sergeant and the suspect must give his informed consent. A simple caution is not a conviction and no penalty is imposed.

The aims of simple cautions seem laudable. There is surely no need for everyone who commits a criminal offence, however minor, to be dealt with by a court. However, as Lord Justice Auld noted in his Review, the system lacks rigour and posed a temptation to hard-pressed police officers to use simple cautions to effect a better clear-up rate of crimes. He therefore suggested ‘caution-plus’, a proposal which led ultimately to the system of conditional cautions found in sections 22 to 27 of the Criminal Justice Act 2003.

The conditional caution is intended for cases where an adult has admitted his guilt in relation to a low-level offence but is willing to make amends and get help to address his offending. In such a case the Crown Prosecutor, in consultation with the police, can

offer a conditional caution. Free legal advice is available. The person may either accept the conditions or refuse and opt for a court hearing. If, having accepted them, he fails without reasonable excuse to comply with any of them criminal proceedings for the offence may be instituted against him.

It is for the Crown Prosecutor to decide whether a conditional caution is suitable and to identify appropriate conditions. In making those decisions he will be guided by the CPS Code of Practice for Conditional Cautions. The conditions must have the objective of facilitating the rehabilitation of the offender or ensuring that he makes reparation for the offence, or both. Rehabilitative conditions might include attendance at drug or alcohol misuse programmes whilst reparative conditions could include apologising to the victim or making good any damage caused, provided this was acceptable to the victim. A conditional caution is not a criminal conviction.

In my view it is difficult to argue with all this. The scheme helps both victims and offenders and at the same time promotes efficiency in the criminal justice system by diverting from the courts cases where offenders admit their guilt and, if prosecuted, would receive only a minor penalty. The Government anticipates that the conditional caution will enable some 30,000 cases to be diverted from the courts, thereby creating some capacity for tackling more serious cases. However, the matter has now become more complicated. By section 17 of the Police and Justice Act 2006 the government has amended the conditional caution scheme by adding ‘punishing the offender’ to the existing objectives of rehabilitation and reparation. The punishment may consist of payment of a financial penalty of up to £250 (in certain prescribed cases), unpaid work for a period not exceeding 20 hours or attendance at a specified place for a period not exceeding 20 hours.

Opponents claim that prosecutors thereby become sentencers. Baroness Linklater of Butterstone said in debate in the House of Lords on 1 November 2006:

‘To extend these conditions as proposed, however, is to open the door to administrative justice, where a punitive element is now present; where punishments are imposed by the police and Crown Prosecution Service, which then become de facto investigators,

prosecutors and judges. The principle of sentencing and punishment being imposed by an entirely independent tribunal—the court—is thus dispensed with. We recognise that we are talking here about the lowest level of offending but, none the less, this all-important principle of our justice system is being bypassed.'

The thrust of the government's response is that the courts do retain control because the suspect always has the right to have the matter dealt with by a court. The Attorney General, Lord Goldsmith, said on 10 October 2006:

'It cannot be imposed on him against his will. He will have free legal advice on whether to accept the condition. If he does not accept the condition, he can simply say, 'I will go to court. I will plead not guilty in court', or 'I will plead guilty in court and I would rather have the court deal with it'. It is not a case of giving the prosecutors the power to punish because it is for the court ultimately to do that.'

This divergence of opinion is one which the courts themselves are likely to have to resolve at some point, the question being whether the suspect's rights to 'a fair and public hearing by an independent and impartial tribunal established by law' under article 6 of the European Convention on Human Rights are engaged and, if so, whether there has been a breach of them.

Administrative justice: penalty notices

Penalty notices for speeding and other road traffic offences are a well-established feature of the criminal law. Chapter 1 of Part 1 of the Criminal Justice and Police Act 2001 is entitled 'On the spot penalties for disorderly behaviour' and introduced penalty notices for disorder. These can be issued by the police and, to a limited extent, by community support officers and other accredited persons where they have reason to believe that a person has committed a 'penalty offence'. The penalty is £50 or £80 depending on the severity of the behaviour. If the penalty is paid no proceedings may be brought and there is no conviction, but if the recipient asks to be tried proceedings may be brought against him. If he neither pays the penalty nor asks to be tried a sum equal to one and a half times the amount of the penalty may be enforced against him as a fine.

The purpose of the original scheme was to provide the police with a quick and effective tool for tackling low-level, drink-related nuisance offending. However, a number of further offences have since been added to the list of penalty offences, including, for example, destroying or damaging property up to the value of £500 and retail theft up to the value of £200. A cynic might observe that a penalty of £80 for shoplifting goods worth (say) £160 is good business. The consequence is that an offender who commits an offence of dishonesty involving quite a substantial sum may now escape prosecution and conviction. The Anti-social Behaviour Act 2003 makes further provision for penalty notices and there are several similar provisions in environment protection legislation. Most recently the Education (Penalty Notices) Regulations 2007 (SI 2007/1867) permit local education authorities to issue penalty notices to parents who fail to send their children to school. Moreover, whilst the original penalty notice scheme applied only to adults, it has since been extended to those aged 16 and 17 and is being piloted in relation to 10 – 15 year olds (where the parent would be liable to pay).

Conclusion

Acting fairly is not the same as counting widgets and there are no statistics to say whether the introduction of active case management has caused or risked unfairness. I am sure that judges and magistrates have been more robust in taking case management decisions to reduce delay but I doubt whether this has imperilled the fairness of criminal proceedings generally. The reason is that, if ever the question seems finely balanced, the judicial instinct to do right prevails.

The consequences of the expansion of alternatives to prosecution are, I think, less clear. There are justified concerns about the protection of a suspect's article 6 rights as conditional cautions come to include a punitive element. In the case of conditional cautions with a punitive element and penalty notices in general there is a risk of a two tier system where those who can pay avoid court. In addition there is a danger that cases serious enough to warrant prosecution will be disposed of by an administratively convenient alternative.

Administrative justice has obvious practical benefits but its limitations should be acknowledged.

THE CARIBBEAN COURT OF JUSTICE AND THE EVOLVING HUMAN RIGHTS JURISPRUDENCE OF THE CARIBBEAN

*The Hon Mr Justice Adrian D. Saunders, Judge of the Caribbean Court of Justice
A paper at the CMJA triennial conference in Toronto*

Any discussion on Caribbean jurisprudence and the Caribbean Court of Justice should take as its point of departure a theme upon which Dr Ralph Gonsalves, currently Prime Minister of Saint Vincent and the Grenadines, is fond of commenting. It is the notion of Caribbean civilization.

In a lecture delivered in Barbados in March 1998, Dr Gonsalves developed some of his ideas on this notion. He first quoted the late Prime Minister of Barbados, Errol Barrow, one of the founding fathers of the Caribbean Community (CARICOM) when the latter had said of Caribbean people:

'We are peoples with an identity and a culture and a history – the Parliament of Barbados will be 350 years old in 1989. We don't need lessons in democracy from anyone. However severe the economic difficulties facing the Caribbean, we are viable functioning societies with the intellectual and institutional resources to understand and grapple with our problems. Collectively, we have the resource potential necessary for our continued development and, of course, we have a heritage of exquisite natural beauty entrusted to us. The Caribbean is, after all, a civilization.'

Dr Gonsalves added that:

'Our region's evolution from a culturally plural social arrangement to a relatively integrated creole society composed almost entirely of migrant peoples from three continents – Africa, Europe and Asia – has made us a unique civilization... No where else in the world does a society exist like the Caribbean with its peculiar geography, special physical environment, distinct history, particular language, and a community of migrant peoples in which there is a non-white and creolized majority.'

This notion of Caribbean civilization is not always readily appreciated. One of the saddest legacies of the break-up of the ill-fated West Indies Federation in 1962 is that in its aftermath, in the joyful embrace of independence and national sovereignty by each of its constituents, considerable effort has been spent by Caribbean politicians, over the last 40 years, in de-emphasising the oneness of our Caribbean people. Yet, as both Barrow and Gonsalves attest, no one can deny or efface the common bonds that make us one people, with our own unique way of life, forged in the crucible of a shared experience of slavery, indenture, displacement, colonialism, resistance and struggle. In the course of that struggle we have justifiably earned the admiration of the international community in fields of endeavour ranging from international diplomacy and governance to literature, sports and music. We do represent a discrete, authentic civilization, recognisable to ourselves and even more so, to others. It is a civilization that is worthy of the respect of all the nations of the world and, the more so, of ourselves.

The need for institutions

Like every other self respecting civilization, the Caribbean civilization must have institutions that help to preserve its integrity and enhance its unique features. Equally, it must have its own institutions to interpret its laws so as to promote its democratic traditions, guarantee the rights of its people and oversee the measured evolution of its jurisprudence.

One of the interesting aspects of the common law world is the tremendous role accorded to judges in the shaping of the law. In some quarters it is still considered heresy to advocate that judges make law. The truth of the matter is that the common law does permit and indeed requires judges to fill gaps in the law and to interpret the law in light of the concrete social conditions and human values that

currently exist (see *R v Ireland* (1998) AC 147). When applying the controlling precedent or available principles might result in a decision that would be contrary to public policy, or where the controlling principles were premised on ideas and values which, locally and internationally, have become discredited, or if the circumstances before us will only fit the controlling principles if we extend those principles in a new direction, or indeed when there is no controlling precedent whatsoever, judges develop and are entitled to develop the law. The law is after all, a social instrument - a means, not an end. And so, over time the law must change, evolve, as society itself changes and evolves. There should be therefore, always a connection between the forward march of the society in general and the development of its jurisprudence.

The Constitutions

With the attainment of political independence of the countries of the Caribbean following the dissolution of the West Indies Federation, the various territories of the Caribbean adopted written Constitutions each of which contained a Chapter on Fundamental Rights and Freedoms. In *Boyce and Another v. The Queen* ([2005] 1 AC 400 at paras 27-28), Lord Hoffman states of the provisions in these Chapters that they:

... are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions. The framers of the Constitution would have been aware that they were invoking concepts of liberty such as free speech, fair trials and freedom from cruel punishments which went back to the Enlightenment and beyond. And they would have been aware that sometimes the practical expression of these concepts – what limits on free speech are acceptable, what counts as a fair trial, what is a cruel punishment – had been different in the past and might again be different in the future. But whether they entertained these thoughts or not, the terms in which these provisions of the Constitution are expressed necessarily co-opt future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights. The judges are the mediators between the high

generalities of the constitutional text and the messy detail of their application to concrete problems. And the judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary, they are applying the language of these provisions of the Constitution according to their true meaning...'

It is natural therefore that the character, scope and content of the fundamental rights contained in the Constitutions may undergo evolution over time and indeed, this has occurred in the Caribbean. Political independence may have however placed responsibility for national development in many areas in the hands of the local legislature and executive but, responsibility for the evolution of the Caribbean's human rights jurisprudence has not been determined by the newly independent peoples themselves. It has been determined for them.

The Savings Clause

In the first place, for the early group of countries that proceeded to independence, Jamaica and Trinidad in 1962, followed by Barbados and Guyana in 1966, the Constitutions all contained a clause (referred to as a 'Savings Clause') which immunised the existing corpus of law from any curial challenge grounded on an alleged contravention of the fundamental rights sections of the constitution. Thus, the pre-Independence written law, inherited by the newly independent states, was not to be trumped by the Fundamental Rights and Freedoms laid out in the new Constitutions. The existing laws were, as Lord Devlin stated in *Nasralla* ([1967] 2 AC 238 at 248), 'not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the ... [fundamental rights] ... provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the [fundamental rights] chapter covers derogate from the rights which, at the coming into force of the Constitution, the individual enjoyed'.

It seems that, after two decades of independence, there became an awareness that insulating *all* existing law from scrutiny was not an appropriate way of giving effect to the fundamental rights of the people and so, by the time the smaller countries of the Eastern Caribbean proceeded to independence in the late 70s and early 80s, the amplitude of the Savings clause was restricted only to laws that authorised punishments and treatments that might otherwise be said to infringe the constitutional protection against inhuman punishment and treatment.

The Privy Council's role

The immunisation of existing law from challenge was reinforced with the entrenchment of the Judicial Committee of the Privy Council (JCPC) as the final court of appeal. No one of course can justifiably criticise either the integrity or competence of their Lordships who have invariably always fully demonstrated both of these qualities. But there are inherent dangers when a foreign court, located outside the region and staffed by judges from another civilization, is permitted to drive the evolutionary development of the jurisprudence of countries with which they have little or no real connection. The main purpose of this paper is to look at some of these dangers and to comment upon how they may have manifested themselves in the Caribbean region.

Phases of evolutionary development

It is possible to suggest that the evolution of the interpretation of our Fundamental Rights provisions by the JCPC, since the dissolution of the federation, has been characterised by two pronounced phases and perhaps a short third phase bridging the two.

First, there is the immediate post independence period. The general approach taken to fundamental rights in the decades of the 60s and 70s was a very conservative, 'austere' one. The citizen's rights were for the most part construed restrictively. Consistent with the assumptions that underlay the general savings clauses, the JCPC repeatedly decided that the new Bills of Rights represented no more nor less than a re-statement of common law principles. Cases like *DPP v Nasralla* ([1967] 2 AC 238) and *de Freitas v. Benny* ([1976] AC 239) well illustrate the austere approach.

In *de Freitas*, Lord Diplock held that a condemned man had no legal rights and that delay in carrying out his death sentence could not amount to inhuman treatment. In *Nasralla*, Lord Devlin agreed that it was correct to treat a particular right laid out in the Jamaica Bill of Rights Chapter 'as declaring or intended to declare the common law on the subject'. In determining therefore whether that right had or had not been infringed he proceeded to examine the common law on the question.

In assessing the legislature's power to restrict fundamental rights, some of the cases in this period placed great store on a presumption of constitutionality test. See *Antigua Times newspaper case* ([1976] AC 16, 52) and also *Hinds* ([1977] AC 195 at 224) where the test used to rebut the presumption was whether the Court was satisfied that Parliament was either acting in bad faith or had misinterpreted the provisions of the Constitution under which it purported to act.

The austere approach was more than merely conservative. It also consistently reflected a sensitivity to and appreciation for the views of the Caribbean judges. Both points are well demonstrated in the Jamaican case of *Baker v The Queen* ([1975] 1 AC 304). Two young men, aged 17 and a half at the time, committed murder. They were convicted and sentenced after they had attained the age of 18. Section 29(1) of the Juveniles Act prohibited a court from pronouncing or recording the sentence of death against a person under the age of 18 years. Section 20(7) of the Jamaica Constitution read, in part:

'...no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed'

The issue before the JCPC was whether the material date for assessing whether the young men could take advantage of section 29(1) of the Juveniles Act was the date on which the murder was committed or the date when the offenders were sentenced. The Board (Lord Salmon dissenting) examined the particular section of the Act along with the Act as a whole and concluded that the date of sentence was the material date. In the course of so

doing, speaking for the majority, Lord Diplock, in reference to the Jamaican judges, stated that:

‘Those judges are familiar with conditions in Jamaica, with the pattern of violent crime among young people and, perhaps most important, with the state of public opinion there upon the controversial subject of capital punishment. This makes the judiciary in Jamaica much better qualified than any member of this Board to assess whether there is material, extraneous to the Juveniles Law itself, which could give rise to a presumption as to the policy of the Jamaican legislature sufficiently strong to justify the conclusion that it cannot have intended section 29 (1) to mean what it so plainly says’.

A more international approach

In the 1980s the JCPC judges began to abandon the austere approach demonstrated in the preceding twenty years. Appropriately, this decade commenced with the famous dictum of Lord Wilberforce in *Fisher v. Minister of Home Affairs* ([1980] AC 319). In a judgment that represented a manifesto for a brand new approach, Lord Wilberforce noted that Caribbean constitutional rights were:

‘...greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms. That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations’ Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism,’ suitable to give to individuals the full measure of the fundamental rights and freedoms referred to’.

What is significant in this short passage is the references to and reliance upon international law for validation of the new approach that was being ushered in. This was a clear statement that the JCPC was about to change gears and to construe Caribbean fundamental rights, not as codified common law but as *sui generis* rights traceable to the European Convention and to the Universal Declaration of Human

Rights. Implicit in this is the sense that interpretation of these rights must inexorably follow the interpretation of those international instruments by the appropriate agencies that are responsible for so interpreting them. This was a comprehensive repudiation of and a radical departure from the old approach.

Embarking upon this new path necessarily involved moving away, as the occasion arose, from those precedents of the past that could not be distinguished. *De Freitas v. Benny* was one such precedent to come under early attack and the case of *Riley v Attorney General of Jamaica* ([1983] 1 AC 719) illustrates the struggle between the members of the Board espousing respectively the austere and, what I would refer to as, the international approach. In *Riley*, three members of the Board, basing themselves on *Nasralla* and *de Freitas*, were determined to maintain the austere approach to delay in the execution of a death sentence, namely that it could not provide a basis for a complaint about the infringement of rights guaranteed by the constitution. The minority favoured strongly Lord Wilberforce’s new approach and, not surprisingly, their dissenting judgment was largely premised on the views of ‘many judges in other countries’ along with precedents from the United States of America, the Indian Supreme Court and the European Court of Human Rights. If the decade of the 1980s can be characterized as the playing out of the tension between the old and the new, the case of *Riley*, in a sense, represents the apogee of the austere approach.

The present phase

The third phase in the approach towards Caribbean human rights is to be found in the 1990s and continues down to the present time. Interpretation that was presaged in the passage of Lord Wilberforce’s, quoted above, was now fully expressed by significant reliance on international precedents. The human rights cases decided during this period have been dominated by but not by any means restricted to cases on capital punishment. In the latter category, the judgments are typified by decisions such as those in *Pratt & Morgan v The Attorney-General* ([1994] 2 AC 1) which, in overruling *de Freitas* and *Riley*, held that a condemned man should be executed within five years of being sentenced, failing which the delay in executing him would invariably be

regarded as amounting to inhuman treatment thereby justifying a commutation of his death sentence; *Reyes v R* ([2002] 2 AC 235) which held that the mandatory death penalty constituted inhuman treatment, and *Lewis v The Attorney-General* ([2001] 2 AC 50) where the JCPC answered in the affirmative three hotly contested questions, namely: Is the Jamaican Privy Council, before deciding whether or not to recommend a commutation of a sentence of death, required to disclose to the prisoner the information which it has received and afford him the opportunity to make written submissions? Secondly, is it unlawful to execute a sentence of death while the prisoner's petition is under consideration by the Inter-American Commission on Human Rights? Thirdly, might the execution of the sentence of death be unlawful because the prisoner, while in detention, has been subjected to treatment which is unlawful or unconstitutional but is otherwise unrelated to his being under sentence of death?

This paper is not about the death penalty and therefore it is neither desirable nor necessary to pursue the treatment of death penalty cases in the period since *Pratt* was decided. The new approach of overwhelming reliance upon international jurisprudence has not been confined to capital punishment cases. It is also for example very evident in freedom of expression cases like *Benjamin v The AG of Anguilla* ([2001] 1 WLR 1040) where, on the strength of a substantial body of precedents from Europe, relief was given to a producer of a radio show that was arbitrarily taken off the air by the Government of Anguilla, and *Observer Publications Ltd v Matthew* (58 WIR 188) where the JCPC, after referring to European cases, noted that '[T]he authorities just cited are European, but it would not be consistent with the largely locally-originated Constitution of Antigua and Barbuda, with its strong and elaborate affirmations of freedom of speech, to distinguish them on that account'.

The consequences of the evolutionary development

What does this admittedly brief look at the evolution of the interpretation of Caribbean rights suggest? The first and most obvious point is that, over a relatively short period of time, some 10 years or so, the approach to interpretation of those rights has gone almost from one extreme to the other. Important

questions arise. This paper chooses to look only at two of them. What has been the motive force for such evolution? Is that motive force a sufficient condition for such rapid and radical evolution?

Consider for a moment Caribbean human rights jurisprudence as a living organism. First of all, for all organisms, evolution is normal, natural, healthy. But while evolution may be profoundly influenced by the impact of the external environment upon the organism, evolutionary development normally springs from the internal dynamics of the organism, from an appreciation by the organism itself of the necessity to evolve and to adapt based on a profound awareness of its possibilities and limitations.

Giving effect to individual human rights involves deciding between competing interests. Individuals living in a society cannot reasonably expect to have unrestrained freedom to engage in any and all pursuits in howsoever manner and at whatever time they might choose so to do. The State has a right and duty to pursue policies that inure for the public good. Invariably the pursuit of such policies on the part of the State may require legitimate, sometimes temporary, fetters on individual freedoms. This is recognised and practised in every organised society of humans. In some cases it is not difficult for a court to determine where the line between individual freedom and the good of the public should be drawn. In other cases, it is not and the line then can properly only be drawn if due regard is paid to prevailing social, economic and cultural circumstances, with full account being taken of the moral and spiritual values of the vast majority of the people. Failing this, it might be said that the line is being drawn arbitrarily with the result that confidence in the administration of justice inevitably suffers.

No one can, with respect, quarrel with Lord Wilberforce's statement in *Fisher* quoted above. In developing the human rights jurisprudence of the Caribbean, it is important and necessary to take into account international developments in and approaches to the interpretation of such rights. The beneficial influences flowing from such interpretation should be welcomed and embraced. But if interpretation is wholly premised upon external influences in isolation from or uncon-

ditioned by local realities and especially if such interpretation is being made by judges who are alienated from the social and cultural environment of the Caribbean, then problems will ensue. The risk of such problems occurring escalates if these judges sometimes decide the cases on the basis of submissions from counsel who are similarly alienated.

This is not about whether or not one regards one's Constitution as 'a living instrument'. The plain fact is that no civilization can develop an effective jurisprudence for its people in such a fashion. High regard for international precedents is necessary and desirable, but there must be some reference point for the extent to which such influences are to be accommodated and the time and manner in which effect is given to those influences. In the absence of this the Bill of Rights will truly be all sail and no anchor!

In *Boyce and Another v. The Queen* ([2005] 1 AC 400), Lord Hoffmann warned that:

'The 'living instrument' principle has its reasons, its logic and its limitations. It is not a magic ingredient which can be stirred into a jurisprudential pot together with 'international obligations', 'generous construction' and other such phrases, sprinkled with a cherished aphorism or two and brewed up into a potion which will make the Constitution mean something which it obviously does not.'

Equally, Caribbean human rights jurisprudence cannot be effectively developed if either no attempt is made to anchor the jurisprudence in the mores and values of the Caribbean people or indeed, the judges are ill-equipped properly to assess the 'margin of appreciation' the State should enjoy in the striking of a fair balance between the competing interests of the individual and of the State as a whole.

The evidence and consequences of the detachment of Caribbean societies from a final court developing Caribbean jurisprudence wholly or principally on the basis of international law are not difficult to discern. Three such consequences can be mentioned. Firstly, stability and certainty in the law are primordial prerequisites for the orderly development of any jurisprudence. But if a final appellate court, not bound by its previous decisions, is disconnected from the consequences of its decisions,

then respect for the principle of *stare decisis* is likely to be a casualty of its decision-making.

It is to be regretted that in the period between 1994-2002, the final court of the Caribbean repeatedly reversed itself on the same point, leaving an exasperated Lord Hoffmann, in *Lewis*, to caution his colleagues that

'the power of final interpretation of a constitution must be handled with care. If the Board feels able to depart from a previous decision simply because its members on a given occasion have a 'doctrinal disposition to come out differently', the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean'.

It would not have escaped the attention of onlookers that, by contrast, the House of Lords adopts a different approach to the principle of *stare decisis*. In *Kansal (No. 2)* ([2002] 2 AC 69) for example, four of five of their Lordships felt constrained on the basis of adherence to *stare decisis* principles to uphold a House of Lords precedent which three members of the court thought was wrongly decided.

Secondly, in the period since *Pratt* was decided, Caribbean people have witnessed regular, open and ugly condemnations by their respective governments of decisions of their own final court. This was never a feature of life prior to the 1990s. In the wake of decisions on cases concerning the death penalty, regional governments have not just publicly and forcefully railed against the JCPC, but they have denounced human rights treaties they have ratified, enacted constitutional amendments that are to be deeply regretted and, most unfortunately, have led some sections of the public to believe that there is a sinister link between the governments' dissatisfaction with the judgments of the JCPC and their entirely unrelated plans to establish a Caribbean final court of appeal. None of these matters has helped the evolution of Caribbean human rights.

Thirdly, confidence in the local judiciary has been undermined. The JCPC's decisions naturally constitute binding precedent. The local judges are bound to obey them. When a disconnected foreign Court drives the evolutionary process and there is no common ethos between

the judges who sit on that court and the domestic judges, and when the final court repeatedly reverses itself, the local courts find themselves in an impossible position. After the JCPC shifted gears in the 80s, many of the region's judges were still faithfully applying the philosophy and the precedents of the 60s and 70s with the result that appeal after appeal was allowed and large sections of the region's private Bar and lay persons alike have been led to believe that it is only in London they can get justice.

All of the above have created a poisonous climate for the emergence of the Caribbean Court of Justice (CCJ). It was never going to be plain sailing to establish such a court in the first place. As a trait of colonialism, perhaps, in all the former British colonies which have sought to establish their own final appellate courts in place of the JCPC, there have been serious expressions of concern on the part of some that such a move, irrespective of when it is undertaken, would be dangerous and untimely. Unsurprisingly, this has been the case in the Caribbean as it had been in New Zealand, Australia, Canada and other former colonies. The arguments are depressingly familiar. The move would have a seriously adverse effect on the investment climate. There would be political interference in the appointments process. The local judges are not up to the mark. The use of the Privy Council is free and we can't afford this new expense. And so forth and so forth.

One expects to hear these worn out contentions that were also trotted out prior to political independence. But whatever merit they might have had in relation to the CCJ has been reinforced substantially by the undermining of public confidence alluded to above. If the perception is unwittingly encouraged that it is only in London that one can get 'true justice', if Governments have been goaded into expressing public dissatisfaction with the decisions of the JCPC and they link that dissatisfaction to the need to establish a Caribbean final court, then it is understandable that the public would be wary of such an institution.

Notwithstanding these matters, the Caribbean Court of Justice (CCJ), as a court of final appeal, is now a reality, at least for the States of Guyana and Barbados at this point in time. Time will tell just how it will approach the task of developing the human rights jurisprudence of the

Caribbean. So far as we are concerned with evolution of that jurisprudence, it would certainly be better equipped in such matters as: balancing the need for a further step in the evolutionary process with the equal need for promoting stability in the law; weighing the interests of the State and the citizen while promoting evolutionary steps and generally, managing evolution in a judicious manner. These are all matters that are rooted in an intimate awareness of concrete political, economic, social and cultural conditions that exist in the region.

For the future?

As to the direction in which our human rights law is evolving? I can think of two trends in the world today that are having and will continue to have a tremendous impact on how our human rights law evolves. The first is the trend towards globalisation of the law generally and the globalisation of human rights in particular. What do I mean by globalisation of the law? I refer to the tendency toward confluence of international and domestic law. In areas such as crime, protection of the environment, human rights, trade, investment and economic activity, international law has reached beyond the sphere of impersonal relationships between States and now directly affects individual citizens.

The convergence of domestic and international law is particularly marked in the sphere of human rights. Since the United Nations Declaration of Human Rights 60 years ago, we have seen the promotion of common, universal standards of human rights, accepted simultaneously both at the domestic and at the international plane. Citizens are now at liberty to press for the observance of these rights at both levels. At the former, the jurisprudence of international bodies is fully considered and applied. In determining the content of a municipal right, domestic courts regularly consider the judgments of international bodies. Likewise, at the international plane, the judgments of domestic courts assist in informing the manner in which international law should be interpreted.

The second trend is the increasing degree to which courts are called upon to determine the procedural propriety of administrative bodies and in particular to assess whether those bodies have dealt with the citizen in a fair manner. In Trinidad & Tobago judicial review of administrative action is a rapidly developing

area of the law. While in 2001, only twenty judicial review matters were disposed of by the Trinidad and Tobago judiciary, in 2005, that figure had shot up to 131.

The task of a CCJ is to give a measured response, anchored in our own realities, to the need for our jurisprudence to evolve in these and other areas; to determine, for example, the extent to which international norms can and should impact upon the domestic rights of the citizen; to protect the rights of the citizen and encourage fairness while at the same time being careful not to usurp the functions of the other branches of Government and to afford to the Executive an appropriate margin of flexibility in order to carry out the policies it was elected to pursue.

In the House of Lords in 2006, Lord Nicholls drew attention to the tricky nature of the concept of 'fairness'. In *Miller v Miller* ([2006] UKHL 24) he said:

'Fairness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next. It is not surprising therefore that ... there can be different views on the requirements of fairness in any particular case.'

It seems to me that any concept that is 'grounded in social and moral values' must

perforce require for its expression judges who also have some awareness of how such values are expressed and here again, the CCJ judges should start with an edge.

Going through cases on the impact of treaty law on the domestic plane recently, it was easy to glean the distinct approaches of different courts, of different civilisations. The Law Lords in the House of Lords, on the whole, held to an austere, traditional position on the issue. The courts of New Zealand and Australia had a much more liberal position. The Supreme Court of Canada had a cautiously liberal stance. The courts of India were way out by themselves with an extremely assertive position. These various stances reflect the views of the respective final courts on how an international issue might be accommodated on the municipal plane. It is not surprising that although each of the various courts were grappling with the same principle and faithfully applying the common law, the results reached were not identical.

In the CCJ, the Caribbean now has a voice that should be equipped to reflect: our status as developing countries on the periphery of the international centres of trade and commerce, our continuing struggle to defend and assert our independence and the constraints under which our respective States function. In this respect the countries of Guyana and Barbados certainly do find themselves in an advantageous position because of the steps they have taken to subscribe to the CCJ in its appellate jurisdiction.

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CONTROL OF ILLEGAL DRUG USE THROUGH THE COURTS: THE JAMAICAN EXPERIENCE

*The Hon Miss Justice Paulette A. Williams, Supreme Court of Jamaica.
A paper from the CMJA's Toronto conference*

Over the past two decades the correlation between illegal drug use and crime and the resulting impact on the criminal justice system have been the topic of much debate. There has been an increased awareness and acceptance that drugs are related to crime in myriad ways.

In March 2000, the U.S. Office of National Drug Control Policy released a fact sheet in which there was an attempt to summarise the relationship between drugs and crime. It distinguished three categories: *drug-defined offences* (violations of laws prohibiting or regulating the possession, use, distribution or manufacture of illegal drugs); *drug-related offences* (offences to which a drug's pharmacologic effects contribute; offences motivated by the user's need for money to support continued use; and offences connected to drug distribution itself); and a *drug-using lifestyle* (one in which the likelihood and frequency of involvement in illegal activity are increased because drug users may not participate in the legitimate economy and are exposed to situations that encourage crime).

The illegal drug trade has reached alarming proportions in many countries around the world. The gamut of activities relating to the production, manufacture, trafficking and consumption of drugs and the attendant criminal activity is pervasive.

Jamaica has been a major supplier of marijuana entering the United States drug market. In 1986 it was estimated that Jamaica was one of four Caribbean basin territories to be supplying 90% of all ganja imported. In recent years, while there has been some success in the eradication of the marijuana crop locally, there has been a significant increase in using Jamaica, along with other Caribbean territories, as a transshipment point.

The attitude of the Jamaican courts to those who engage in the production, manufacture and trafficking of illegal drugs have remained quite 'tough' and these offenders continue to

be visited with terms of imprisonment. The concern of the courts has been increasingly for the offenders who commit crimes because of their addiction to illegal drugs — those who commit offences to support their drug habit or because of this habit. The debate as to whether drug - addiction ought to be regarded as an illness has highlighted the issue as to whether punitive measures are appropriate in dealing with these offenders. The traditional approach of arrest, prosecution and incarceration of these offenders saw a number of them returning to court time and time again.

In his testimony before the Senate Judiciary Committee on the 1988 National Drug Strategy, Barry R. McCaffrey, Director of the Office of National Drug Control Policy said:

'The correlation between drugs and crime is well established. Drug addicts are involved in approximately 3 to 5 times the number of crimes as arrestees who do not use drugs. Approximately three quarters of prison inmates and half of those in jails or on probation are substance abusers, yet only 10 to 20% of prison inmates participate in treatment while incarcerated. Simply punishing drug-dependent criminals is not enough. If crime is to be reduced permanently, addiction must be treated. Treatment while in custody in prison and under post-incarceration or release supervision can reduce recidivism by roughly 50%.'

It is hardly surprising that with this recognition, the United States of America grappled with the issue and came up with the concept of the Drug Treatment Court, one which sought to address and treat the addiction, not merely punish the addict. The first Drug Treatment Court was established in Miami, Florida in the summer of 1989 and since its creation, jurisdictions across that country embraced the concept and jurisdictions across the world are following suit. Happily, Jamaica is one of them.

What is the Drug Treatment Court?

The Drug Treatment Court is not easily defined, but its concept more readily understood. The criminal justice system co-operates with treatment providers and other services to provide an offender with the tools needed to get into recovery, to stay in recovery and lead a productive crime free life.

It is accepted that there can be no single universal model for drug treatment courts, as what is found to work effectively in one jurisdiction may not work in another. Hence the drug treatment court has evolved in different forms to suit different legal systems and cultures while the core underlying characteristics are the same.

The Drug Treatment Court - the Jamaican Model

The Jamaican Parliament passed legislation that saw the creation of the Drug Treatment Court in the Drug Court (Treatment and Rehabilitation of Offenders) Act 1999.

The objects of the Act are to:

- a) reduce the incidence of drug use and dependence by persons whose criminal activities are found to be linked to such dependence.
- b) reduce the level of criminal activity that results from drug abuse
- c) provide such assistance to those persons as will enable them to function as law abiding citizens.

The Court itself is constituted of a Resident Magistrate as chairman and two Justices of the Peace, one of whom must be a woman.

Once a person is deemed to be eligible, for the purposes of the Act, they are referred to the Drug Court where they are subjected to an assessment by an approved treatment provider who then recommends the person's suitability for participation in a prescribed treatment programme.

Persons become eligible if

- a. they are charged with a relevant offence, namely:
 - possession of not more than one ounce of prepared opium, eight ounces of

ganja, or one-tenth of an ounce of cocaine, heroin or morphine.

- possession of any pipes or other utensils for use with the smoking of opium or ganja as the case may be or any utensils used in connection with the preparation of opium for smoking;
 - smoking or otherwise using ganja or prepared opium;
- b. appear to be dependent on the use of drugs; and
 - c. satisfy other prescribed criteria, in that they are at least 17 years of age and are not suffering from any mental condition that would prevent or restrict the person's active participation in a prescribed treatment programme.

When a person is recommended as suitable, prosecution of the offence is deferred or the imposition of a sentence for the offence after a guilty plea is deferred.

The Court then makes an order requiring the offender to undergo a prescribed treatment programme and to comply with the conditions imposed by the Court. It will then impose such conditions as it deems fit in relation to the offender's participation in the programme. The offender will be required to give written consent to his participation in the programme. A prescribed treatment programme is for such period as the court shall specify unless terminated sooner.

It is terminated if the offender successfully completes the programme; the offender requests the Drug Court to terminate the programme; or if there is no useful purpose to be served by the offender's continued participation in the programme.

If the offender successfully completes the programme, the Drug Court then discharges him in relation to the relevant offence, and that discharge may be either absolute or conditional as the Court thinks fit. If the offender fails to complete the prescribed treatment programme the court may hear and determine the relevant offence; if the circumstances warrant, make an order requiring the offender to undergo a new prescribed treatment programme; or, if sentencing was deferred, impose any sentence which it could have imposed.

The regulations to the Drug Court (Treatment and Rehabilitation of Offenders) Act were formulated in 2000 to give effect to the provisions of the Act. They provide, inter alia, an indication as to what is to be contained in the programme.

Firstly in addressing the issue as to what conditions the court can order in relation to the drug offender's participation, they provide for 'advantages' and 'sanctions'. The court may specify any of the following advantages:

- a. specified privileges;
- b. a change in the frequency of counselling or other treatments;
- c. a decrease in the degree of supervision to which the drug offender is subject;
- d. a decrease in the frequency with which the drug offender is required to undergo drug test;
- e. a change in the nature of the vocational and social services attended by the drug offender or the frequency with which he is required to attend those services.

The following sanctions may be specified:

- a. withdrawal of privileges;
- b. an appropriate change in the frequency of counselling or other treatment;
- c. an increase in the frequency with which the drug offender is required to undergo drug tests;
- d. a change in the nature of the vocational and social services attended by the drug offender or the frequency with which he is required to attend those services.

An insight into what a drug offender can expect from the programme is gleaned from the Regulation by which the approved treatment provider is required to conduct an intake interview with him, in the form of a discussion of the following:

- a. the goals and objectives for participation, including abstinence from the use of drugs during the period of the programme;
- b. counselling and education requirements;
- c. attendance requirements;
- d. drug testing requirements;

- e. payment of contributions, if any;
- f. the place and times for participation;
- g. reasons for termination of the programme; and
- h. rules which relate to the drug offender.

Finally the regulations specify what a plan of a prescribed treatment programme should include namely

educational sessions (a minimum of 8 weekly sessions of at least 60 minutes), and information on the effects of drug use on the individual, the fetus, the family and society; the physiological and psychological facets of drug use; the nature of addiction; HIV/AIDS, intravenous drug use, sex and sexuality; alternatives to drug use; relapse prevention; stress management and conflict resolution;

group counselling sessions (a minimum of 12 weekly sessions of at least 90 minutes in length) conducted in such a manner as to encourage participants to talk and share ideas and information in order to identify and resolve drug related problems; provide an opportunity for participants to examine their own personal attitudes and behaviour; developing action plans to address those matters; and evaluating the participants' need for referral to ancillary services;

drug testing (a minimum of monthly random urine analyses, the frequency to increase whenever the approved treatment provider determines that additional drug tests are necessary); and

a treatment/recovery plan. Each participant has to have such a plan based on the information obtained in the process of intake and assessment. The plan is to be developed within 30 days of the date of commencement and is to be reviewed and updated at least every 60 days.

The Drug Treatment Court - the Jamaican Experience

The Drug Treatment Court first began in Kingston & St. Andrew in 2000 and a second was established in Montego Bay, St. James in 2001. Due to lack of resources, unfortunately, there has not been the anticipated establishment of Drug Treatment Courts in the remaining ten parishes. Those Resident Magistrates who have thus far worked in the

Courts agree it can be a rewarding and fulfilling experience but not without its frustrations.

The Resident Magistrate coordinates the multi-disciplinary team, consisting of the Clerk of Courts, Justices of the Peace, Probation Officers, Treatment/Rehabilitation Providers and the Defence Attorney, where available. The team meets on a regular basis in pre-court meetings to discuss each case and consider recommendations with regard to the progress of the offender, as well as possible incentives and sanctions in case of relapse. In this regard drug testing is critical.

The drug offender has to be encouraged to talk freely and honestly in Court, hence the usual stricter and adversarial approaches have to be set aside. Some offenders find it difficult to accept that the Resident Magistrate is in these courts not there to judge and punish but to encourage and assist in their recovery. The Drug Court Judge becomes a powerful motivator for the offender's rehabilitation. Ultimately, each team member recognizes that their job is the facilitation of the offender's rehabilitation.

Throughout the offender's appearance in Court, the team of the Resident Magistrate and the Justices of the Peace has to assume different roles - as cheerleader, confessor and toastmaster, in turn exhorting, threatening and congratulating each offender for his or her progress or lack thereof.

As the programme continues, one sanction which is used sparingly is short periods of incarceration to encourage compliance. Given the fact that most offenders are from the lower economic strata, rewards such as tickets to see a movie, vouchers to get meals from fast food establishments, and little gift baskets with basic food and hygienic items are appreciated.

The offender is encouraged to find employment or to enroll in some educational programme before being allowed to 'graduate' from the programme. Graduation is treated as a grand affair. Where possible, media coverage in some scale is welcomed. The graduate is given a certificate or diploma and there is no record of the offence which brought him or her before the Court.

A more detailed look at the statistics of the St. James Drug Court reveals that the numbers

that have passed through the court may seem small. However, given the limited resources and constraints, the programme can still be considered a success.

Since its introduction in 2001 some 170 persons have been referred to the Court. Of this number 72 have graduated. 49 dropped out voluntarily and eight 8 were expelled, with 4 others referred to other programmes and 18 returned to court.

It is significant to note of that of this number, 102 were first time offenders while 56 were regarded as multiple offenders. The most common offence committed was found to be possession *simpliciter* of the drug itself, with the second most common being simple larceny. The drug of impact for 107 offenders was marijuana while 33 preferred a mixture of crack/cocaine and marijuana, 10 preferred crack/cocaine while 9 preferred cocaine.

The educational background of the participants was as follows: Primary 34; Secondary 130; Tertiary 1. The remaining five could not be accounted for.

There were one hundred and sixty-two men in the programme. Most of the offenders entering the programme were within 17 to 25 years of age. The breakdown is as follows:

Age	17-19	20-22	23-25	26-28	29-31	32-34	35-37	≥38
No.	53	29	18	17	8	9	12	24

Conclusion

In a newspaper story of a 'graduation' held in the St. James Drug Court, one graduate was quoted as saying:

'This programme really helps young people to understand and really think about what they really want out of life instead of just sitting on the corner smoking weed (ganja/marijuana).'

As simplistic as this may sound, this statement is vindication to those who work within the system of the merits of adapting such a concept to our jurisdiction. The Drug Treatment Court seems the most appropriate way within the criminal justice system to handle a drug offender's addiction. The Court is able to control the underlying problems of drug crimes, illegal drug-use and addiction.

MAGISTRATES' WORK IN SOUTH AUSTRALIA

*Fred Field, Stipendiary Magistrate South Australia.
A paper from the CMJA triennial conference 2006.*

South Australia has 40 magistrates of whom 3 are permanently appointed to the Industrial Court. At any time two magistrates will be working full time at the Youth Court and the rest work in the Magistrates Court. (Five do civil work and the remainder do criminal work). The total number of magistrates in the whole of Australia is approximately 440.

Appointments

There are no Appointments Boards within Australian jurisdictions. There is no mandatory procedure laid down for appointments of magistrates. In South Australia the usual procedure is for expressions of interest to be called for when there is a vacancy. Interviews are conducted. The panel submits two or three names of persons recommended as suitable for appointment for consideration by the Attorney General. Usually a person from this list will be appointed but not always. The Attorney General sometimes chooses another person altogether.

There is a policy to increase the numbers of female magistrates subject to suitable applicants coming forward. There are currently nine female magistrates in South Australia. The State appointed the first woman magistrate in Australia in the 1970s. Female magistrates are in the minority in all jurisdictions in Australia. Of the 440 magistrates in the nation less than 25 percent would be female. There is still a glass ceiling for woman lawyers entering the judiciary. Some States have moved to appoint part time magistrates. It is hoped that this will result in more female appointments. Our State is about to introduce such legislation. In our State we have eight magistrates whose parents were European immigrants. There are none from South East Asian or Muslim backgrounds. There is no indigenous magistrate in South Australia. I know of five indigenous magistrates who have been appointed in other States. I know of only three indigenous lawyers in South Australia.

Promotions

Promotional opportunities in South Australia are limited. It is rare for a magistrate to be appointed a judge of the District Court. There have been two magistrates appointed judges and one appointed a master of the District Court since 1990. There are few promotional appointments within the magistracy. In these circumstances the most effective form of career development in practice has been in the form of lateral moves. There have been opportunities to work in mental health and some administrative Tribunals. There are opportunities to sit in the therapeutic courts of the mental health diversion, family violence and drug programmes. There have been Aboriginal sentencing courts for about 13 years. Most of these have been generated by the interests of certain magistrates. I will refer in more detail to Aboriginal sentencing courts later.

Continuing education

This important area has expanded in recent years. There are three compulsory days (annual conference and seminar) per year. Magistrates are encouraged to attend external conferences which relate to the many aspects of our work in civil, criminal and youth courts. The committee for continuing legal education for magistrates has a responsibility for the management of the continuing education programme under the direction of the Chief Magistrate. Inevitably there are some magistrates who are averse to attending conferences and there is an element of preaching to the converted in approving applications to attend external conferences.

In South Australia there are regular seminars on Aboriginal cultural issues organized by the committee for Aboriginal justice issues. The seminars have tended to concentrate on the issues relating to the semi traditional Aboriginal peoples of the remote northern and western areas of the state. Some seminars have taken place in such locations. The committee has achieved better access to justice for Aboriginal people in remote areas. Aboriginal

justice officers have been appointed to assist Aboriginal litigants and to assist judicial officers in liaising with Aboriginal community.

Minority groups

Most European and Asian immigrants have achieved integration steadily within the main stream Australian community. The most significant minority group is the Aboriginal community which is approaching two percent of the population. The total Aboriginal population in South Australia is approximately 12,000. About fifty percent of those people live in the city or in larger country towns. About 4,000 Aboriginal persons live in remote areas of the north and west of the State. Nineteen percent of the area of the State is occupied by Aboriginal lands, which have been established as freehold titles under statute.

Aborigines are far from a homogenous section of the population. Mistakes in the policy areas of health, welfare, education and other areas have been made through failure to recognise the cultural diversity among Aboriginal people. There are over 300 separate tribal areas. There are 18 language and cultural groups with distinct differences between some of them. Traditional people from different language groups cannot communicate in indigenous language with those from other such groups. In the last two years, amongst some controversy, steps have been taken to direct resources and programmes directly to tribal groups and community rather than through intermediate bureaucratic networks. There has been recognition that the most important unit within Aboriginal community is the family or clan. White society views the decision making processes of Aboriginal community as nepotistic and not community based. Difficult issues can arise for courts to consider, particularly in sentencing. Aboriginality is a matter to be taken into account in sentencing but the courts do not take into account customary law.

Interaction between courts and Aboriginal communities

In the early 1990s Magistrates experienced in dealing with Aboriginal offenders recognised that the traditional court system was failing those people. Many Aboriginal people did not understand the procedure of courts. Injustice occurred where too many guilty pleas of

convenience were being entered without adequate submissions. The Magistrates devised a form of sentencing court which reduced formalities and included tribal or community elders in the process. The Magistrate under this model sits at the opposite side of the bar table from counsel and is flanked by the elder. The prosecutor is sometimes accompanied by the victim. The offender sits beside his lawyer at the bar table. The elder and the Magistrate speak directly to the offender after hearing allegations and some submissions. Sometimes the elder will speak in Aboriginal language where the offender is not literate in English. Such exchanges are valuable in remote areas where there is great reluctance of indigenous people to act as interpreters in court. The elder translates into English what has passed between him and offender. The victim is able to speak directly to the court and to the offender. Personal and cultural considerations are taken into account. The court endeavours to craft a sentencing outcome which will enhance rehabilitation of the offender while at the same time recognising the impact of the criminal conduct upon the victim. This process was developed in 1993 in the suburban court at Port Adelaide.

The Port Augusta courts

I had the task in 1996 of establishing an Aboriginal sentencing court at Port Augusta which is 300 kilometres to the north of Adelaide. Port Augusta is the service centre for the north of the State of South Australia, catering for the needs of sheep and cattle stations, the mining industry, and thousands of tourists. It is a major road and rail transport hub. The existence of 19 tribal groups in the Port Augusta area presented a challenge for establishing an Aboriginal sentencing court. As many had different words for 'Aboriginal people' it was agreed to call the court the Aboriginal Sentencing Court. A semi circular table was attached to the bar table so as to more easily draw all parties into the sentencing process. The choice of suitable elders presented problems at times. For many Aboriginal it is not appropriate for them to have an elder from a different cultural or language group become involved in their personal problems. Other individuals objected to certain elders because they were either of the wrong family group or they knew too much about the offender.

Anangu Pitjantjatjara

From December 2003 the two resident magistrates at Port Augusta took over responsibility for the circuits to the remote communities in the Anangu Pitjantjatjara lands in the north west of the State. These communities are 1,000 km or more from Port Augusta. The people are semi-traditional and for many English is their second language it was already accepted that formal court procedures did not serve them well. The courts were already more informal with the Magistrate and parties sitting at the same table in make shift court rooms adapted from administrative offices or community halls. On a few occasions courts have had to sit in the open air. The weather is extremely hot in summer with temperatures up to 50 degrees C.

Delivering justice in communities where most people regard the process as irrelevant presents a great challenge to the Magistrates and their staff. The gulf between the indigenous people and the court is exacerbated by the 'fly in, fly out' pattern of travel between the communities. The court has to cram in as many sittings as possible during the one circuit week. For the indigenous people funerals and associated sorry camps, football carnivals and traditional business meetings are more important than 'white fella court business'.

Traditional culture is breaking down in settings where social welfare benefits, take away food, motor vehicles and other technological devices have combined to replace the hunting and gathering lifestyle. The process has been exacerbated by widespread alcohol abuse, drug abuse and petrol sniffing which have contributed in turn to waves of family violence and sexual abuse. Bylaws on the Lands prohibit alcohol, drugs, petrol sniffing and gambling but are honoured more in the breach than the observance. By 2003 policing had become over-zealous without consideration as to whether there were any productive results of that practice. Huge lists of up to 190 matters per day had become the norm in some circuit locations.

My colleague and I held consultations with community councils, tribal elders, with police, defence lawyers and administrators with a view to modifying court procedures and producing better outcomes. Court procedures were modified to allow submissions to be made by community representatives on important

issues for the community arising in certain cases. The communities rejected the Nunga court model used at Port Adelaide and Port Augusta because in small communities (all are less than 500 people) many defendants and victims are related to the elders. Conversely defendants or victims may be from a clan or family which is hostile to the elder's family.

We were able to negotiate better arrangements for the performance of community service work whereby it was carried out in concentrated short periods in particular communities at times which did not conflict with traditional business as far as practicable. Most of the inhabitants of the Lands are impecunious and have difficulty in paying fines. Aboriginal Justice Officers have had some success obtaining payments by small instalments. Community service is a much more practicable alternative than large fines. Imprisonment is a last resort as the nearest prison is at least 1,000 km away from their homes. The police were persuaded to adopt a community policing approach to anti-social behaviour and minor offending rather than the zealous arrest and charge based approach. As a result the court lists became more manageable and we had more time to devote to the more difficult cases.

It has not been possible to conduct other than very short trials at the communities. The nearest suitable court is at Marla which is up to 520 km away from the various communities. Attendance rates of both offenders and victims are poor. Plans are underway for the establishment of a permanent court building either at the central administrative centre (Umuwa) or possibly at both Ernabella and Amata communities. Trials will then be able to be conducted within a reasonable distance of the place of offending.

The Anangu Pitjantjatjara Lands will continue to produce a high level of offending and to present a great challenge to the Magistrates Court. There will be a continuing need to adapt procedures in order to achieve better outcomes for the 2,300 inhabitants whose way of life is still quite dysfunctional. It was a great privilege and a rewarding experience to serve as one of the circuit Magistrates in the Lands for two years. It is a truly diverse experience and a satisfying aspect of career development.

BOOK REVIEWS

WITNESS TESTIMONY: PSYCHOLOGICAL, INVESTIGATIVE AND EVIDENTIAL PERSPECTIVES

Edited by Anthony Heaton-Armstrong, Eric Shepherd, Gisli Gudjonsson, and David Wolchover
OUP, 2006 496 pp. £49.95 (*Paperback*) ISBN: 9780199278091

Judges and lawyers (and police officers) have much to learn from psychologists. But often they don't do so. Partly it is because we appear to live in different realms with different languages and cultures. How can the experimental psychologist's 'clean' experiments have anything to offer those of us who live in the messy real world? Well, this book succeeds in breaking down some of the hurdles, and although it is a little Anglo-centric, readers throughout the common law world will find it stimulating.

The first edition was published in 1999. The project's aim then was to 'change the mindset of key decision makers concerning the reliability and accuracy of witness evidence'. To what extent it succeeded must be a moot point: how much time do 'key decision makers' allocate to reading books; and who are the 'key decision makers' in this field? The academic lawyer frequently faces a quandary: if we want promotion it seems we should write monographs or articles in rarely read journals; articles in newspapers or popular practitioner journals gain us no academic credit, but are actually read. The authors of this book faced a similar quandary: they will probably not reach the minds of many 'key decision-makers' with this book, but they can make you think.

Back to the book. It has three sections. The first is on psychological perspectives. The first chapter, an overview of the psychology of witness testimony by Elizabeth Loftus, David Wolchover and Douglas Page looks at what is known of the 'hidden influences' which can undermine witness reliability. As the editors point out, it seems unlikely that courts in many Commonwealth jurisdictions will in the near future be prepared to accept expert evidence from those expert in the psychology of credibility, and this summary is particularly useful. But it focuses more on what is known of witness memory than on the problems

connected with testimony and court procedures: perhaps a final section of the book could have woven together the three separate sections? The first section continues with chapters on, for example, detecting deceptions, on the effects of learning disability, false accusations and false confessions, the effects of drugs, recovered memory and false memory and crime-related amnesia. We could all add a wish list for more: on, for example, statistical or ethical issues (readers might like to turn to the Nuffield Council on Bioethics' Report on 'the forensic use of information' (2007) for a lively argument on why DNA databases need to be controlled and limited). But this is not an encyclopaedia, and should not be criticised for what it is not.

The second section, on investigative perspectives, contains 8 chapters, the first of which has the admirable title 'Have you told Management about this?: Bringing witness interviewing into the Twenty-first Century'. It ends with a request that 'management – police service and CPS managers and the judiciary – acknowledge the crisis facing the service in respect of interviewing the generality of witnesses, and prevail upon government to require the recording of all witnesses'. Hear, hear: why oh why do we continue to have witness statements written in longhand by police officers, in their own police officer language ('I saw Male 1 who I would describe as...'). Not only does this distort the evidence, but also it plays into the hands of defence counsel in cross-examination. Handheld recorders, digital recorders, PC tablets, and mobile phones: technology is not the barrier to change.

The final section is on evidential perspectives. Perhaps the title is unhappy: psychologists and lawyers use the term evidence somewhat differently. The focus is on the courtroom. This section reproduces an interesting paper by

Lord Bingham, written more than twenty years ago, which explores the ‘ephemeral, uncreative and particular’ art of judicial determination of factual issues: as he says, a lowly but onerous and crucial duty. Other chapters discuss improving visual ID procedures, disclosure and the admissibility of expert evidence, amongst other issues. Saul Kassin gives a measured critique of jury decision-making: they are informationally and structurally handicapped in their ability to make judgements of accuracy and credibility. He asks interestingly whether they would be more proficient if provided with electronic recordings of the process by which the evidence was gathered.

The final chapter is on Judicial Training by Justice William Young, President of the Court of Appeal of New Zealand and His Honour Judge Sam Katkhuda. They point out the limitations on the value of professional and life experience and the scope for improvement in judicial practice, in particular, in helping juries

understand the evidence. They commend ‘a methodical approach’ to judicial training: one which builds on the knowledge of newly appointed judges (no small challenge given the increasingly disparate background of judges) ‘but also ensures that all who are appointed to the bench have ready access to information which is fundamental to their developing the skills necessary to perform effectively as judges’. The problem here of course is the limited resources (time and money) available for judicial training. Criminal judges should have better understanding of the ‘science’ of evidence collecting and of witness testimony, but also a much better understanding of the wider context of their work, of criminology and ‘what works’ in sentencing, for example. Reading is a useful but time consuming judicial training exercise: could this book be reduced to a short on-line training package?!

Nicky Padfield

CORRUPTION IN JUDICIAL SYSTEMS (GLOBAL CORRUPTION REPORT 2007)

Compiled by Transparency International (and available on its website)
Cambridge University Press ISBN: 978-0-521-70070-2 pp 362

Transparency International is the leading organization seeking to combat corruption. Its annual Global Corruption Report for 2007 addresses the issue of Combating Corruption in Judicial Systems. It attempts a comprehensive diagnosis and suggests the beginnings of a cure for the various ills affecting judicial systems worldwide.

A corrupt judicial system is a threat to access to justice and good government; as a system open to the highest bidder, it is discriminates against the disadvantaged members of society, stunting the growth of a democratic culture. There is no doubt as to the prevalence of corruption in the courts systems of many parts of the world. A survey of 8,263 people who had been in contact with the judicial system recently, found that 991, more than one in 10, reported having paid a bribe. In Africa and Latin America, about one in five of people who had interacted with the judicial system had paid a bribe. In Bolivia, Cameroon, Gabon,

India, Mexico, Morocco, Pakistan and Paraguay the figure was more than one in three court users.

In Sri Lanka, research was conducted in 2002 not amongst the generality of court users but amongst legal professionals and litigants, all with experience with the judiciary. The results showed 84 per cent did not think that the judicial system was ‘always’ fair and impartial, and one in five thought it was ‘never’ fair and impartial. Among judges, lawyers and court staff, 80 per cent considered the judicial system was ‘not always’ fair and impartial. The same survey showed that of 226 incidents of bribes reported by judges, the largest single bloc of officials who benefited were court clerks (32 per cent). Bribes were typically offered to influence the issue of a summons and the choice of trial date. Other beneficiaries were public prosecutors, police and lawyers. The lowest incidence of bribe taking was among judges

but it was judges in the survey who identified at least five of their colleagues as bribe-takers.

Transparency International sees the root of corruption in systems where judges lack sufficient independence, asserting that ‘Without an independent judiciary, graft effectively becomes the new rule of law’, and yet also recognizes that corruption takes diverse forms in various systems. To this end, the report divided into three parts, one covering an analysis of the divergent forms of judicial corruption, the second dealing with country reports, and the third detailing recent research on corruption.

The first part seeks to undertake a comparative analysis of judicial corruption with contributions from a number of specialists in the field. The topics examined deal with judicial independence and accountability, the broader justice system, courts, culture and corruption, and lessons to be learned in fighting corruption. Two underlying themes are the multi-faceted nature of corruption, and a message that a programme of reform is not an immediate solution to social ills.

Symbolic of the first, is the inclusion of articles on both the US and Zimbabwean judicial systems. In both scenarios, there are systematic barriers to judicial independence. The United States has a controversial procedure allowing the democratic election of state judges, and in Zimbabwe the policy of land reform has been accompanied by assaults on the judiciary, in which judicial officers seen as opposed to the Mugabe regime have been dismissed, and their replacements have been beneficiaries of land allocation. Whilst the USA and Zimbabwe are nations which claim (or claimed) to set examples for judicial independence, two of the other nations discussed, Russia and China, are those where there is no tradition of judicial independence and where the judiciary is or was an organ of the State or Communist Party. This raises a question of whether a competent judiciary is easier to achieve than a truly independent one.

Also of interest is the section discussing ‘cultures of corruption’, countries where no amount of legal reform can erase the taint of past misdeeds. This ranges from many African countries, where bribery continues to be considered a normal part of accessing the judicial system, to the situation in Italy, where

in spite of judicial reforms, judges have, for example, a practice of lenient treatment of athletes who go before the court due to an unhealthy desire to satisfy public opinion. Perhaps most interesting is the situation in South America, where since the 1980s there has been a long process of democratisation and legal reforms, such as the creation of judicial councils in several countries. Nevertheless, the public continue to be wary of the judiciary, as citizens are now aware of corruption hidden from them in the past, and also due to the perception that, even without government interference, ethical behaviour is not guaranteed. Finally, the case of Mexico provides a cautionary tale: it challenges any assumption that the level of corruption is directly related to poverty. On the contrary, although Mexico is wealthier than many other developing countries, the relationships between the judiciary and drug cartels come across as more insidious than the petty graft of poorer nations.

The second part includes country reports for thirty-seven countries. The idea that different countries face different ills is supported by these case studies. Often, as in Pakistan, there is a seemingly paradoxical combination of too much governmental influence in judicial decision-making coupled with corrupt and unaccountable judges. In reality, these flaws are intertwined, as the lack of independence of higher judges confers low status on poorly paid lower court judges, giving them little incentive to obey a code of conduct. Of further note in Pakistan, and of particular interest to the Commonwealth, is the heavy use of traditional (in this case Islamic) courts, despite the fact that they may often be corrupt and capricious in their decision making. They are much resorted to because of the greater corruption and inaccessibility of the formal legal system.

Also of note is the section devoted to debunking myths. One myth is that a country can experience economic growth even with a corrupt system, relating to the dichotomy between business success and political corruption. Often multi-national corporations will benefit from corrupt political systems, yet evidence that growth would increase under a more honest system, suggests that if for no other reason than self-interest, businesses should work toward combating corruption. Finally, a comparison of corruption in Brazil

and Russia demonstrates that the nuances of corruption are difficult to quantify. While the countries are similar in a number of aspects, and have similar levels of corruption, a close study indicates that while Russia's problems relate more to undeveloped infrastructure, Brazil's are more often individual incidents of corruption. Ultimately, at best, the report suggests that the countries studied are working toward judicial reform, even though it is less optimistic about their chances for success.

One fascinating study in the research material investigates why judges become corrupt and how a pattern of corruption can be ended. The results confirm what is often thought to be a correlation between high judicial salaries and a

low level of corruption, but also that this is far from being the only factor. Four measures to reduce judicial corruption are suggested. One is indeed an increase in the remuneration of judges and prosecutors, but the others are reductions in procedural formalism and in the time needed to arrive at judicial decisions, and the removal of the monopoly of prosecution agencies to initiate the prosecution of suspects. The authors argue that a number of isolated measures are unlikely to induce such a change of from an established pattern of high levels of corruption, but that simultaneous changes in a number of judicial institutions promise to have more significant effects.

Jordan Silver

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