

Commonwealth

Judicial Journal



Journal of the
Commonwealth Magistrates'
and
Judges' Association

Vol 17 no. 3 June 2008

 **Tottel**
publishing

COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION

Established in 1970

Registered Charity (LTK) No. 800367 Company Limited by Guarantee Reg. No. 1942930

PATRON

Her Majesty the Queen

PRESIDENT

(Vacancy)

EXECUTIVE VICE-PRESIDENT

Sir Henry Brooke

HON. TREASURER

Mr Paul G Norton JP

IMMEDIATE PAST PRESIDENT

Lord Hope of Craighead, PC

LIFE VICE PRESIDENTS

The Hon. Magistrate David Armati

The Hon. Justice Kipling Douglas

Mr Michael Lambert CBE

The Hon Judge Sandra Oxner

Mrs Clover Thompson -Gordon JP

CARIBBEAN

REGIONAL VICE PRESIDENT

Justice Norma Wade-Miller (Bermuda)

COUNCIL MEMBERS

M. E Birnie Stephenson –Brooks (Anguilla)

The Hon. Judge Richard Williams (Turks and Caicos)

EAST CENTRAL AND SOUTHERN AFRICA

REGIONAL VICE PRESIDENT

The Hon. Mr Justice Joe Raulinga (South Africa)

COUNCIL MEMBERS

Mrs Rosemelle Mutoka (Kenya)

Mr Christie Liebenberg (Namibia)

INDIAN OCEAN

REGIONAL VICE PRESIDENT

Mr Nicholas Ohsan-Bellepeau (Mauritius)

COUNCIL MEMBERS

Mr Nithiyantham Murugesu (Malaysia)

(Vacancy)

NORTH ATLANTIC & MEDITERRANEAN

REGIONAL VICE PRESIDENT

Sheriff Douglas Allan OBE (Scotland)

COUNCIL MEMBERS

Justice John Vertes (Canada)

Mrs Jean Hanson Hills (England & Wales)

PACIFIC

REGIONAL VICE PRESIDENT

Mr Samuela Palu (Tonga)

COUNCIL MEMBERS

Deputy Chief Magistrate Michael Hill (Australia)

The Hon. Robin Millhouse (Kiribati)

WEST AFRICA

REGIONAL VICE PRESIDENT

Magistrate Paul Evande Mwambo (Cameroon)

COUNCIL MEMBERS

The Hon Mr Justice Mensah Quaye (Ghana)

Chief Magistrate Ahmed Mhmd Abubakar (Nigeria)

CO-OPTED COUNCIL MEMBERS

Justice Christakis Eliades (Cyprus)

Sir Phillip Bailhache (Jersey)

Mr Wilson Masulu Musene (Uganda)

SECRETARY GENERAL: Dr Karen Brewer

EXECUTIVE ADMINISTRATOR: Ms Kate Hubbard

Auditors: Alliotts

EDITOR OF COMMONWEALTH JUDICIAL JOURNAL

Professor David McClean

EDITORIAL BOARD

Dr Peter Slinn (Chairperson)

Mrs Nicky Padfield

Mrs Betty Mould Iddrisu

Judge David Pearl

Mr Geoffrey Care

Correspondents: Mr Christopher Rogers,

His Worship Dan Ogo

CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX, U-K. Tel: +44 207 976 1007

Fax: +44 207 976 2394 Email: info@cmja.org website: www.cmja.org

This journal is generously funded by Tottel

CONTENTS

EDITORIAL		2
<i>Sir Henry Brooke</i>	Equality and the Courts: Some Issues for the Judiciary	4
<i>Jack N’riva</i>	Affected or Infected: HIV/AIDS and the Malawi Judiciary	11
<i>Rowland J V Cole</i>	Some Modern Expressions of the Non-Punitive African Criminal Justice System	13
<i>Gerard Winter</i>	Model Codes	16
<i>Jan Doogue</i>	The Road to a Global Treaty: the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance	23
<i>Roger Coventry</i>	Eliminating Civil Case Backlogs in Smaller Jurisdictions: a Practical Guide	29
<i>John Meredith</i>	When a Turkish delight gives rise to a Judge’s dilemma	39
<i>David McClean</i>	More on Judicial Bias	44

This year marks the tenth anniversary of the Commonwealth (Latimer House) Guidelines, and the relationship between the Judiciary and the Executive is a constant theme of this *Journal*. In a number of Commonwealth countries, the independence of the Judiciary is under some degree of threat, so it is good to note that it flourishes in England, as a trilogy of recent cases will illustrate.

The High Court declared unlawful two Orders in Council, the Terrorism (United Nations Measures) Order 2006 and the Al-Qaida and Taliban (United Nations Measures) Order 2006, in *A and others v HM Treasury* ([2008] EWHC 869 (Admin)), criticising the use of an Order in Council which avoided Parliamentary scrutiny and holding that the first Order set an unreasonably low threshold for the making of an order freezing assets, and that the second was unlawful on the basis that it lacked a genuine and effective mechanism by which a person who had been designated as a 'listed person' could challenge that status.

In *R (on the application of HSMP Forum Ltd) v Secretary of State for the Home Department* ([2008] EWHC 664 (Admin)), the High Court considered the actions of the Government in changing the conditions of the 'Highly Skilled Migrant Programme' and (despite express assurances given to migrants) requiring some to leave after the criteria had been changed. The court held that there was no good reason why those already on the scheme should not enjoy the benefits of it as originally offered to them. Good administration and straightforward dealing with the public required it. Not to restrain the impact of the changes would give rise to conspicuous unfairness and an abuse of power.

The most remarkable of these cases dealt with the relationship between the courts, the Executive, and an entity with statutory independence. *R (on the application of Corner House Research) v Director of the Serious Fraud Office* ([2008] EWHC 714 (Admin)) concerned an investigation into allegations of bribery by a British company in negotiating contracts for the supply of military aircraft to Saudi Arabia. The Serious Fraud Office resisted earlier attempts to have the investiga-

tion halted, citing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997, article 5 of which provides:

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

By mid-2006, the SFO was about to investigate transactions on Swiss bank accounts. Although the Government at no stage admitted the truth of the allegations, the court proceeded on the basis that a Saudi Prince, himself allegedly involved in the bribery, had visited the Prime Minister's office and said that unless the investigation were stopped, there would be no future contract and the previous close intelligence and diplomatic relationship between the UK and Saudi Arabia would cease. The Prime Minister (Tony Blair) wrote personally to the Attorney General urging him to reconsider in the interests of national security. Five days later, the Director of the SFO told the Attorney General that he had concluded that to continue the investigation risked 'real and imminent damage to the UK's national and international security and would endanger the lives of UK citizens and service personnel'.

The claimants challenged that decision by way of judicial review, arguing that it was unlawful for the Director to accede to the threat made by the Saudis as such conduct was contrary to the constitutional principle of the rule of law. The court delivered a long and careful judgment, the tenor of which can be gathered from the following extracts:

'The constitutional principle of the separation of powers requires the courts to resist encroachment on the territory for which they are responsible. In the instant application, the Government's response has failed to recognise that the threat uttered was not simply directed at this country's commercial, diplomatic and security interests; it was aimed at its legal system. ...That threat was made with the

specific intention of interfering with the course of the investigation. ... Had such a threat been made by one who was subject to the criminal law of this country, he would risk being charged with an attempt to pervert the course of justice.’

‘At the heart of the obligations of the courts and of the judges lies the duty to protect the rule of law: “the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based” (per Lord Hope in *R (Jackson) v Attorney-General* [2006] 1 AC 262 at [107]). ... The rule of law is nothing if it fails to constrain overweening power.’

‘The courts protect the rule of law by upholding the principle that when making decisions in the exercise of his statutory power an independent prosecutor is not entitled to

surrender to the threat of a third party, even when that third party is a foreign state. The courts are entitled to exercise their own judgment as to how best they may protect the rule of law, even in cases where it is threatened from abroad. In the exercise of that judgment we are of the view that a resolute refusal to buckle to such a threat is the only way the law can resist. ... Certainly, for the future, those who wish to deliver a threat designed to interfere with our internal, domestic system of law, need to be told that they cannot achieve their objective. Any attempt to force a decision on those responsible for the administration of justice will fail, just as any similar attempt by the executive within the United Kingdom would fail.’

Stirring stuff, and encouraging reading for all those who treasure the Rule of Law.

CALL FOR CONTRIBUTIONS

The Editor is calling for contributions from Readers. Articles, essays, reviews are all encouraged. Contributions, ideally no more than 3,000 words should be sent to the Editor c/o the CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX or by email: info@cmja.org.

LETTERS TO THE EDITOR

If you have a burning issue you want to raise in the Journal, or if you feel you need to respond to an article that appears in the Journal, the Editor would welcome your input and feedback. Please contact him at the address above.

EQUALITY AND THE COURTS: SOME ISSUES FOR THE JUDICIARY

*Sir Henry Brooke, Executive Vice-President of the CMJA.
Paper presented at the CMJA's Regional and Gender Conference in Bermuda, 2007*

To most lawyers and judges, equality is a topic which has only come to the fore in the last thirty years. I didn't learn much about it when I studied for my Bar exams in the early 1960s. And equality means different things to different people.

When the six founder members of the European Community signed the Treaty of Rome in 1957, equal pay for equal work meant equality between men and women. When we introduced an Equal Pay Act in the UK over 30 years ago, this was what that Act was all about. But gradually over the years what is meant by the obligation to provide equal treatment for everyone has steadily widened.

In England and Wales we are all issued with an *Equal Treatment Bench Book*. You can pull it down from the Judicial Studies Board's website where it is available for everyone in the world to read. The first section is called 'Equality before courts and tribunals'. It starts with a piece on equality and justice, and continues with chapters on diversity, unrepresented parties, social exclusion and poverty, minority ethnic communities and equality law. These are all 'must reads' for all judicial officers.

There are then six other sections that give very practical advice to judges and magistrates on different themes: 'minority ethnic communities' (again), belief systems, children, disability, gender inequality (which includes a bit about gender reassignment) and sexual orientation. This is what today's equality agenda is all about.

There was nothing at all of this kind available to judges and magistrates when I became a full-time judge in 1988 – still less when I became a part-time judge in the early 1980s. We were all supposed to be fair, and to do our best when we were judging cases involving people whose culture or religious beliefs were very different from our own, but we did not receive any specific advice on how to do it.

Although this bench book contains masses of factual information, its main thrust is practical. It starts with some key points which I think are worth quoting in full.

Equal access to justice

- Most people find an appearance before courts or tribunals to be a daunting experience.
- People who have difficulty coping with the language, procedures or facilities of courts or tribunals are equally entitled to fairness and justice.

Inequality

- People who are socially and economically disadvantaged in society may assume that they will be at a disadvantage when they appear before a court or tribunal.
- Those at a particular disadvantage may include people from minority ethnic communities, minority faith communities, individuals with disabilities (physical or mental), women, children, those whose sexual orientation is not heterosexual, and those who through poverty or any other reason are socially or economically excluded.
- Just because someone remains silent does not mean that they necessarily understand, or that they feel they have been adequately understood. They may simply feel too intimidated, too inadequate or too inarticulate to speak up.
- Ensuring fairness and equality of opportunity may mean providing special or different treatment.

Judgcraft

- Effective communication is the bedrock of the legal process – everyone involved in proceedings must understand and be understood or the process of law will be seriously impeded. Judicial office-holders

must reduce the impact of misunderstandings in communication.

- Unless all parties to proceedings accurately understand the material put before them, and the meaning of the questions asked and answers given during the course of the proceedings, the process of law is at best seriously impeded and at worst thrown seriously off course.

Discrimination

- Discrimination must not be permitted, whether direct or indirect. Recognising and curbing our prejudices is essential to prevent erroneous assumptions being made about the credibility of those with backgrounds different from our own.
- Most people 'read' behaviour in terms of their own familiar cultural conventions and in doing so can often misunderstand. Ethnocentrism – the use of one's own taken-for-granted cultural assumptions to (mis)interpret other people's behaviour – is a common human failing.

This is about treating everyone who comes to court with dignity and respect. It is about administering the law in a way that appears fair to everyone: in a way that everyone feels comfortable with. People should be able to go home after a day in court and tell their friends and family, 'Even though I lost, they really listened to me. They really understood what I was saying to them, and I thought I had had a fair deal'.

I remember Anesta Weekes QC, whose family comes from Montserrat, telling a judges' training course in England 15 years ago that she once had a Jamaican client who was really angry about the British justice system. He told her he didn't think for a moment he would have a fair trial. He had such a broad Jamaican accent that she had difficulty in understanding what he was saying. During the trial the judge handled him beautifully. Without being patronising, he made sure that the jury understood everything he wanted to say. After the trial was over, and he had been inevitably convicted, Anesta went down to see him in the cells, where he told her how impressed he had been with the fairness of his trial. This is what equal treatment is all about.

But this isn't what always happens, in my country at least. An experienced academic researcher, Professor John Baldwin, recently conducted a

study into people's perceptions of small claims process, and this is what he had to say:

With or without a lawyer, few lay people say that they feel at ease in this setting. Many litigants described in interviews how they were taken aback by their first sight of the courtroom and its formality. ... The interviews were peppered with words like 'intimidating', 'daunting', 'frightening', 'terrifying', 'forbidding', and 'formidable'...

Less than half of the unrepresented litigants ... said that they coped well in this setting and even those who were represented by counsel frequently said that they found the court appearance a daunting experience ... a few described how they had gone to pieces when they realised what was expected of them.

This is the opposite to what is meant by Equality and the Courts.

In her speech at the CMJA triennial conference in Toronto, Chief Justice Beverley McLachlin told us that for a judicial officer deciding a case in accordance with the law, in a reasonable time, and in accordance with the processes mandated by law, is only one part of the judicial task. Justice must also be delivered in a responsive manner, one that takes account of the social context, and the different perceptions of those who seek it.

She went on to make the point I have quoted from the bench book about the need to avoid what she called false assumptions about cultural differences. In a world marked by pluralism, she said, and in communities where diversity is so prevalent, the judge must become the interpreter of difference. The judge must become the one who listens to every voice and understands them all.

And this does mean every voice. A judicial officer cannot pick and choose which voices to listen to with special care, because he or she has a sense that they are people who are particularly disadvantaged. In his Kapila lecture in 1992, Jerome Mack, a very experienced black American equality trainer, said:

I am totally at ease on the issue of race. I am somewhat less at ease on the issue of gender. I am not quite at ease on the issue of disability. So race is my issue, I feel confident on that issue, I can talk to that

issue. But if I can only talk about discrimination based on race then I am not against discrimination. I'm against discrimination against black people. And I say, if you are going to be about discrimination then you must say that any discrimination which is arbitrary, is bad. Not just discrimination that talks to your issue. I find that a lot of people are advocating their own issues as a way forward, but when they come to other people's issues they have no understanding or clarity about them. I find ethnic minorities who are sexist and cannot begin to understand the ramifications of sexism, but they cry crocodile tears when it comes to racism. I find women who are emotive on the issue of sexism and have no understanding of racism or disability and do not care. I say then that you are talking about self-interest, you are not talking about discrimination. We are ill-at-ease on this subject, except our own issue.

I am here to talk particularly about gender equality, which has never been a topic at which I have been particularly at ease. One must always be careful to ensure that prejudices about what were traditionally regarded as the different roles for men and women don't creep into the process of judging. About 15 years ago my wife was a member of a school board charged with the job of choosing a new head teacher. One of her male colleagues asked a female candidate why she wanted the job and why she didn't prefer the role of bringing up children at home. The local authority representative on the Board immediately cut in. 'Don't answer that question', she said. 'It's illegal'.

Another of Jerome Mack's stories arose from an experience he had had when advising the board of a bank. It was full of well-meaning men who were genuinely worried because they were very good at recruiting women to the lowest grade jobs, but when it came to promotions, women fared very much less well than men. Jerome listened to them carefully, and then asked if he could take home twenty personal appraisal reports, picked at random, with an equal number of reports on men and women. The next day he brought the reports back, with copies made of them so that all the names were blanked out. He then asked each member of the board to do a little test. They

should read each report carefully and then guess whether it was being written about a woman or a man. They were all 100% correct. The criteria that were being used by their line managers at that level were quite different for men and women employees. This was unconscious bias, built up of the prejudices about the role of females which those line managers had gained over the years. It was resulting in a great deal of injustice for the women concerned.

When we come to talk about issues of gender equality within the Commonwealth, we find that the path is strewn with similar prejudices, which may be conscious or unconscious. A lot of the prejudices stem from the religious codes that have come down through the centuries. For Christians, for instance, the teachings of St Paul had a lot of influence over the years in relation to the way in which women were treated. In his letter to Timothy he said that women should adorn themselves in modest apparel, with shamefacedness and sobriety; not with braided hair, or gold, or pearls, or costly array, but with good works, as becometh women professing godliness. 'Let the woman learn in silence with all subjection', he said.

Women were legally subjected to men as a matter of English law in a number of remarkable ways until well into the twentieth century. Marriage, or coverture, under the common law amounted to the extinction of the wife's independent legal being. Blackstone wrote:

The very being or legal existence of the wife is suspended during marriage or at least incorporated and consolidated into that of the husband under whose wing, protection and cover she performs.

The husband had the right to administer lawful and reasonable correction to his wife. A married woman could not enter into a legally binding contract unless she was a merchant in her own right. She could not make a will without the consent of her husband. It is only 125 years since the Married Women's Property Act was passed, which ended a lot of these old rules. But some of them lingered on. Women were not entitled to vote in our national elections on equal terms as men until 80 years ago. Until very recently the English common law was interpreted as meaning that a husband could not be convicted of raping his wife.

Muslims, too, have inherited stricter rules in relation to the way women may behave than are current in many parts of the non-Muslim world. Devout Muslims follow the teaching in that passage from the Holy Quran which I quoted in my judgment in the case of the schoolgirl who wanted to wear the jilbab:

And tell the believing women to lower their gaze and guard their sexuality, and to display of their adornment only what is apparent, and to draw their head-coverings over their bosoms....

O Prophet, tell your wives and daughters and the believing women to draw their outer garments around them when they go out or are among the men.

There are elements of Shari'a law which are much more favourable to women than their equivalents in the common law. But there are other features of it, for example the penalty of death by stoning for a woman caught committing adultery, that seem barbarous to most non-Muslims today.

But it is not only our inheritance from Christian and Muslim moral codes that confront the judicial officer in the Commonwealth in these days of the pluralism and diversity of which Chief Justice McLachlin spoke. The papers at the Toronto conference included contributions from different parts of Africa which brought home the role played by customary law in the different jurisdictions.

A High Court judge from Nigeria explained that his country is a secular state characterised by religious pluralism. There is the law embodied by the Nigerian Constitution, and then there is customary law. Islamic law is now administered in the courts of eleven states in Northern Nigeria, but the Nigerian Constitution categorises it as customary law and not as an independent source of law. In Nigeria a court may declare a custom repugnant to natural justice, equity and good conscience, or inconsistent with public policy. This is how the Nigerian Supreme Court struck down an Ibo custom that allows a woman to be married to a deceased man.

In Nigeria the role of the judiciary has been described by another Nigerian judge in these terms:

The judiciary has always been in a position to concretise the divergencies in cultures and customs which have existed among the various ethnic and/or religious groups within the country. In appropriate cases the courts could by skilful and intelligent interpretation and application blend differing rules of customary law together, always with a view to a unity of goals and purpose.

Thus the apparent divergencies can be made responsive to the challenges of forging a sense of national consciousness and building a national identity despite and even within such divergencies.

This provides a challenge for a judge, particularly when people's views about what is appropriate are sharply polarised. Similar issues arise in Uganda, as the author of a paper on Ugandan family law which was given at Toronto described. She said that the laws governing family life in Uganda today legitimise the authority of male members of a family over the lives of female members. For example, a wife cannot obtain a domicile of choice that is different from her husband's until after his death. In matters of inheritance daughters are prejudiced when compared with sons. A man can divorce his wife on the grounds of her adultery, but his wife has to rely on another matrimonial offence in addition to adultery before she can obtain a divorce.

Article 21 of the Constitution of Uganda, however, says that:

All persons are equal before and under the law in all spheres of political economic social and cultural life and in every other respect and shall enjoy equal protection of the law.

The Constitution also contains a standard non-discrimination provision in relation to race, sex and colour and so on. The paper suggested that in these circumstances:

The role of a judicial officer is to ensure proper implementation of law. When faced with laws that are discriminatory and which perpetuate inequality, the judicial officer should scrutinise them more deeply with the view of bringing them into conformity with the Constitution.

The judicial dilemma is highlighted, however, by the fact that over the last ten years reforming legislation has been stalled. Laws to criminalize rape within marriage, or to provide equity within polygamous marriages are unable to reach the statute book. The judge therefore has the language of the Constitution as a tool for achieving greater equality than the legislature is willing to provide in express terms.

In the same way a Ugandan magistrate described in Toronto how the clash between the new legal regime introduced with the arrival of colonialism and the traditional beliefs within Ugandan tribes remains very strong in many parts of Uganda today. The protection of women by the criminal courts is not helped by the way in which most African women have been raised. They know they are not supposed to utter certain words in public, especially those that are seen to be of an obscene nature, and this means that if they are the complainants in a case of sexual assault it is very difficult for a conventional court to elicit from them precise information about what actually happened.

There were similar contributions at Toronto from Ghana and Malawi. These are two other countries where family relationships were regulated by customary law before the British came, and where customary law is still powerful. In Ghana, like Nigeria, the courts have an express power to override customs that are repugnant to national justice, equity and good conscience. A Ghanaian judge described how since independence the courts have tried to be abreast of the times by making declarations intended to mitigate the harsher features of customary law. A good example of this was a judgment of the new Chief Justice of Ghana 14 years ago. To reduce the hardship suffered by many widows who could not prove that they had been married with all the necessary customary rites and ceremonies, she held that a form of valid customary marriage could be proved if it was shown that the parties had lived together as man and wife to the knowledge of their families and the whole world.

As in Uganda, the Constitution of Ghana contains provisions protective of fundamental human rights and individual dignity. Article 1(2) of the Constitution provides that it is to be the Supreme Law of Ghana and that any other

law found to be inconsistent with any provision of it shall, to the extent of the inconsistency, be void. This, too, provides the judicial officer with the tools to override elements of customary law that are inconsistent with the basic human rights norms identified by the Constitution.

A Malawian judge told how a defendant husband had been acquitted of murdering his wife when he was upset when she changed her mind and refused him intercourse after a seven month gap. This was held to be sufficient to cause an ordinary person of the accused person's community to lose his self-control. In Malawi express provisions of the Constitution have brought about important changes in customary family law. Young people over the age of 18 no longer need their parents' consent before they can lawfully marry, and the minimum age at which girls may lawfully consent to intercourse is now 15, not 12.

What I have been suggesting so far has been that in our different countries the unequal treatment of women has been a feature ingrained in societal consciousness for centuries, and that it remains so strong in many parts of the Commonwealth today because it has such deep roots either in religion or in customary law. I have also suggested that the judicial officer does not always have to wait for a change in statute law before he or she can give effect to a woman's right to equality. Although practices have to be pretty bad before a judge can hold that they are contrary to national justice, equity and good conscience, or that they are inconsistent with basic constitutional norms, these powers do exist and have been used to good effect from time to time.

Where does our common membership of the Commonwealth fit into all this? The Commonwealth has an action plan for gender equality. In this plan the Commonwealth asserts its commitment to promoting a rights-based approach in every area of its work. The plan points out that on issues related to gender equality and human rights, the main instruments by which Commonwealth member states are obliged to guarantee equality of rights between women and men are not only the various national constitutions. They also include international human rights instruments like the Universal Declaration of Human Rights and the Convention on the

Elimination of All Forms of Discrimination against Women (CEDAW). The plan describes how this framework is reinforced by provisions in national statutes, as well as by regional treaties and instruments and other international or regional human rights instruments and monitoring bodies, which embed and extend these rights. Of particular relevance in this context are the International Covenant on Economic, Social and Cultural Rights; the 2003 protocol to the African Charter on Human and Peoples' Rights which deals with the Rights of Women in Africa; the Convention on the Rights of the Child; and the four gender-related Conventions of the International Labour Organisation, on equal remuneration, on freedom from discrimination at work, on workers with family responsibilities and on maternity protection.

Although 50 Commonwealth countries have ratified CEDAW and 15 have ratified its Optional Protocol, the plan says that there are still significant gaps in implementation, and that many countries have ratified them with reservations. More importantly, the plan suggests that the lack of a gender perspective in the administration of the law often stymies the gains that are made in international and regional treaties and conventions. Even where sound legislation exists, the application and interpretation of these laws are often inadequate. Eight different reasons are given for this: absence of political will; jurisdictional difficulties; lack of awareness at all levels in the public service and justice systems; lack of enforcement capacity; traditional or customary systems of law that discriminate against women; women's inadequate awareness or legal illiteracy concerning their rights and how they may obtain recourse to justice; limited human and financial resources for monitoring and enforcement of women's rights at national, local and community levels; and inadequate evidence-based data collection.

Of the different forms of discrimination and disadvantage experienced by girls and women, the plan mentions the way in which girls may be denied the right to an education; how women's work is often accorded lower value, status and remuneration; how women and girls are more vulnerable to exploitation; and how women experience particular discrimination as they age. The plan proclaims the importance of promoting active dialogue and engagement,

not only among members of the justice system, but also among members of religious, cultural, traditional and civil institutions and communities, to address women's human rights within all the different cultures that make up a country. Harmful practices which violate the rights of women and girls such as female genital mutilation, early marriage, and widow inheritance should be eliminated as a matter of urgency. Where multiple legal systems and practices exist – as when constitutional, religious and customary systems and practices co-exist side by side – full consideration should be given to the human rights of women and men, and girls and boys. Where violations of these rights occur, effective recourse to justice and effective remedial measures need to be established.

The plan goes on to speak of gender-based violence, trafficking in women and girls, and the marginalisation of indigenous peoples (particularly women) in some countries. It ends this section by saying that respect for land and property rights is fundamental to the realisation of human rights and gender equality. *De facto* discrimination persists with regard to ownership of land and property and inheritance rights in spite of the constitutional and legal guarantees in many Commonwealth countries which prohibit such discrimination.

There follows a long list of things that need to be done throughout the Commonwealth to achieve greater equality. The list starts with legislative and constitutional reform and then refers to what it calls 'judicial capacity building'. It goes on to say that the mechanisms for implementing gender equality commitments should be strengthened and more effective ways worked out for monitoring future progress.

I always feel a bit lost when reading high level plans, because there is such a gulf between the planners in their offices and at their international meetings and those of us who have to put their plans into effect. This is why conferences which focus on what the judicial officer should do to ensure equality at ground floor level, are so important, and I wish there were more of them.

The plan talked about judicial capacity building. This means that in each of our countries we should have judicial officers who are capable of doing all they can within the law to advance the cause of equality. It means a

judiciary to which women have access, not through positive discrimination, but on merit. It means a judiciary that appears scrupulously fair when determining cases involving women and children. This does not mean weighting the law in their favour, but it does involve judges and magistrates making sure that they understand all the particular needs and problems of the women before the court, and that they are not imposing male-centred solutions which do not take into account

women's special needs as people who are responsible for the care of others.

It means alertness to relevant provisions of equality law, and of the provisions of the national constitution or the Human Rights Act or the local Charter rights, or whatever, which make it possible for the law to be administered more evenly. And it means training arrangements for judges and magistrates that bring home the messages of the importance of equal treatment before the law again and again.



AFFECTED OR INFECTED: HIV/ AIDS AND THE MALAWI JUDICIARY

Jack N'riva, Principal Resident Magistrate, Lilongwe, Malawi.

Paper first presented at the CMJA Triennial Conference, Toronto, Canada, 2006

In Malawi, HIV and Aids were discovered in and around 1983 from which time it has had some devastating effects on the population. The pandemic has affected almost all the spheres of society directly or indirectly. The pandemic has affected all manner of people and the Malawi judiciary has not been spared. Whereas initially the approach to the scourge was prevention and awareness, at present the philosophy is that of voluntary counselling and testing with the ultimate approach of care and support, both clinical and psychological, i.e. non-discrimination. This short paper outlines how the HIV/AIDS pandemic has affected the Malawi Judiciary as an organization and as a case handling institution.

The Judiciary as an organization

As an organisation, just like many other organisations, the Malawi Judiciary has been affected by the scourge. There could be instances where the judicial business has been negatively affected due to attendance to hospitals, funerals and nursing HIV/AIDS patients. The issue of losing staff to the pandemic cannot be overemphasized. Staff training and development consumes financial resources and time and it is quite regrettable to lose persons to AIDS.

Judiciary's Response

For that reason, the Malawi Judiciary has joined the bandwagon of the battle against AIDS. In 2004, the Honourable the Chief Justice of the Republic appointed a task force that developed a project proposal to the National Aids Commission. The proposal was accepted and the judiciary was allocated US\$174,134. The main agenda of the project is to reduce the transmission of HIV/AIDS; to improve quality of life of the infected members of staff and their families; and HIV/AIDS impact mitigation.

The Malawi Judiciary established a National Committee on HIV/AIDS. The committee comprises representatives of all the levels of the

judiciary. The committee has carried out several activities including sensitisation campaigns, trainings of trainers as well peer educator- trainings and workshops for magistrates and judges respectively.

Apart from that, all the cost centres (offices that receive funding from the government) allocate two per cent of their funding towards reduction of AIDS impact and its related attrition.

The Judiciary as Case handling Institution vis-à-vis HIV AIDS

The jurisprudence on AIDS in its nascent stages. Most of the issues have not come to courts to trial. However, through the Judiciary's HIV interventions papers have been written in some training workshops which highlight some issues that may arise. It is possible, for example, that the courts may be flooded with tort cases arising out of negligent treatment or diagnosis.

Another area is on the issue of contracts and confidentiality between a client and health practitioners. The issue may also loom large in divorce proceedings. Apart from the jurisprudential discourse, matters involving the syndrome have indeed arisen. In *Singini v Singini* (Civil Case No 231 of 2005), following a period of separation, a husband and wife were willing to reconcile on condition that they should both go for testing. The husband turned out to be positive while as the wife tested negative. When both parties were asked whether or not they still want to reconcile, the affected party responded positively and the wife who was tested negative left the matter to the discretion of the Court.

Another example is *Ndailo v Ndailo* (H/C Appeal Case No 209 of 2005) where the appellant explained that one of their children was also HIV positive and that she had to travel to and from Lilongwe from her home in Ntcheu once a month to collect the drugs for the child at Kamuzu Central Hospital which is the only

designated place administering that drug for children. As for herself, she said that she easily collects the drug from Ntcheu District Hospital. Justice C Mkandawire held that these were issues which need court intervention when orders are being made as to the custody of children and maintenance. He then ordered that apart from the general maintenance order that the court made on the children, the respondent should be providing transport money from Ntcheu to Lilongwe and back on a monthly basis in order for the appellant to collect the drug for the child.

The pandemic has had an impact on criminal justice too. In Malawi, cases of rape and defilement of minor girls are on the increase of late. As a Magistrate, I am not aware why. Perhaps some researchers may find out the reason. But that has prompted some civil society (non-governmental) organisations to ask the judiciary to impose very serious, lengthy custodial sentences. It has been argued that an act of rape or defilement is heinous and detrimental to the victims, in the wake of the pandemic. The Chief Justice responded by issuing a practice direction, whose apparent aim is to a

common consensus (not absolute uniformity) in sentencing, with the trial of such cases reserved to the Chief Magistrates (*Practice Direction Number 1 of 2006*).

Still on criminal justice, needless to say, the syndrome has left behind many orphans who actually resort to criminality and the child justice courts and agencies handle many such cases of juvenile delinquency.

Conclusion

AIDS has affected the judiciary in several ways institutionally and juridically. Litigation has arisen and may still arise vis-à-vis an infected or affected litigant as well as suspects. The judiciary has to play an expansive activism as well to be responsive to public perception, beliefs and public opinion. Courts at all levels will have to develop an approach which deals fully and sensitively with issues of HIV/AIDS. Judicial business is about the administration of justice. Justice is about putting law into action. Law does not exist in a vacuum, but must take account of changing social realities and public views, perceptions, and aspirations.

SOME MODERN EXPRESSIONS OF THE NON-PUNITIVE AFRICAN CRIMINAL JUSTICE SYSTEM

Rowland J V Cole, Senior Magistrate, Mahalapye, Botswana

The modern adversarial system is combative and interest-based. The contest is basically between the State and the accused. The aim of the State is to secure a conviction and punishment of the accused. This is a far-cry from pre-colonial African legal philosophy. African customary systems emphasise more on reconciliation and restorative justice rather than penalty. Though post-colonial African systems inherited western penalty-driven criminal systems, the resolution of criminal action by reconciliation still persists in the modern African dispensation and seems to be assuming a position of relevance. In this regard, the resolution of criminal conduct takes place both within and outside the criminal justice system.

The African customary system

Restorative justice is a system of dispute resolution whereby the victim, the offender and affected members of the community participate in the resolution of matters arising from a crime. It focuses on repairing the harm caused by the crime and involves conciliation, reparation, healing and reintegration. Reparations are consistent with African systems of justice. D M Chirwa has written 'Such reparations could be symbolic, for example, making the offender and victim drink from the same cup; or in kind, for example, payment of goats, cattle, chicken and sheep; or in cash, in the form of blood money'. In the African customary legal system, compensation and restitution are more likely outcomes as opposed to the infliction of action of a penal nature. Restorative justice takes into consideration the interests of all affected parties including offenders and victims, which are addressed by mechanisms such as restitution, compensation, participation and rehabilitation. Crime involves more than a breach of the criminal law and government authority. It is a violation against the victim, families and communities. Reparation and restitution therefore involves repairing harm and healing the victim and community. This process can only be completed with the participation of the offender, victim and community. One can therefore say that this system is management-outcome-based, as the

proceedings are driven and the results generated by the parties themselves.

In Africa, the influence of families and communities is persuasive in a whole range of relationships. The African society is highly socialised. Indeed, in most of Africa, marriage is negotiated and contracted between families and not individuals. In pre-colonial Africa, trade was conducted between communities and not individuals. In pre-colonial Botswana for example, kinship groups provided the initial forum for the resolution of disputes. Disputes could only be heard in traditional courts after an attempt had been made to settle it among the family. It was a requirement that senior members of the respective groups introduce the dispute to the court and state what attempts had been made at settlement at family level. The main function of the courts was to confirm the settlement of the senior members of the family group and to resolve their disagreements. The orders of the courts were directed to them and they were required to carry them out.

In present day Botswana, particularly in rural areas, 'the parents' still play a great role in settling criminal acts committed against a member of the family. This dispute settlement mechanism is based on reconciliation, compensation, admonition and repentance. The elders/parents of both families negotiate compensation, the offender is warned not to repeat his actions, and the family of the offender and the offender himself tender an apology. Compensation is usually in the form of cattle though monetary payment is often used.

It must be noted however that customary criminal law includes crimes unknown to western criminal law such as impregnating a woman out of wedlock. In such instances, marriage may be accepted as an alternative to monetary payment. Family settlement creates a binding influence. So strong is the 'word of the parents' that victims of offences as heinous as rape will refuse to proceed with a case in magistrates' courts, on the grounds that 'the parents have discussed the matter at home',

even though State prosecutors will want to pursue the matter. This represents the great finality attached to the decision of the parents.

Such situations clearly present a challenge for the application of western model systems against the back drop of persisting cultural systems. This clearly shows the difficulties of implementing restorative justice practices in predominantly adversarial systems. Clearly, the African system is a deviation from the western interest-based system where opposing interests may score or loose points. The primary aim of the African system is to heal the community in reconciliation, rather than scoring points.

Modern Forms of the System

The traditional African model based on reconciliation and compensation has manifested itself in modern forms. Truth and reconciliation commissions which started in South Africa and subsequently spread to other parts of the world like Sierra Leone and Northern Ireland is an expression of the traditional African process of reconciliation and healing whereby members of the community confess their guilt and ask for forgiveness from the community. It is rehabilitative and 'reconciliative' oriented rather than retributive.

The concept of *ubuntu* is referred to in South African modern law. The Child Justice Bill originally read -

'The objects of this Act are to:-

- (a) protect the rights of children as contemplated in section 28(1)(g) and (b) of the Constitution;
- (b) promote *ubuntu* in child justice system through –
 - (i) fostering children's sense of dignity and worth;
 - (ii) reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safeguarding the interests of victims and the community;
 - (iii) supporting reconciliation by means of a restorative justice response; and
 - (iv) involving parents, families and communities in child justice processes

in order to encourage the reintegration of children; and

- (c) promote co-operation between all government departments and other organizations and agencies involved in implementing an effective child justice system.'

In Rwandan post-conflict dispensation, the government of that country enacted legislation, the Organic Law on the Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed since October 1990, creating community based *gacaca* courts which are based on communal participation. These local courts, based on traditional methods of dispute resolution were established to reduce the caseload of conventional courts and to involve popular participation in the dispensation of justice. Under this model, justice is dispensed at the local level, involving the ordinary people in the collection and processing of information.

The process is based on the African model and victims tell their stories at local hearings where all are at liberty to take the floor. Offenders are classified into four groups under this system. The first group consists of the most serious offenders such as the planners, instigators, those in administrative positions and sex offenders. The second group consists of perpetrators, conspirators or accomplices perpetrating homicide or serious assault resulting in death. The third group consists of perpetrators guilty of other serious assaults. The fourth group consists of those who committed offences against property. Perpetrators in all groups except the first may make confessions and receive reduced sentences. Those convicted of offences in the fourth category are liable to pay damages negotiated with the victim with the involvement of the community. They are also liable to undergo community service. This model possibly allows the public some accountability and ownership in relation to the process. The combination of retributive and restorative measures especially in post-conflict situations avoids the winner takes all situation which does not really benefit communities divided on tribal lines.

The concept of reconciliation finds itself into modern legislations though not widely used. Section 321 of the Criminal Procedure and Evidence Act of Botswana provides for the promotion of reconciliation. The court, with the consent of the prosecutor is empowered to

promote reconciliation between the parties. The consent of the prosecutor is important since it is he who proffers the charge. In scope, the Act limits reconciliation to offences of assault 'or for any other offence of a personal or private nature not aggravated in degree'. Reconciliation may be subject to the payment of compensation or any other terms approved by the court. The court may also stay proceedings in order to facilitate reconciliation. Though this provision promotes reconciliation, it is based on the modern principle that the State is the prosecutor for crimes. Hence, the parties cannot on their own approach the court for reconciliation. Reconciliation is subject to the consent of the prosecutor.

The role and consequence of traditional models in contemporary legal society is undermined by a general lack of acceptance. In South Africa, there is general hesitation in accepting the customary African model as a form of restorative justice. This is an unfortunate state of affairs. In my view, the African model is a system based on restorative justice and presents valuable lessons for State implementation of any form of reconciliation or restorative justice. The fact cannot be ignored that a wide range of communities in African States employ this model and that it forms a successful parallel system to modern adversarial models.

Conclusion

Indeed the question arises as to what is the role and future of customary dispute settlement in modern adversarial systems. Perhaps, to contextualise the question, one must ask, how can restorative justice properly function in a constitutional adversarial system, having regard to the rights of the accused. Though attractive, it is not easy to graft restorative justice into the present criminal justice model.

The first obvious challenge is that on the face of it, it appears to infringe on the accused's right to silence and to be presumed innocent. Questions arise as to what stage of the criminal process it should be implemented and whether a normal court trial acts as a bar to restorative processes and *vice versa*.

The further issue that arises from this question is whether the rule against double jeopardy is open to the offender and at what stage can he exercise it. Tshehla proposes a plausible solution which can form the broad basis of a model accommo-

dating restorative mechanisms. He suggests that in the exercise of restorative justice, jurisdiction should be limited to less serious cases and subject to appeal or review processes. He concludes, referring to the mediation process used by the Restorative Justice Initiative, an NGO based in Gauteng, South Africa, that the judicial process should be put on hold in respect of a case that has been sent for mediation. A report on the results of the mediation should be submitted to the prosecutor who should then decide whether the terms agreed upon are acceptable and then withdraw the matter from court or refer it back for further mediation. While these suggestions are attractive as broad ideas, the process will certainly have to be refined to avoid issues like bottlenecks in the court system and abuse of the process.

Further reading:

G H Boehringer 'Aspects of Penal Policy in Africa With Reference to Tanzania' (1971) 15 JAL 182; D Brown 'The Award of Compensation in Criminal Cases in East Africa' (1966) 10 JAL 33; D M Chirwa 'The Implications of the Emerging Jurisprudence in International Criminal Law for Penal Regimes in Post-Independence Africa' (2004) 17 SACJ 193; P Contini 'The Evolution of Blood-Money for Homicide in Somalia' (1971) 15 JAL 77; S Dignan 'The Crime and Disorder Act and the Prospects for Restorative Justice' (1999) Crim LR 48; I T Gaparayi 'Justice and Social Reconstruction in the Aftermath of Genocide in Rwanda: An Evaluation of the Possible Role of Gacaca Tribunals' (2001) 1 AHRLJ 78; N J Kritz 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights' (1996) Law and Contemporary Problems 127; D Nsereko 'Compensating the Victims of Crime in Botswana' (1989) JAL 157; E V Mittlebeeler African Custom and Western Law (1976) 193; G M Musila 'Challenges in Establishing the Accountability of Child Soldiers for Human Rights Violations: Restorative Justice as an Option' (2005) 5 AHRLJ 321; S Roberts 'The Settlement of Family Disputes in the Kgatla Customary Courts: Some New Approaches' (1971) 15 JAL 60; S Roberts 'The Survival of the Traditional Tswana Courts in the National Legal System of Botswana' (1972) 16 JAL 103; B Tshehla 'The Restorative Justice Bug Bites the South African Criminal Justice System' (2004) 17 SACJ 1.

MODEL CODES

Mr Justice Gerard Winter, the High Court of Fiji.

Paper first presented at the CMJA Triennial Conference, Toronto, Canada, 2006

Model codes are only ever intended to be a valuable tool of assistance to both local and international actors involved in the criminal law reform process. A common practice in this process of creating new law is to look to different states as a source of inspiration. Where other similar legal provisions from different states exist using then as a model can significantly expedite the process of law reform and circumvent the need to go back to first principles when drafting new legal provisions. However, simply transplanting model legislation is seldom effective.

This paper discusses the use of model codes to increase capacity in justice systems. In Part I, using the lessons learnt from two scenarios, peace keeping in post-conflict states and organised crime in the Pacific, the proper use of model legislation in vulnerable states will be discussed. Then, in Part II, the UN-inspired codes project will be introduced.

Scenario I: War

General Sir Rupert Smith is one of Britain's most distinguished soldiers. When there was serious business to be done, he was the man to whom the government turned. He has recently published a seminal work on conflict and war called *The Utility of Force: The Art of War in the Modern World*. He makes the point that the nature of armed conflict has changed. 'Industrial war', the all-out sort of struggle that disfigured the 20th century, is dead. Instead, we now fight 'among the people'. War among the people is about winning the battle of wills. The objective is not to crush and destroy but to change minds. The problem is that our forces and thinking remain configured for wars we will never fight; they remain strategically and overwhelmingly powerful but not ready to engage the hearts and minds of the people. Condoleezza Rice famously stated that it was not the job of the 101st Airborne to take children to their kindergarten; true — but not because this is the wrong task, rather because we have the wrong forces for it.

These same forces are often deployed into the lawless chaos of post-conflict states. They take with them a mindset unprepared for the complex issues raised by a law and order vacuum. Since the UNEFI operation in 1958, through Cyprus, then Cambodia, Kosovo, East Timor and now the Solomon Islands, peacekeepers have had to perform a large array of interim law and order tasks: crowd control, individual and zone protection, weapons and contraband confiscation, genocide and criminal investigations and even basic judicial functions.

In post-conflict settings, national judicial, police and corrections systems have typically been stripped of the human, financial and material resources necessary for their proper functioning. They also lack legitimacy, having been transformed by conflict and abuse into instruments of repression.

Experience has led many, including the former High Representative for Bosnia and Herzegovina, to the belief that prioritising the rule of law is paramount:

In hindsight, we should have put the establishment of rule of law first, for everything else depends on it: a functioning economy, a free and fair political system, the development of civil society, and public confidence in police and courts. We should do well to reflect on this as we formulate our plans for Afghanistan, and, perhaps, Iraq.

Peace builders working within hostile, violent and frequently anarchist states must be prepared to face this seemingly impossible task of restoring law and order if they are to win the hearts and minds of the people. There is no other way to secure a viable peace and provide the secure environment within which the rebuilding of a state can be safely fostered. The difficulty with this essential but complex task is that the applicable law in a conflict or post-conflict environment is frequently elusive, often not trusted and can only be reintroduced in a way that relevantly meets the needs of the people.

Military peace keepers have frequently found themselves unprepared for the complicated political and legal dimensions of this role. Peace-builders have frequently failed to follow any clear or consistent policy on rule of law application as none existed under the executive mandate. Instead experience has shown peace-keepers left to guess at an appropriate policy often inappropriately grafting on a liberal interpretation of pre-existing law or transplanting their own laws and criminal jurisprudence. The interim law and order tasks were often carried out under the doctrine of necessity or more robust but piecemeal parameters set by rules of engagement, standard operating procedures and frequently unlawful but equally understandable use of force as a last common sense option.

Lesson One

Ad hoc responses fail to promote the strategic advantage of trust-building with locals as there is seldom a consistent application of a single rule of law value. Short term fixes frequently carry with them long term operational and tactical consequences as malcontents are quite happy to probe any operational ambivalence particularly at sensitive areas such as check points.

The lessons learnt have emphasised the need for the military and peace-builders to prepare in advance of deployment and take with them the practical infrastructure, tools and policy necessary to restore and maintain law, order and justice on an interim but well planned and resourced basis. As part of that package this may include model legislative tools but should never assume a simple transplant of legislation will ever of itself win the war among the people.

Lesson Two

In almost all instances, some form of law reform is necessary in the very early stages to ensure that there is an adequate legal basis to prosecute crimes that are occurring, particularly 'newer' crimes that are not contained in the pre-existing legislation. There will always be a vital need to win the acceptance and confidence of citizens by a consistent application of any model law. Introducing even the barest form of transitional law without at the same time building the capacity for local enforcement of it is a redundant and often dangerous option. Law without order, law without justice, law without relevance, law without

consistent application simply remains black-letter law on a departmental book shelf. Redundant law in a post-conflict state will not serve the need of citizens, in point of fact, it may do them a grave disservice as the transplanted model may give the appearance but not the reality of justice and so push people out of sight further down a rule of law black hole where order subverts to chaos.

Scenario II: Organised Crime

The small size of South Pacific populations makes the region particularly exposed to external threats whether those are problems associated with globalisation or security or sweeping economic changes. Smaller and less populated countries have greater difficulties in coping with the globalisation of crime. The principal reasons why these nations have increasingly become a target for transnational organised crime lies in their weak and vulnerable economies with limited human and financial resources.

At the same time the demands on Pacific Island States to keep up with international obligations are outstripping the capacities of many inherited colonial systems of law and justice.

The following case study on the regions drugs problem and attempted response by the Pacific Islands Forum using model legislation provides some interesting insights.

Drugs: The Pacific Problem

The cultivation, manufacture, trafficking, and consumption of narcotic drugs and psychotropic substances together with the money laundering of the proceeds of drug crime is the largest organised crime problem in the Pacific.

Cannabis, is cultivated in the region especially in the Melanesian islands and there are some reports about cannabis cultivation in Micronesia, Tonga, and Samoa. There are also some anecdotal reports about coca cultivation in Papua New Guinea's Sepik Province.

A 'Strategic Assessment' issued by the Pacific Islands Forum Secretariat in April 2006 found that there has been, are currently and are likely to continue to be in the future, efforts to develop large methamphetamine production facilities. There are continued efforts to import large volumes of methamphetamine precursor agents into certain Forum Island Countries.

The most significant seizure yet was made on 9 June 2004 by Fijian authorities in Laucala Bay, Suva, where 5 kg of crystal methamphetamine and 1000 kg of precursor chemicals were found. This seizure was described as one of the world's largest clandestine labs ever detected, having the potential to produce 500 kg of crystal methamphetamine a week. The size of the operation is underscored by two facts. The syndicate was importing 40ft container loads of precursor substances. And, the estimated value of the seizure was \$FJ one billion. The end-products were destined for markets in Australia, the United States, and Europe; see *State v Yuen Yei Ha & Ors* (Criminal case No. HAC 012 of 2004, High Court of Fiji at Suva).

At a time when most other nations had up life imprisonment for this type of offending Fiji did not. In Fiji the maximum available penalty at this time for the manufacture of 'ice' was 8 years imprisonment. That has now dramatically changed; however, the case does illustrate that the sentencing imperatives of denunciation and deterrence become irrelevant when the available punishment does not really fit the significance of the crime.

Archipelagic coastlines, sea borders, and vast areas of ocean are difficult, if not impossible, to patrol, especially by countries with limited financial, technical, and human resources. The mere size of the sea-borne trade across the Pacific is difficult to monitor and control. UNODC reports that there are about 5,000 vessels transiting the Pacific on any given day.

The Pacific Islands connect some of the world's largest drug producers with the largest drug markets in the world and have long been considered vulnerable to trafficking and smuggling activities. The geographical location between Asia, Australia and the Americas make the islands a strategic, if not peerless, location with regard to the global illicit drug trade. The rapidly expanding trade routes transecting the Pacific are aggravating the region's already exhausted and fragile border and customs services.

In 2000, police in Suva seized 357 kg of heroin bound for Australia, New Zealand, and Canada. It is believed that the heroin originated in Southeast Asia. In April 2001, some Chinese nationals were arrested in Fiji for shipping 160 kg of heroin from Myanmar to Vanuatu, presumably on their way to

Australia. A frequently cited case is that of 50 kg of cocaine which was found floating in a lagoon in Micronesia. The locals who found it mistook the white powder for washing detergent and used it accordingly, before realising that the powder wasn't lathering as it should. On 10 September 2004, Agencé France Press reported that 'police in the Pacific nation of Vanuatu have found 120 kg of cocaine on a beach as the biggest such haul in the Pacific nation's history'.

In recent years, the focus of drug trafficking in the Pacific islands seems to have shifted away from heroin to crystal methamphetamine (or 'ice'). Seizures of crystal methamphetamine in Palau have averaged 3-7 kg per year for the last several years. In 2002, 74 kg of methamphetamine was found on a ship in Singapore headed for Fiji and Australia.

People smuggling, money laundering, and to some extent gun running have accompanied the establishment of organised regional crime syndicates as they bed down in legitimate society and bide their time. Add to this the introduction of the newer crimes such as identity and secure code theft from electronic transactions, the 'legitimate' purchase of assets and migration of gang members and then you may begin to comprehend the size of the threat and the anxiety it has caused Forum Island Countries.

The Response

The Pacific Islands Forum is a regional inter-governmental organisation founded in August 1971 in response to specific political and economic concerns among leaders of the newly-independent Pacific island states. Its membership comprises Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. The annual meeting of Forum Leaders is the Forum's pre-eminent decision-making body. Its administrative arm is the Pacific Islands Forum Secretariat, which is chiefly responsible for ensuring the implementation of decisions made by the Forum.

In 1987, following the coup in Fiji and the attempted hijacking of an Air New Zealand aircraft, Forum Leaders agreed to establish a system of information exchange on international developments affecting regional security.

They also agreed that ‘a regional response to terrorism was appropriate to counter this emerging threat’ and established a working group to develop such a response. This was the beginning of a programme of work related to combat transnational crime which developed over the next few years, including in 1990 when Leaders noted that ‘many aspects of law enforcement... such as drug related crimes, extradition and customs could be addressed more effectively at the regional level’.

The culmination of this early work was the *Honiara Declaration on Law Enforcement Cooperation* issued by Forum Leaders in 1992, which remains to this day the key framework for the Forum’s engagement in international criminal law matters. Leaders declared that ‘the potential impact of transnational crime was a matter for increasing concern to regional states’ and that ‘there was a need for a more comprehensive, integrated and collaborative approach to counter these threats’. The Honiara Declaration largely focused on commitments to develop and enact new or improved national legislation on transnational crime matters, to address training in these areas, and to enhance cooperation between the Forum and the regional customs and police organisations. Other Declarations in the intervening years have reinforced the Honiara Declaration and built on it culminating in the recently published Pacific Plan.

The Secretariat has undertaken a wide range of activities over the years to help members. One of the most significant areas of practical activity has been the development and implementation of regional model legislation. The aim of doing so has not only been to help fill a shortfall in legal drafting capacity in the region by providing the legislation itself, but to use regional models to harmonise legislation between jurisdictions and in that way, make legal cooperation between Pacific Island Countries easier and more effective. The Forum Secretariat has coordinated or worked with others on the development of several regional model laws, some of them very good, including laws on extradition, mutual legal assistance, proceeds of crime, transnational organised crime, terrorism, weapons, drugs, and sexual offences. For example, the regional model laws on Mutual Assistance in Criminal Matters and on Proceeds of Crime were developed by a subcommittee of the Pacific Islands

Law Officers’ Meeting (PILOM). The Commonwealth and Forum Secretariats jointly coordinated the drafting of the model law on Extradition.

In the early years Forum Leaders commended progress in the implementation by members of their commitment to combat crime but by 1996 they were recognising the need ‘to examine ways to take forward the objectives of the Honiara Declaration more effectively’. Leaders expressed their concern over the lack of progress in implementing several of the key models in 1997, 1998 and 2001. Deadlines, set first in 2000 and then 2003, for all members to have enacted the legislative priorities of the Declaration have not been achieved.

In the Forum’s work on regional approaches to security and transnational crime, there have undoubtedly been successes. In particular, effective systems have been built for co-operation and coordination between member countries’ police, customs and immigration agencies. But the record of achievement is a mixed one. Enactment of the Forum-produced model legislation by member countries has been disappointing; notwithstanding that in-country drafting and implementation assistance is offered by both the Forum and the Commonwealth Secretariat.

Lesson Three: Relevance and pace

Cases such as this demonstrate the real problem of ‘disconnect’ between aspirational declarations of priority and action on those priorities. However, ‘pushing’ a particular legislative agenda on a reluctant or disinterested state is seldom welcome or effective. This is a very real issue not only for Forum Island Countries and their powerful partners but several other vulnerable regions in the Commonwealth. It is one that needs to be frankly discussed. In my view there has been a complete failure to recognise the high level of support needed for the implementation of model laws especially those touching on criminal justice. Powerful and undoubtedly well intentioned state and non state actors have simply not confronted the twin realities of relevance and capacity.

A blind transplant of a legal provision without an assessment of whether the foreign legal provision is workable in the context and culture of the receiving state is not desirable. A

Careful process of consideration and reflection is necessary before deciding upon the appropriateness of using any foreign legal provision in the creation of new laws. The proposed new law must first have relevance. Establishing relevance will often move rule of law aspiration from rhetoric to reality.

The process of creating relevance takes time. All too often generous donors hold wonderful conferences inviting ‘stakeholders’ for a lush indoctrination into the latest new law. Indoctrination no matter how attractively packaged will not create relevance. Relevance comes from a rigorous study of need. Whose need is the proposed new law addressing? What needs does the host state have for this law? How will the new law meet that need? What capacity is there to implement that law? This needs analysis is pivotal to the process and, if properly made respecting local culture, will begin the two way education required for both the donor and the receiving state to establish relevance and provide for a durable and effective law. Thereafter a more consistent and strategic approach to implementation may include for example capacity assessments and in country training.

A proper needs analysis has one more indirect benefit. Where an external legal provision is considered inappropriate for inclusion in newly drafted laws, it is still highly useful to the extent that it serves as a general source of inspiration or a starting point in the debate surrounding the drafting of entirely new legal provisions or the consideration of otherwise differing points of view.

Lesson Four: Capacity

The slow progress of criminal law reform in the Pacific region to combat organised drug crime has, I suspect, been caused by a failure to recognise the importance of capacity in regional co-operation. National capacity building and harmonisation of law between individual States one by one, using a patchwork approach, will not offer a complete and integrated regional solution to difficult problems. In the absence of a regional framework and mechanism of law and justice these efforts cannot really achieve the desired effect of deterring transnational crime across any region or indeed any country. The patchwork approach assumes similar capacities and standards of criminal procedure will apply to

the transplanted law. That is too big an assumption to make in countries and regions with little in the way of resources that struggle to mobilise a police force, keep the power on or provide judges with access to books or computers. At the time of writing Fiji still requires its Judges and Magistrates to write down the evidence and submissions made in any trial and the police do not have sufficient motor vehicles to respond to emergency calls.

That said, for those actors involved in criminal law reform, it is useful to draw upon other sources of law as tools to assist in moving forward the reform process. Even more useful would be to draw upon a tool or a potential source of law that is tailored specifically to criminal law reform in vulnerable states of varying national capacities.

The *Model Codes for Postconflict Criminal Justice* were drafted as such a tool. Instead of looking at the criminal legislation of another state, drafters can look to the model codes as ‘model’ legislation. Many so-called ‘model’ laws have been created around the world. Ordinarily, they focus on a specific criminal problem and provide model provisions for states wishing to combat that particular crime. The model codes however do not focus on any one specific crime but rather provide model legal provisions for a specific context of application to vulnerable states. The term ‘model’ is not meant to imply that a model law is the best or the only option in the criminal law reform process, or indeed, that it should be used in whole in a state reforming its criminal laws. Instead, the term ‘model’ is used in the sense of providing a sample law or a useful example. The model codes can be used along with any number of other sources in drafting new provisions of criminal law.

The Codes Project

The inspiration behind the *Model Codes Project* stemmed initially from the *Brahimi Report*, which cited the need to develop a set of interim codes to be used by the UN in the context of executive missions. In response to the recommendation, in August 2001, the United States Institute of Peace and the Irish Centre for Human Rights, in cooperation with the Office of the High Commissioner for Human Rights, embarked upon a project that sought to develop these codes.

In mid-2002, a panel of experts, representative of all sectors of the criminal justice system, in addition to academics, human rights advocates and military personnel, gathered in Galway, Ireland for the first of a series of expert meetings. Over the following year, coordinated by the Irish Centre for Human Rights, the panel worked on the creation of a set of draft codes. These would later be offered for widespread consultation and vetting at the hands of a broader pool of experts.

What emerged at the end of this process was a package of four annotated model codes; a draft penal code, the *Transitional Criminal Code* ('TCC'), a draft procedure code, the *Transitional Code of Criminal Procedure* ('TCCP'), the *Transitional Detention Act* ('TDA'), a body of law that regulates procedural and substantive issues relating to pre-trial detention and imprisonment, and finally, the *Transitional Law Enforcement Powers Act* ('TLEPA'), a draft Police Act. Recognising the symbiotic relationship between the different elements of a criminal justice system, the 'codes package' is a compendium of draft laws and procedure that seeks to address each element - courts, police and prisons - in a cohesive and integrated manner. The draft laws developed have now been vetted by an additional 250 experts from across the globe. This has been done through various mechanisms, including meetings, individual consultations and institutional consultations.

To identify their role of inspiring change in post-conflict states, the codes have been renamed as the 'model codes'.

The substantive provisions of the codes provide much in the way of material with two hundred articles of substantive criminal law, containing both general provisions and one hundred and fourteen substantive offences ranging from drug crime, to crimes against property, organised crime, corruption and bribery, money laundering, incitement to crime on account of hatred, weapons offences, sexual violation, slavery, people smuggling, crimes against children, peacekeepers and protected persons, cyber-crime and election offences.

The *Model Code of Criminal Procedure* (MCCP) contains over two hundred and twenty seven articles covering everything from the investigation of offences (search and seizure of persons, questioning of suspects,

covert surveillance, search of persons, forensic examinations, etc.) to the indictment, trial and appeal phases of the proceedings. It also includes provisions on witness protection, extradition, international cooperation and mutual legal assistance.

Throughout the MCCP, international standards for rights such as fair trial and due process, both general and those relating to women and children in particular, and the right to privacy have been translated from the theoretical framework into practically applicable and enforceable provisions. The *Model Detention Act* also continues this translation process in relation to standards and procedures for detention. This is not a one size fits all strategy: each application will require the effective and efficient identification of the particular needs of a Host State so that overall a long term plan to support the rule of law can be established. But what the codes provide is a most necessary resource.

The goal of the Codes was to create a package of draft rules that draw upon the lessons learned in past peace operations and that are tailored to the exigencies of the environment in vulnerable or post-conflict states. The target audience of the Codes includes both national and international personnel (whether acting as part of an assistance or an executive mission) engaged in the law reform process in such environments.

These Codes were developed through the blending of different legal systems to create a coherent legal framework. They take into account factors that are often present in conflict and post-conflict conditions, such as a lack of resources and personnel. Rather than drawing from one legal system, the Codes represent a cross-cultural model inspired by a variety of the world's legal systems (common, civil, and Islamic law). Sources cited for provisions throughout the Codes reflect this rich blending of various legal traditions used in a practical sense.

Potential

The Codes provide a set of tools. They may provide a useful source of inspiration wherever the criminal law in place is deficient or for some reason unusable and consequently in need of reform. They will be of undoubted assistance for military and civilian lawyers engaged in capacity

building. The codes offer an opportunity for peace keepers to effectively blend security and law and order tasks without compromising efficiency or creating operational confusion between those roles. The codes remain flexible enough to provide law on dealing with the criminal, the spoiler or the individual presenting a security threat or any combination of the three; while still providing for due process to ensure offenders are dealt with in accordance with accepted legal principle.

Where the pre-existing law contains 'gaps', such as is commonly found in these environments, the Codes could be used to fill them. An example would be the situation in which certain crimes do not exist on the statute books but are being perpetrated at large. This would be more common with 'newer' crimes or crimes that are prevalent particularly during or after a conflict, such as the trafficking in persons, people smuggling, organised crime, money laundering, or incitement to crime on account of hatred.

In addition to criminalising such acts, procedures will also need to be put in place to adequately investigate and prosecute them. In the case of organised crime, for example, experience has shown that measures to protect victims, witnesses and their families are an essential component of criminal procedure legislation. Covert or other technical means of investigation are also often required to give the police the necessary tools to investigate organised crime. The codes provide for these.

The criminal legislation in many vulnerable environments often violates international human rights and criminal law standards. Early on in the mission in Kosovo, for example, it became clear that a lack of provision in the law for the review of detention was in violation of international standards. In East Timor, on the Authority of the Transitional Administration in East Timor, a number of provisions of the then existing penal code were deemed to be no longer applicable as they violated international standards on human rights. In order to bring the law in line with these standards, it would be necessary to delete objectionable provisions and replace them with standards that comply with human rights norms. The codes assist in that regard.

In some conflict or post-conflict environments, the law in force might have been that of a

former dictatorial or oppressive regime and might therefore be politically objectionable to the succeeding local authorities and not trusted by the population at large. The Codes could be a valuable source of inspiration in creating transitional legislation. Given the fact that there is no 'one size fits all' model, it is unlikely that the Codes would be used in their entirety, but the provisions used could be adapted to the particular context in which they were to apply.

In cases where a special chamber or division or a tribunal is being set up either as part of the domestic system or as a stand-alone body to handle, for example, international crimes (genocide, crimes against humanity and war crimes) or serious crimes (organised crime, terrorism, economic crime) the Codes may again be used as a source of inspiration. For example, an economic and organised crime division was established in Bosnia within and as part of the existing criminal justice system, as well as a war crimes division.

It is also likely that additional uses for such a set of Codes will unfold over time. During the consultation and vetting process, for example, input received from legal experts suggested that the utility of the Codes should not be limited to conflict or post-conflict environments. Many were of the view that the Codes could be useful in weak States, unstable States or States which may not be in a conflict situation *per se*, but experience the same justice system resource issues as those of post-conflict States.

Conclusion

I end this paper as I began by citing a General, this time a Chinese one, Lao Tse, undoubtedly the most enlightened warrior in Asian history, who once reminded his over zealous officers that the way to effect change was by: *gentle pressure applied relentlessly*.

The codes project will provide a most vital tool for peace-builders and law reformers alike as it contains the legal essence to effect 'gentle change' among the people. When people are so changed their confidence will maintain the rule of law, there then can be nothing surer to promote a just and fair society. Publication of a two-volume monograph containing the *Model Codes for Post-conflict Criminal Justice*, the first volume containing the MCC was published in 2007, with further volumes promised for 2008 and 2009.

THE ROAD TO A GLOBAL TREATY

The Hague Convention of 23 November 2007 on the International Recovery of Child Support and other Forms of Family Maintenance

Judge J. M. Doogue, District and Family Court Judge of New Zealand

*“We haven’t got the money,
so we’ve got to think!”*

Ernest Rutherford (Baron Rutherford of Nelson 1871 – 1937)

The protection of children and their rights is one of the main concerns of the international legal community in general and in the work of the Hague Conference on Private International Law in particular. The Hague Conference has successfully adopted several Conventions on the protection of the rights of children and adults. Perhaps the most well known of all is the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

A new Convention on the International Recovery of Child Support and other Forms of Family Maintenance was adopted on 23 November 2007 by States that took part in the Twenty-First Session of the Hague Conference and this Convention can be considered as a significant step in the further protection of the rights of children and adults in the international context. The Convention is the culmination of negotiations that occurred during Special Commissions in 2003, 2004, 2005, 2006, culminating with the Diplomatic Session of November 2007 when the Convention was concluded by the diplomatic representatives. A Protocol on the Law Applicable to Maintenance Obligations was also adopted on 23 November 2007.

A Special Commission of the Hague Conference was held in 1999 to examine the practical operations of the four existing Hague Conventions dealing with the cross-border recovery of maintenance: the Conventions on the Law Applicable to Maintenance Obligations Towards Children, 1956; on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children, 1958; on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, 1973; and on the

Law Applicable to Maintenance Obligations, 1973. As well as the four existing Hague Conventions there were other existing Conventions including the 1956 New York Convention and various regional Conventions, bilateral and other cross-border systems such as those operating among Commonwealth countries including New Zealand. In most Commonwealth countries there is legislation with a title such as the Reciprocal Enforcement of Maintenance Orders Act. (REMO). It was generally accepted that these Conventions were not generating sufficient practical traction in ensuring effective international recovery of maintenance for children and other vulnerable persons and that better solutions needed to be identified and implemented in a new Convention. Hence the quote in the title from Ernest Rutherford.

The Special Commission of 1999 directed that it was desirable that a more modern Convention should contain, as an essential element, provisions relating to administrative co-operation and be comprehensive in nature, building upon the head features of the existing Conventions, including in particular those concerning the recognition and enforcement of maintenance obligations. It was also agreed that it was essential that any new Convention take account of future needs, the developments occurring in national and international systems of maintenance recovery and the opportunities provided by advances in information technology.

The strong components of administrative co-operation in this new Convention are an important mechanism to give practical effect to Article 27 of the UN Convention on the Rights of the Child:

1. States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to

secure, within their abilities and financial capabilities, the conditions of living necessary for the child's development.

Significant challenges faced those negotiating and drafting the new instrument having regard to the divergence of approaches (both substantive and procedural) that negotiators brought to and advocated for during the successive Special Commissions.

The 2003 Special Commission elected a Drafting Committee and elected me to chair it. It was the Drafting Committee's responsibility to draft tentative text for consideration of the Plenary throughout the negotiations according to the mandate given by the Chairs of the Special Commission. The Drafting Committee met frequently during the Special Commissions and also at other times in order to prepare a draft text of the new instrument for consideration and comment by all the negotiators. In this paper, I give a general overview of the new Convention; discuss some of the major challenges confronting the negotiators and the Drafting Committee in drafting a new global treaty and how these issues were resolved in the drafting; and discuss the resolution of the particular challenges for Commonwealth countries and the REMO system.

General overview

The Convention is divided into eight Chapters: Object, Scope and Definitions; Administrative Co-operation; Applications Through Central Authorities; Recognition and Enforcement; Enforcement by the Requested State; Public Bodies; General Provisions; and Final Clauses.

The overriding objective of the new Convention is to ensure that maintenance obligations are respected even though the creditor and debtor may be in different countries. The object Article expresses the intent of the Convention and says it is to ensure the effective international recovery of child support and other forms of family maintenance by (a) establishing a comprehensive system of co-operation between the authorities of the Contracting States; (b) making available applications for the establishment of maintenance decisions; (c) providing for the recognition and enforcement of maintenance decisions; and (d) requiring effective measures for the prompt enforcement of maintenance decisions. The Convention sets

out procedures which maximise accessibility to relief and promote prompt, efficient, cost-effective and fair procedures for the international recovery of maintenance.

There were lengthy discussions during the Special Commissions about the material scope of the Convention. It was ultimately decided that the core maintenance obligations to which the whole of the Convention applies should be maintenance obligations arising from a parent-child relationship towards a person under the age of 21 including claims for spousal support made within claims for maintenance in respect of such a person, and, with the exception of Chapters II and III (the administrative co-operation articles), in respect of spousal support. The Convention does allow a Contracting State the right to limit the application of the Convention to persons who have not attained the age of 18 by way of reservation. The Convention also allows for a Contracting State to extend by way of declaration the whole or any part of the Convention to any maintenance obligation arising from a family relationship, parentage, marriage or affinity, including in particular obligations in respect of vulnerable persons. The provisions of the Convention apply to children regardless of the marital status of their parents. A significant number of countries (led by the Latin American States) expressed the view that the core scope of the Convention should extend to maintenance obligations arising from relationships with vulnerable persons. It was eventually decided that the Hague Conference should consider in future a protocol on that subject.

It was common ground amongst all negotiators that effective administrative co-operation was an essential and perhaps the pre-eminent element in any new Convention. In Chapter II the 2007 Convention establishes a system of co-operation through Central Authorities. The designation of a Central Authority in each Contracting State to discharge the duties that are imposed on it by a Convention is a feature of many modern Hague Conventions. These authorities and co-operation between them are the cornerstones of effective international co-operation. Article 5(b) makes it clear that the Central Authorities must assist, as far as possible, in finding solutions for difficulties arising in the application of any part of the Convention. This could include action to promote more consistent application of the

Convention through information sessions for Judges, lawyers, administrators and others involved in the operation of the Convention.

The Convention establishes a system of applications made through Central Authorities for the establishment or recognition of maintenance decisions and for other procedures that could be useful for the effective collection of maintenance. Article 10 establishes the scope of the Convention in terms of available applications. The range of applications in Article 10 reflects the discussions at the 2006 Special Commission when it was resolved that each Contracting State must make certain applications available to creditors; and that each Contracting State should provide for applications made by debtors for recognition and enforcement of a maintenance decision by a debtor.

A fundamental principle of the Convention is the right to have effective access to services and procedures, be they administrative or judicial. As stated in paragraph 372 of the Draft Explanatory Report

‘Effective Access to procedures’ for a person seeking assistance under this Convention implies the ability, with the assistance of authorities in the requested State, to put one’s case as fully and as effectively as possible to the appropriate authorities of the requested State. It also implies that a lack of means shall not be a barrier.

Article 14(1) imposes an obligation on a Contracting State to ensure that an applicant who has made an Article 10 application has effective access to procedures. To provide such effective access to procedures the requested State is obliged to provide ‘free’ legal assistance in accordance with Articles 14 to 17 inclusive. However the obligation to provide effective access does not always require the provision of free legal assistance for this purpose, as the Convention recognises that in some systems procedures exist, such as the simplified procedures of administrative schemes operating in New Zealand and Australia and other countries, which enable the applicant to make the case without the need for legal assistance. Article 15(1) obliges Contracting States to provide free legal assistance in respect of all applications by a creditor arising from a parent-child relationship towards a person under the age of 21. Article 16 permits a State as an alternative to the provision of free legal

assistance in child support cases, to apply a means test based on an assessment of the means of the child rather than the parent, but there can be no derogation from the principle of free legal assistance in applications for recognition and enforcement of child support orders. Article 17 provides that in respect of all applications other than child support (dealt with in Articles 15 and 16) the provision of free legal assistance may be subject to a means or merits test.

Throughout the negotiations it was always a goal for the majority of the participants that the Convention should contain provisions designed to facilitate and to simplify the interim measures to which a foreign decision is submitted (what is known as *exequatur* for judgments) before enforcement under national law may take place. Such simplified and harmonised procedures are contained within Chapter V. The bases for recognition and enforcement are a set of indirect rules of jurisdiction.

Finally the Convention in Chapter VI covers enforcement by the requested State. Once a decision has been recognised and declared enforceable in the requested State, measures must be taken to enforce the decision to effect practical recovery of the maintenance ordered. It was accepted by the negotiators that the best international procedures for recognition of enforcement may be frustrated if, in the end, national measures of enforcement are ineffective at national level. This is the reason why this Convention, for the first time in the history of Hague Conventions, contains a separate Chapter on enforcement by the requested State. It also represents a major compromise by some of the negotiators, in particular those from the USA, who initially strenuously argued for mandatory enforcement measures. By the time of the 2006 Special Commission they had accepted that to insist upon mandatory rules for enforcement would potentially alienate too many countries from ratifying the Convention stating their position thus:

The measures of enforcement ... are not mandatory. Nevertheless we think that including them in the Convention serves a useful hortatory purpose. Without effective enforcement remedies, support will not reach needy families – no matter how strong the rest of a State’s child support

system is. Inclusion of the examples ... may inspire States to revise their laws to determine if more effective enforcement remedies are needed.

Some of the major challenges in the negotiations

Article 6, which deals with the specific functions of Central Authorities, was one of the most extensively debated articles during the negotiations. This arose in part because of the different interpretations attributed to the provision. It also arose from concerns that Central Authorities should not be expected to act beyond their powers and resources, or be unreasonably burdened with too many functions. At the same time, there was support in Special Commission debates for maintaining a broad range of administrative functions for Central Authorities in child support cases.

A compromise was reached. This reflected the balance between making the functions as expansive and effective as possible while at the same time not too over-reaching or rigid that Central Authorities were expected to act beyond their powers and resources or be unreasonably burdened with too many functions. The choice of flexible verbs in Article 6 ('facilitate', 'encourage', 'help' and the use of the term 'all appropriate measures') affords the greatest possible level of flexibility. Some negotiators considered this sort of terminology watered down the obligations but the existing text was retained because the majority conclusion was that to use more concrete terminology 'ignores the wide divergence in the powers, resources and capabilities of Central Authorities to perform the functions in question'.

Articles 14 to 17 which deal with effective access to procedures represent another important compromise. Several tensions needed to be addressed and put in the balance for consideration by the negotiators. Overarching all of the negotiations were the twin tensions described by the Deputy Secretary General William Duncan thus:

First, costs for the applicant shall not be such as to inhibit use of the process. Second, the cost of services to Contracting States should not be disproportionate to their benefits in terms of achieving support for dependants and in consequence reducing burdens on taxpayers.

In addition tensions existed between those systems wherein the assessment and recovery of maintenance is an administrative process and those where it is entirely judicial. Difficult issues relating to reciprocity exist between countries providing an administrative system in which services are provided free of charge and those countries relying on a judicial process where free legal assistance is not granted. Responses to Questionnaire on Maintenance Obligations were reported by the Deputy Secretary General William Duncan in May 2004 and showed a vast array of different approaches to this issue between Member States.

At the outset some negotiators were opposed to the idea of completely free services for all children, while for others the failure of the Convention to provide for completely free services for all children was described by them to be a potential 'deal-breaker'. Thus the task of negotiators and drafters alike to find an acceptable compromise was gargantuan.

In initial working drafts of the Convention the obligation to provide effective access to procedures did not differentiate between the different classes of applicants. But as the negotiations developed, a strong desire to differentiate as between child applicants and others emerged; as did a very strong desire amongst many negotiators to provide for completely free legal assistance in child support cases. By the conclusion of the 2006 Special Commission a new draft had emerged in which child support applicants were ensured free legal assistance save for three exceptions: (a) reasonable changes for costs of genetic testing; (b) if the application is manifestly unfounded in the merits; and (c) where the applicant is exceptionally wealthy.

During the 2007 Commission a Working Group was established tasked with working out a compromise solution acceptable to those whose views appeared implacably irreconcilable. Fortunately this Group settled on a proposal that the Commission ultimately accepted. This still gives preferential status to child support applications but allows for States to declare that they permit the use of a child-centered means test rather than providing free legal assistance in all cases. The 'exceptions' of charging reasonable costs for genetic testing and for the exceptionally wealthy applicant were retained,

but by the deletion of express reference to either in the text and a minor redraft of what is now Article 43 which allows a State to recover costs from an unsuccessful party.

Another of the significant challenges in drafting this Convention was the divergence of countries' approaches to jurisdiction. On one hand there are those systems which accept creditor's residence without more as a basis for exercising jurisdiction and on the other there are those systems which demand some minimum nexus between the authority exercising the jurisdiction and the debtor. Further there is the divergence between systems that adopt the concept of 'continuing jurisdiction' in the State where the original decision was made and those which accept that the jurisdiction to modify an existing order may be assumed by the courts or authorities of another state.

At the outset of the deliberations negotiators considered potential options for resolving rules of jurisdiction. One was to identify a common core of jurisdictional grounds beginning with debtor's forum and submissions to the jurisdiction, together with creditor's forum but subject to limitations necessary to satisfy the 'due process' concerns of certain States. Another was to set aside the search for uniform principles and concentrate on an effective system of co-operation combined with indirect rules of jurisdiction for the purposes of recognition and enforcement of maintenance decisions. Eventually negotiators favoured the second approach over the first because negotiators considered it unlikely that uniform rules acceptable to all would be achievable.

A novel feature of the indirect rules contained in the Convention is the obligation contained in Article 20(3) which provides:

A Contracting State making a reservation under paragraph 2 [to exclude recognition on certain bases] shall recognise and enforce a decision if its law would in similar factual circumstances confer or would have conferred jurisdiction on its authorities to make such a decision.

Under this approach, which was based on a proposal made by the European Community, a foreign decision is recognised as made in factual circumstances that would, *mutatis mutandis*, be a basis for jurisdiction in the

State addressed. Thus the ground of direct jurisdiction on which the Judge of origin acted is disregarded and attention is only paid to the links of factual proximity. This became known as the 'fact-based approach' and was necessary primarily because of the special requirements of the US Constitution.

Finally, another significant challenge was to ensure that the new Convention was future-proofed to take advantage of improvements in information technologies. Care has been taken to ensure the language of the Convention is media-neutral without altering the substance of the procedures and without doing damage to due process principles.

Commonwealth implications

The existing REMO system within the Commonwealth makes provision not only for the recognition and enforcement of existing maintenance orders but also for their establishment by the combined efforts of courts in two countries. i.e. those of the creditor's and debtor's residence.

Under the existing system the originating court (whether it is that of the creditor's residence or the debtor's when application is made for the modification of an existing order) makes a provisional order. This order is made without notifying or hearing the respondent. This order however has no effect unless and until it is confirmed by a competent court in the country in which the respondent resides. The respondent is notified by that court which hears his or her side of the case before deciding whether to confirm the provisional order (and whether to confirm it with or without variation). The court in the country in which the respondent resides does not apply its own substantive law in confirming the order. It is the law of the overseas country that applies insofar as it is only the defences which a respondent can raise in the original proceedings that can be raised at a confirmation hearing. If confirmed, the order is registered by the court and enforced in the country in which the respondent resides, as if it had been made by that court. The court in the country in which the applicant resides maintains jurisdiction to vary or revoke a confirmed provisional order but any variation needs to be confirmed in the reciprocating jurisdiction. The court in the country in which the respondent resides also has jurisdiction to vary or revoke the original decision.

As some of the Commonwealth countries will become parties to the Convention but will retain the existing system for the foreseeable future when dealing with other Commonwealth countries which do not become parties to the Convention, it was very important that in the negotiations leading up to the creation of the new instrument orders made under the Commonwealth system should be capable of recognition under the Convention. Professor David McClean for the Commonwealth Secretariat ably and almost single-handedly advocated for the Commonwealth position. He argued successfully that as almost all of the fifty-plus Commonwealth countries use the existing system this was not a narrowly parochial issue – but that it was one issue of global significance. His Working Document 81 presented to the Special Commission of June 2006 is now enshrined in Article 31(a) to (c) inclusive of the new Convention. In addition he proposed an additional paragraph (d) be added during the 2007 session dealing with the effect of Article 15 on proceedings for modification of an order in the REMO context. This proposal was also successful and was added to the text of Article 31.

Chapter V of the Convention regulates recognition and enforcement. This Chapter requires that any decision in respect of which recognition and enforcement is sought must emanate from a Contracting State ('the State of Origin'). As a result of Professor McClean's efforts the Special Commission of 2006 accepted the idea that each Commonwealth country involved in the REMO system should be treated as if it were a State of Origin for the purposes of the recognition rules. His efforts developed a way through the complexities that the interface between REMO and the new Convention presented. Explaining some of these complexities, Professor McClean presented a paper to the 2005 Special Commission, and added that if it gave the delegates a bad headache, the Secretariat had the addresses of pharmacies.

Article 20 provides for the bases for recognition and enforcement. It distinguishes between 'respondent's jurisdiction' and 'creditor's jurisdiction' cases. The effect of Professor McClean's proposal to the Special Commission was that a REMO order would always qualify as a case of an order emanating from a respondent's jurisdiction. Ultimately it was concluded

that no substantial problem need arise from the reference to 'the time proceedings were instituted' as there are two sets of proceedings (or on one view of the matter, one proceeding divided between the two countries involved). It was decided that any uncertainty arising in the interpretation of this phrase and its applicability to a REMO type case could be explained in the Explanatory Report.

Article 31(b) and (c) obviate two potential difficulties with earlier drafting namely it clarifies how the REMO system complies with the requirement contained in Article 22(e) (concerning the rights of the respondent) and the requirement contained in Article 20(6) that a decision shall be recognised only if it has effect in the State of Origin, and shall be enforced only if it is enforceable in the State of Origin. It does this by providing that in REMO type cases both the requirements of Article 22(e) and Article 20(6) are met if the respondent had proper notice of the proceedings in the confirming State and an opportunity to oppose the confirmation of the provisional order and that the decision is enforceable in the confirming State.

Conclusion

Given the divergence of approaches (both substantive and procedural) that negotiators brought to and advocated for during the successive Special Commissions of the Hague Conference it is a truly remarkable achievement that a new Convention on the International Recovery of Child Support and other Forms of Family Maintenance was adopted on 23 November 2007.

The aspirational list of objectives set by the directives of the Special Commission of 1999 have been met in the new instrument by the willingness of those who participated to compromise and to find solutions acceptable to the majority of those represented at the Hague Conference.

The ability to enforce the rights of children and other vulnerable persons to a standard of living adequate for their physical and mental wellbeing has potentially been significantly enhanced in the global context by the adoption of this Convention. It is the hope of those that participated in its creation that it becomes in the fullness of time as widely ratified, well known and well utilised as the Abduction Convention.

ELIMINATING CIVIL CASE BACKLOGS IN SMALLER JURISDICTIONS – A PRACTICAL GUIDE

Roger J Coventry Former Justice of the High Court of Fiji, Justice of the Supreme Court of Vanuatu, Chief Registrar of Solomon Islands and Senior Magistrate, Seychelles.

The essence of justice is not in the propounding of great principles nor in learned debate of fine points of law but in the day after day hearing and deciding of cases. People want decisions. And they want those decisions in a reasonable time.

Backlog and delay are the monsters that have plagued justice for hundreds, even thousands, of years. In Hamlet, Shakespeare placed ‘The law’s delay’ alongside ‘the pangs of disprized love’ and ‘the insolence of office’. Moses met with the same problems in Exodus. A little more recently, Lord Woolf in his Interim Report in 1995 concluded that one of the principal defects in the civil justice system was that ‘it is too slow in bringing cases to a conclusion’. Reduction and elimination of backlogs and delays are two of the principal aims inherent in the formulation of new Civil Procedure Rules throughout the Commonwealth and the world.

The two monsters, Backlog and Delay, are closely related and are staunch allies. They are nevertheless two separate monsters. The caging of one does not necessarily curb the activities of the other. Indeed, if both are not attacked the one will release the other from its cage. There is no shortage of other monsters in legal systems. In this paper I will look to the elimination of backlog.

Unless a jurisdiction has set time limits for case progress, collects meaningful and reliable statistics and monitors them frequently, it is difficult to discern when delay begins or when the number of delayed cases becomes a backlog. However, when a backlog does exist everyone will tell you in clear ringing terms.

Backlogs occur for many reasons, singly or in combination.

In most jurisdictions the Judiciary, when viewed either objectively or in comparison with other arms of Government, is understaffed and under-resourced. Even when judges manage cases efficiently and work long hours,

backlogs can still build up. In the annual fight for funds, the appeal for ‘more judges’ always lags well behind the call for ‘more doctors’ or ‘more teachers’. The plain fact is that when the question is raised ‘how do we reduce delays and eliminate backlogs?’ the first answer is ‘more Judges, more Magistrates’.

Antiquated court rules and case authorities and practices from bygone eras create backlogs. The behaviour and size of the legal profession of a country or a court centre can have a determining effect upon the build up of a backlog and its size. Civil and political upheaval locally or nationally can produce a backlog in a matter of weeks. For example, in Fiji, a programme to eliminate a backlog of over two thousand cases begun in 2005 was approaching conclusion in mid 2007. Following upon the removal of the elected government in December 2006, that programme gradually came to a halt and is now, with gathering momentum, going backwards.

The attitude and approach of Judges and Magistrates can be determinative. Whilst the public will accord a high degree of respect to Judges and Magistrates by reason of their office, this does not mean there will be no time-servers or accomplished passers-of-difficult-cases-onto-others on a bench. I well remember when I first started sitting as a Magistrate the previous post-holders had been more interested in outdoor pursuits than the simple sitting and hearing of cases. There was a considerable and wholly unnecessary backlog.

There are less obvious factors which contribute to backlog creation, for example the lack of reasonable office facilities, inadequate administrative support, remoteness of court locations, difficult relations between judges and support staff, political upheaval, harsh climates and cyclones. Recently the beautiful Supreme Court building in Vanuatu was burnt to the ground, along with all the case files, computers and records. That single event is causing delay and backlog which the judges and staff are battling

to contain. There are many more examples one could quote. The Judiciary is not in a position to do anything about many of those factors. We can fight over budgets, but I do not know of any court orders that can stop cyclones. Nevertheless the Judiciary is in a position to, and can, do an immense amount to eliminate backlogs.

The successful completion of a programme requires the solid determination of the Chief Justice or Chief Magistrate, or the Judicial Officer in charge of a court centre. Although the administrative side of a backlog elimination programme can be overseen by a judicial officer or an administrator, it will be the Judiciary who, day after day, hear the cases and work through the backlog.

The very size of the task, when a backlog programme is suggested, is often sufficient in itself to deter all but the most strong-hearted. The task necessarily requires months or years of extra work, more resources, more judicial officers, the upsetting of established practices and the overcoming of guided and misguided opposition. However, a backlog elimination programme should not be delayed to be part of a greater package of reforms. Grand plans are not required to eliminate backlogs in smaller jurisdictions. The motto must be 'Do it now!'

There will always be an immense feeling of achievement when a backlog is eliminated or even reduced. The confidence of people in resolving disputes through the courts is restored or enhanced. In smaller jurisdictions confidence in the courts can take years to build and much work to maintain, yet be lost in a matter of a few months. Confidence of people in the Courts is vital for the protection of human rights and the rule of law. It is also important for the economic well being of a country. This last consideration is continually stressed by the World Bank in its annual 'Doing Business Report'.

The purpose of this paper is to set out some practical suggestions on how to go about the process of eliminating backlogs of civil cases in smaller jurisdictions. I acknowledge that in larger jurisdictions the process is more complex and most have been addressing these issues for some time. The considerations are by and large the same. There are some which are peculiar to small jurisdictions. For example, a few antipathetic lawyers can, with little effort, hamper or even wreck a whole programme.

It is essential that any programme is designed for the country and the jurisdiction concerned. Whilst strategies for the elimination of backlogs will broadly be the same, every programme must specifically address local circumstances. It must be made clear that the programme will be designed with this in mind. Enthusiastic support will evaporate in seconds with the pronouncement that 'This is a programme from Harry Potter Land which, with a few adaptations, will work well here'.

Dramatis Personae

It is essential from the outset to win over as many people as possible. Any one group or indeed a few people can easily slow or completely frustrate a programme. Strong opposition can often come from unexpected quarters and sometimes when a programme is well under way. One must consider Judges, Magistrates and other judicial officers, court support and administrative staff, ministries, purse holders, the legal profession, government lawyers, non-government organisations, the public, business and others. There is no magic in the order of that list.

Once the idea of eliminating a backlog is put forward, there is generally enthusiastic support. That support is stronger if the proposal comes from within a Judiciary. Judges and Magistrates know what is involved and will be the ones responsible for hearing the cases day after day and seeing the programme through. Rightly or wrongly there will always lurk in the public mind the idea that it was the Judges and Magistrates who caused the problem, so let them put it right.

The engendering of enthusiasm and the invitation of ideas at an early stage is vital. All those whose professional lives will be affected by the programme, its extra work, its changes in practices, should feel that they are participants in a worthwhile project and not the drudges who carry out the work involved in someone else's bright idea.

It is important from the outset to obtain the full and enthusiastic support of the Chief Registrar and those in charge of the registries. They must not perceive the need for a programme as the result of a failure on their part. All registry staff should feel that they are part of the programme and that there are job-satisfaction gains within it. It must never be

forgotten that administrative staff in registries are the front line court contact with members of the public and lawyers' clerks. They are the ones who will receive the complaints and the abuse over the delays in case progress. The idea that shelf upon shelf of files could be, within a few months, shipped off to archives and never seen again is very attractive. The prospect of dealing with hundreds fewer cases will appeal to everyone, be they Chief Registrar or photocopier clerk.

A backlog elimination programme can often bring with it the possibility of the replacement of the old coal-burning computers with something more modern, the painting of the office walls a colour different from battle ship grey and even a few bright pictures on the wall to go with the master flow chart for the backlog programme.

There will inevitably be doom-mongers who pronounce the whole idea a complete waste of time, citing the efforts of earlier Judges or Magistrates who retired prematurely for health reasons and particularly old so-and-so who went completely barmy towards the end.

Lawyers will find reasons for curbing or obstructing a programme. The logic is simple and well known. The more cases there are and the longer they go on, the more one earns. The idea must be implanted at an early stage, and reiterated throughout, that it is the more efficient and forward-looking firms of lawyers who will gain from the programme itself. There will also be resistance from lawyers to the loss of their power in the control of litigation progress. The strength of this opposition should not be underestimated. It is essential to win over, from the outset, the support of leading and influential lawyers. They must be included in the programme from the planning stage. Their ideas will be invaluable.

It is often a surprise that some of the greatest resistance to a backlog elimination programme can come from Judges, Magistrates and other judicial officers. First, such a programme is often interpreted as an attack upon their diligence and efficiency. Second, it will be recognised that such a programme inevitably will mean more work. A lot more work. The likelihood of there being additional judicial officers to help or vacant posts being filled is generally remote.

Delicate issues can arise. Nearly all Judges and Magistrates work hard, often well beyond what is required of them. However, within many judiciaries there are a few who are more interested in the pomp and status of the position than in actually hearing and deciding cases. They are usually known but are often the ones who protest the most about workload. The temptation to seize upon any reason to adjourn a case is just too great if it means the kava bowl or golf course can be reached before lunch time. There are Judges who devote limitless time to some cases and regard the consequent delay to other cases as a problem to be addressed by others. There are those who leave the pace and convolutions of case progress in the hands of the lawyers. These are not easy circumstances for Chief Justices and Chief Magistrates to address. But addressed they must be if backlogs are to be eliminated and feelings of unfairness and disproportionate bearing of burdens are to be avoided.

Another feature of a backlog elimination programme is the discovery or confirmation of which Judges and Magistrates have diligently progressed their cases and which have kicked the more difficult ones into the long grass. Horror cases will emerge of judgments left unwritten for months or years, even ones where Judges have left a jurisdiction having heard the trial but without completing the judgment. These revelations need careful but firm handling by the Chief Justice or Chief Magistrate. Sensitive yet strong and fair decisions must be made upon the distribution of programme workload if some Judges already have their own personal backlog entirely of their own-making

Changes to Rules

An essential weapon in the armoury of backlog elimination is a robust Rules regime. Many Commonwealth jurisdictions operate under old Rules or ones which have only been partly updated. There is no doubt that Civil Procedure Rules have and still do provide the framework for the creation of backlogs. In many jurisdictions the concept of lawyer control of progress will be the one which it is most difficult to overcome. Court practices and attitudes to Procedure Rules need to change if backlogs are to be eliminated. The enthusiastic support of the 'Rules Committee' is essential and must be obtained at an early stage.

Case authorities require careful scrutiny. The havoc wrought by the principles established in *Birkett v James* ([1978] AC 297) still persists in many jurisdictions. The concept of not shutting out a plaintiff at virtually any price should have gone long ago in favour of the diligent and expeditious pursuit of proceedings. Yet there will be a significant number of lawyers, not always the older ones, who will cling to the old norms as they would to a blunt and rusty bush knife.

An examination of the Rules should be carried out to identify the least number of changes and additions which need be made to facilitate the programme. At the same time the way can be paved for provisions to curb delay leading eventually to a full set of new Rules. This is not a huge task. It will probably boil down to a few provisions such as the introduction of a court-led system for the listing and striking out of stalled or ancient cases, the reduction of the life of a writ or other originating process to a few months, the requirement of the diligent and expeditious pursuit of proceedings, the automatic listing of a case if no step is taken for six months and the lack of detriment to a defendant if he doesn't let a sleeping dog lie.

The first Rule change should allow a Judge or Magistrate, after considering the file, to strike out a case without a hearing where no step has been taken for a set number of years, for example five years. The number of years must be assessed in the context of the jurisdiction. Care must be taken to ensure there is no inconsistency with the Constitution or 'binding' case authority.

The Rule should then require notices to be sent out giving a period in which reinstatement may be applied for and requiring affidavits explaining the delay and giving an undertaking to pursue the case diligently and expeditiously. It is surprising how after years of lying dormant some cases can suddenly be pursued with all the passion and vigour that flows from an outrageous wrong that happened only a few days earlier. Having said that, there is likely to be no demur in well over 90% of cases. This is good for the clearance programme's early statistics.

For cases in which no step has been taken for over six months and up to five years the Rule should give the court power of its own motion or on application to have them listed to show cause why they should not be struck out for failure to pursue diligently and expeditiously.

Care must be taken to include any counter-claims. No case should of course be struck out until six months has elapsed since the introduction of the Rule. The new Rules must be well publicised so no lawyer can claim he or she was unaware that cases should be pursued with 'diligence and expedition'; I would suggest the period should be no longer than six months. It is essential that the Rule is drafted in such a way that it does not allow the reintroduction of *Birkett v James* principles and that the yardstick is the 'diligent and expeditious' pursuit of the case. Most jurisdictions have a provision in their Constitutions giving the right to have a dispute 'determined in a reasonable time'. The requirement of diligence and expedition by all parties to litigation and the power of the Court to strike out a case when not so pursued puts this Constitutional provision into practice.

This Rule must also be drawn so that cases are not struck out on merit but on the failure to pursue them with diligence and expedition. If the former occurs then there is an arguable case that, once struck out, only an appellate court can reinstate them. Dilatory lawyers who face criticism and the possibility of a negligence action from their own clients will seek any avenue to avoid responsibility for a strike-out. Frequently, the explanation given to the client will blame the Court as the unjust terminator of what was a perfectly good case.

These Rule changes come into their own when bulk sessions of reinstatement applications and calling of old cases take place. The new Rules should give the power, after argument, either to strike out the case with the only recourse being to an appeal court or to strike it out and give a set period of time for application for reinstatement. This latter rule means the onus is placed on the litigant to rejuvenate the case otherwise, without further court time being used, it is finished. Affidavits should be required to explain why the case was delayed or not pursued with diligence and expedition and giving an undertaking now to so pursue it. The Court can, of course, decline to strike out a case and give directions for progress with or without the attachment of an 'unless order'. The onus must be on the claimant to satisfy the Court that the case should not be struck out.

A typical backlog elimination Rule will state, 'if no step to progress an action has been taken

for...’ It is important to be clear what constitutes a ‘step’. For example, a notice of intention to proceed after a delay of twelve months is not a ‘step to progress’ an action. It is merely giving notice that that which was stalled is being restarted. I well remember the look of hurt on one lawyer’s face when told that three such notices in five years without anything else being done was not progress.

There must be maintained rigidly the Rule that every case has a ‘next date’ on it, even if the next date is a court check to ensure the case is settled or discontinued. It is well worth publicising the warning, particularly within the judiciary, that orders by a Judge or Magistrate such as ‘adjourned sine die’ or ‘to take its normal course’ will inevitably mean a visit from the programme’s rottweilers.

The Court will deal with dozens, perhaps hundreds, of cases on a strike out day. It is impossible to write a ruling or judgment for each. A Rule should allow the court to strike out a case yet only be required to give reasons in writing if there is a specific request.

The Rules permitting awards of costs against lawyers should be considered. These might prove more difficult to amend and should not, for their own sake, hold up the programme. Frequently in the course of a programme, a judge or magistrate has the unenviable task of balancing the interests of a claimant, who appears to have a good arguable case but whose lawyer has been hopelessly lazy, against those of a defendant who has already expended large sums of money and had the worry of a court case for years. It is easy to tell the litigant with the lazy lawyer to sue him for negligence and to report him to his professional body for misconduct. However, the chances are the profession’s discipline system isn’t working well and after years of waiting and expenditure the thought of sliding down the litigation snake to square one and starting all over again is about as welcome to the claimant as a bite from the snake itself.

A useful sub-Rule can provide for an order requiring a lawyer to explain in writing to his client, with a copy to the court, why his case has been struck out. In a few cases, it will be necessary to require the attendance of the litigant so he might hear directly from the Judge or Magistrate in the presence of his lawyer precisely why his case has been struck out.

A reminder to the Law Society to ensure their disciplinary mechanisms are in working order is always worthwhile.

Service of proceedings and notices always presents problems. A new Rule giving the widest and most versatile range of service provisions is essential. Specific provisions will vary according to the jurisdiction. For example, in jurisdictions with many remote locations service over the radio by ‘service message’ or to a party’s chief or village elder can be usefully inserted. Care must be taken in the wording of these notices. A Rule must allow reinstatement if a litigant can show he or she did not know of the notice, there is a good reason for the delay up to the time of the reinstatement application, the applicant acted quickly on learning the case was struck out and the case will be pursued with diligence and expedition. When formulating this Rule a provision can be added requiring all litigants, once initially served, to maintain an address for service, even if it be to a local chief or pastor.

Care must of course be taken to ensure that litigants in person are fully heard. There should be a reluctance to strike out their cases without strong reasons. Careful and detailed explanation must be given of what is required of them.

New Rules aimed at backlog elimination and delay reduction will inevitably be tested in the Court of Appeal. Cases are often struck out as a result of the dilatoriness and failures of lawyers. It is important that rules are drawn so there is no scope for an appellate court to revert to and re-impose the old norms. Any overhaul of Appeal Rules should, of course, be the result of lengthy, careful and deliberate planning. However, there is a good argument for appeals from strike-out decisions to go through a filter system whereby if a single judge finds there is little or no merit, he can refuse the appeal or require the deposit of a fully realistic security for costs within a set time. The only remaining recourse then being to the full court.

The Master

The appointment of a Master, or Judge or Magistrate acting in that capacity, pays the greatest of dividends. This is a pivotal position in the elimination of backlogs, in the reduction of delays and in the operation of case manage-

ment. If Rules can permit a Master to strike out cases, this will save judges' time and they will also be available for the swift hearing of appeals. The Master should have the capabilities of a Judge or Magistrate, a complete knowledge of the Rules, a strong administrative ability and the attributes of a guard dog. Both during and after an elimination programme he or she will be the front line soldier in bringing diligence and expedition into the progress of cases.

A Master can also ensure there is broad consistency in deciding which cases are struck out and give progress directions for those that are not. If a judge is holding a strike out session then the presence in an adjoining room of the Master is invaluable. He or she can give immediate directions upon the cases that are not struck out. Further, if a case is not struck out and directions are given but not complied with, then it is the same person who will be wanting to know why.

Funds, Resources and Aid Agencies

The harsh reality is that there will almost certainly be few or no extra Judges, Magistrates, funds or resources for a backlog elimination programme. If the programme is to be successful then everyone concerned must be under no illusion that the programme will require extra work. If extra personnel or resources are available for the programme then their use must be kept strictly to the programme itself and not be allowed to be redirected to other work.

There are many justice support programmes in countries around the world. One principal focus is always the efficient and timely delivery of justice. There is no shortage of studies complete with programmes of reform and strings of recommendations. Follow up studies, scoping studies, definition of assessment criteria and other time-consuming and expensive investigations do not clear backlogs. It is the determination of the Chief Justice or the Chief Magistrate within a Judiciary that clears the backlog.

Nevertheless, aid agencies can contribute enormously. The first and most important feature for any programme is that the Chief Justice or Chief Magistrate retains overall control of the whole programme. Second when the plans are being drawn up a careful lookout

must be kept to ensure that the programme and plan is designed for the country concerned. The programme designer must have a good knowledge of the jurisdiction and its problems, and ensure that preliminary studies and preparation are kept to a minimum. Third, Judges, Magistrates, Masters and Registrars do not want advisers at their elbows the whole time, however well experienced those advisers might be. If an agency is willing to fund one or more persons for two or three years then that person should be qualified for and be appointed as a Judge or Magistrate. He or she will then be within the judiciary and involved in the day to day hearing of cases. There must be no feeling of resentment that an outsider is telling everyone what should happen but not actually doing anything beyond that themselves.

Whilst an agency will wish to ensure a programme is being put into effect and its money is being spent properly, the judiciary concerned will wish to maintain the independence and integrity of the appointed Judge or Magistrate. This is not a difficult balancing act, but requires the careful drawing up of the terms of the package. The United Kingdom's Foreign and Commonwealth Office supported my appointment as a Judge to help clear a case backlog in Vanuatu for three years from 2000. I also co-chaired, with the Chief Justice, the working group which, over the same period, designed and wrote completely new Civil Procedure Rules for Vanuatu.

When programmes are agreed with aid agencies there is also the opportunity for gaining more resources. These should be practical, low maintenance and long-lasting. Registrars and registries far prefer simple computer systems, decent desks and practical shelving to a fancy computer system with more capacity and tricks than is needed for a shuttle launch.

If it is possible, then a press liaison officer should be appointed. Often what prompts a backlog elimination programme into life is criticism by Parliament, the press, lawyers' conferences or NGOs. The reputation of a Judiciary can be substantially damaged by genuine or ill-informed criticism. Whilst a press officer must not act as a promoter or apologist for the Judiciary, he or she can quickly and accurately put right incorrect reports and also let the press and general

public know the initiatives being taken to improve efficiency and the progress of a backlog elimination programme.

Mediation

The resolution of disputes by way of mediation in one form or another has been present in the customs of most Commonwealth jurisdictions from long before the arrival of the formalised and adversarial Common Law system. In any backlog programme provision should be made for the resolution of disputes by mediation. This might be on a formal basis, if the rules permit, or on an informal basis. It is likely that the introduction of mediation provisions into the Rules as support for a backlog elimination programme will take too long and will also throw up difficulties of its own.

If no Rules already exist, an informal mediation system will still prove efficacious. Such an approach will require, and generally will receive, the support of lawyers and litigants. Mediation should come into play at strike-out hearings, immediately after the decision not to strike out.

Statistics and Records

Benjamin Disraeli is attributed with the famous warning, 'There are three types of lie, lies, damned lies and statistics'.

There is no doubt that statistics are needed to ascertain the size of a backlog, the length of delays in hearing cases, the time cases take to progress from filing to finalisation, the number and type of cases per Judge or Magistrate, and how fast they progress their cases.

Statistics are not needed to decide if there is a backlog or unacceptable delay. People know. Statistics are most important for ascertaining if things are beginning to go wrong, where they are going wrong and planning programmes. The reality is that in many jurisdictions statistics are few in number, are of questionable reliability, do not address what is being assessed, might have been manipulated, and are subject to the vagaries of the methods by which they are kept and extracted.

In the first place statistics necessarily depend upon records and how well they are kept. Case management computer programmes have been resident in wealthier and more sophisticated jurisdictions for years. One needs look no further than Singapore, to its paperless court

and its ability to extract a range of statistics. However, in many jurisdictions every day life militates against such systems. Funds for computer hardware and programmes and initial training are often available from a variety of sources. The difficulties arise once the system is 'up and running'. So often the system is soon either 'down' or 'limping along with a twisted ankle'. Unpredictable power cuts and electrical surges cause problems, the accidental but irretrievable loss of data occurs and there are difficulties in tracing who it was that negligently or deliberately entered incorrect data or deleted reliable information. There are problems in many countries with the effects of temperature and humidity upon electronic equipment which are necessarily coupled with the costs and problems of air-conditioning.

In many smaller jurisdictions, even where computer systems have been installed, Registrars still maintain 'the Big Leather Book'. The actual entry of particulars into the book takes a little longer but once written, short of 'white out' or 'rip out' the information remains and is unalterable. Any interference there might be with the Register is almost immediately obvious on the face of it; this is far from being so with computer systems.

The extraction of statistics from the big leather book necessarily takes longer than from a computer system. The range of available statistics will be smaller. However, if the column names are carefully thought out, all the basic statistics required for case management and backlog delay and reduction can be ascertained and relied upon. You will not see deputy registrars pummelling the big leather book because they prodded the wrong place and all the entries for March disappeared. This is not to say that if a reliable, well designed, easy maintenance computer system is available it should be rejected. Such systems will always be welcome.

A few key statistics for measuring the progress of a programme should be identified and maintained. Commonsense, not an expert statistician, is required. One way or another at the beginning of a backlog elimination programme, statistics, however reliable, should be compiled. This gives, at the least, a rough datum point against which to measure the progress and success of a programme. A selection of key statistics to measure future

case progress and warn on impending problems should be identified and the data collected from which to draw these statistics.

Whilst I am not suggesting for a moment that statistics should be massaged, cooked or even wrapped in tinsel, real and encouraging progress can be demonstrated by the citing of a few significant statistics. There comes in any backlog elimination programme a time when the start was long ago, the end is nowhere in sight and the number of cases to be dealt with looms greater not smaller. That is the time to circulate positive statistics and indulge in a little self-congratulation.

The likelihood is that within a relatively short time of the commencement of a programme it can be shown that a sizeable proportion of the backlog has been eliminated. These inevitably will be the cases that were already dying and were struck out on the papers, without a hearing. The publication of these figures is good for morale. However, it must not be forgotten the further a programme progresses the more work is required to eliminate a set number of backlog cases.

The Programme Itself

Old Cases

Everyone will be more accepting of strike-outs without a hearing if it is clearly stated that every case has been looked at before an order was made. This task is not as daunting as it might at first appear. A Judge or Magistrate sets aside a few days to review all the old cases which can be considered for strike out under the new Rule without the presence of the parties, (i.e. those in which no step has been taken for five years).

In my experience it takes no more than a minute to make a decision on all but a few cases. After a brief endorsement on the front of the file it can go immediately to a special team of support staff to send out notices to the parties. Occasionally, there will be cases, often involving wills or land, which, despite their age, should not be struck out. These can be flagged and brought swiftly into case management.

The results of this exercise should be published on completion. It can then be said that under the backlog elimination programme so many hundreds or thousands of cases have been considered and finalised or brought into case management. There will be a few that have

been struck out in which the parties make genuine application for reinstatement. These should go for early consideration and, if reinstated, into active case management. This will further enhance the goodwill towards the programme and reassure lawyers and litigants that the programme is not an indiscriminate bonfire of cases of more than five years old.

A careful look out must be maintained to ensure any delay is not the fault of the court. An apology will be required if litigants have been persistently asking for a hearing over years and no listing has taken place. The case should be given priority.

It is likely that in this first phase rows of shelves and possibly whole rooms will be cleared of paper. Archives should be warned to expect an influx of cases. If the files have to be stored after the application to reinstate period has expired then this should be away from the rooms and offices used on a day to day basis by the registries.

Progressive Elimination

After the first phase is complete, a year by year check from the oldest cases should be made. Many will genuinely have been formally completed and these can be immediately archived. The remainder should be listed for consideration of strike-out on a set day in accordance with the Rules. An average of two minutes per case can be allowed. The Master or a Magistrate or Judge should be available in an adjoining room to give immediate directions for those cases which are not struck out. Mediation or the facility to make an appointment should be available. Cases should be listed in tranches at hourly intervals throughout the day. The Judge or Magistrate should sit 'in Chambers', but in open Court. Lawyers should wait in Court so they can hear how earlier cases are dealt with.

Lawyers will sometimes regard a strike out day as a bit of a party. It should be fixed when there is little going on in other courts. The tone of the first strike out day will set that for the following such days. I would suggest a robust approach. Lawyers should be in no doubt what the court is looking for. The yardstick is the diligent and expeditious pursuit of a case. The onus is on the claimant to show the case should not be struck out. A check should also be made for counter claims.

Many cases will have been long settled or there is no appearance by the parties. These can be struck out straight away.

The old argument might be put forward that as the limitation period has not expired there is no point in striking out a case. It can be re-filed the next day. This reasoning should not be accepted. In my experience the great majority of these cases after strike out are not re-filed. Striking out is the court telling this dilatory litigant to be ready to litigate before filing and, once filed, to pursue the case with diligence and expedition. This circumstance also shows the need for a realistic costs order in the defendant's favour. There should be a Rule requiring the full payment of the costs of the struck out case if the same action is re-filed.

It is well worth maintaining a business-like atmosphere but with occasional moments of levity when the more bizarre and unbelievable excuses are put forward. If in the first hour a feeble reason for dilatoriness is met by a gale of laughter from colleagues then the atmosphere is soon established. On one particular strike-out day I listened to a lawyer setting out all the excellent reasons why the case should not be struck out and her opponent telling me why those reasons were nonsense. In the very next case, to the amusement of all, each appeared for the opposite side and just as ardently put forward the other's arguments from the previous case.

Brief notes of reasons and objections put forward must be recorded, along with a note of the reason for strike-out. The better way is by writing or typing rather than audio recording. It is a time-consuming task to match tape recording to individual case if a written ruling is required afterwards. A strong as well as a firm hand is required.

It is at this stage that the enthusiastic support of lawyers from an early stage in the programme shows its value. It would be easy, if there was general resistance to the programme, for lawyers to ruin a strike out day.

I can recommend having a sheet of paper handy when sitting during a strike-out day to note down the more bizarre or unbelievable excuses advanced as to why a case has lain dormant but should not be struck out. By way of example, I quote 'I inadvertently placed the file in my chicken shed and unfortunately forgot it was

there' – 'My partner said I was to do the case and I said he was to do it' – 'It's a long story ... Court: 'no thank you'...' — 'If I had known the case might be struck out I would have filed the summons for directions four years ago' – 'This is isn't justice, the delay is only three years' – 'It's not my fault, my original client died and his wife took over the case and then she died a few years later and then their son went overseas' – 'I didn't know what to do because I don't know why I started the proceedings'.

I re-emphasise that care must be taken to ensure that litigants in person are looked after and don't feel daunted by the whole proceeding.

There must be broad consistency in costs orders. If it is the court that has initiated the strike-out, often after years of inactivity by both sides, then the usual order will be 'no order for costs'. Each case must, of course, be decided upon its own facts. There is a good argument to award a defendant his or her costs; it is for the plaintiff to pursue the case and not for the defendant to wake the sleeping dog. Costs should be assessed on the spot and a date and time given for payment. A check should also be made for any counterclaims.

Inevitably when a programme is started there will be the reactivation of cases which have lain dormant for months or years. The court must be ready for this sudden increase in workload. Part way through a programme the court does not wish to hear the argument 'The Court can't strike out the case because even if we had reactivated it the Court would not have done anything about it'. By the time a second strike-out day comes around no lawyer can have any excuse for not having taken out of his or her cupboard stalled cases and pursued them with diligence and expedition. On second and third strike-out days, as the backlog years are successively worked through, lawyers will accept the termination of cases without demur. It must never be forgotten that the closer one comes up to date, the smaller will be the numbers of cases that can be struck out and the greater will be the number of those coming into case management and requiring hearing.

The Future

The outcome of a successful backlog elimination programme is that a large number of litigants will see their cases heard and deter-

mined instead of waiting for more years in the doldrums. These programmes have an invigorating effect upon staff and, in the long run, make life more pleasant for them. There is also the possibility that the number of claims filed will increase when litigants get to know that cases are completed in a reasonable time.

A fully successful programme is something to be proud of and provides immense professional satisfaction. Whilst there will always be a trickle of missed or appealed cases, there is no reason for not holding a big party and indulging in a bout of self congratulation.

It goes without saying that everyone should do their utmost to ensure that the court hears cases expeditiously and backlogs do not build up again. To this end, jurisdictions should

consider completely new procedure Rules which are designed for the jurisdiction itself. Registry and administration practices and systems should be overhauled. If this can be done in parallel with the backlog elimination programme then that is ideal; the likelihood is the one will have to come after the other.

It must not be forgotten that it can take years to eliminate a backlog but just weeks for another to build up. The locks on the cage which hold the backlog monster must be diligently maintained. All that is needed is a few days of rioting in the central business district, some political instability, a few lazy judges, or a strong cyclone for the achievements of the backlog elimination programme to be wiped out.

WHEN A TURKISH DELIGHT GIVES RISE TO A JUDGE'S DILEMMA

John Meredith, Barrister-at-law, Queensland

This article was first published in the March 2008 edition of the Queensland Bar Association magazine "Hearsay" and is reproduced with the kind permission of the author.

A recent decision of the England and Wales Court of Appeal discussed the difficulties confronting a judge when seeking to determine the most appropriate process to follow when a party seeks a judge's disqualification on the grounds of an apprehension of bias.

Whilst the test to be applied in respect of apprehended bias may be firmly established in Australia as 'whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide' (*Johnson v Johnson* (2000) 201 CLR 488 at 492; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344-345), the actual course that a judge must undertake when such a complaint has been raised is not always clear.

In Australia, in addition to decided cases, obiter dicta, extra-judicial speeches and academic papers, assistance to judicial members and legal practitioners can be derived from the '*Guide to Judicial Conduct*' the second edition of which was published by the Australasian Institute of Judicial Administration in March 2007.

The El-Farargy case

The underlying proceedings in *El-Farargy v El-Farargy* (2007] EWCA 1149 (15 November 2007) involved a matrimonial property dispute. Mrs El-Farargy claimed that the matrimonial residence was owned jointly by her husband Mr El-Farargy and herself, whereas Mr El-Farargy countered that a company he controlled with the third respondent, a Sheikh from Saudi Arabia, were the owners. The proceedings had an extensive history of delay and non-compliance by the husband. During a two-day directions hearing the presiding judge made several comments which the third respondent submitted demonstrated an apprehension of bias against him. An application was made by the third respon-

dent for the judge to recuse himself on that basis. The Judge refused the application.

There were two grounds in the application, firstly that the judge had predetermined the issues, and secondly, that certain comments made by the judge at first instance were described by the third respondent (in his grounds of appeal) as '... would cause a fair-minded and informed observer to conclude that there is a real possibility that the learned judge was (whether or not consciously) mocking the third respondent for his status as a Sheikh and/or his Saudi nationality and/or his Arab ethnic origins and/or his Muslim faith.'

In the Court of Appeal, Lord Justice Ward (with whom Lord Justices Mummery and Wilson agreed) commenced his judgment with the foreboding statement: 'This is a singularly unsatisfactory, unfortunate and embarrassing matter.' The appeal was allowed on the second ground.

In rejecting the first ground, Lord Justice Ward found: 'This judge had already had to deal with this matter on many occasions for many days and, in the light of the husband's appalling forensic behaviour, no observer sitting at the back of his court could have been surprised that he had formed a prima facie view nor even that it was 'a near conviction'. A fair-minded observer would know, however, that judges are trained to have an open mind and that judges frequently do change their minds during the course of any hearing. The business of this court would not be done if we were to recuse ourselves for entering the court having formed a preliminary view of the prospects of success of the appeal before us. Singer J. did express himself in strong terms and he would have been wiser to have kept his thoughts to himself. But there are times in any trial and in any pre-trial review where a judge is entitled to express a preliminary view and I do not see that Singer J. has over-stepped the

mark in the particular circumstances of this case. The husband has behaved disgracefully yet he, noticeably, has not joined in the application for the judge to recuse himself. The Sheikh, who allies himself with the husband, cannot complain too vociferously if some of the judge's wholly justifiable ire rubs off on him.'

With respect to the second ground however, the Court of Appeal found certain comments of the Judge as being unacceptable. Lord Justice Ward stated:

'...It will be recalled that [counsel for the applicant/third respondent] invited us to read extracts 1-4 with brackets inserted around the offending words. This was an utterly compelling piece of advocacy. There is a world of difference between saying: 'If he chose to depart never to be seen again' and gratuitously adding 'if he chose to depart *on his flying carpet* never to be seen again'. Likewise it would have been unexceptional to say that the Sheikh would be present 'to see that no stone is unturned', without glibly adding '*every grain of sand is sifted*'. The judge could well make the point that he did not know what lines of communication were available to Saudi Arabia or wherever the Sheikh may be yet once again there was no need for the uncalled-for addition of '*at this I think relatively fast-free time of the year*'. Without the additional words, the judge was making fair points but the incidental injections of sarcasm were quite unwarranted.

The third example is the worst. [Counsel for Mrs El-Farargy] quite clearly did not understand why the judge had interrupted his submission that the Sheikh's case was not entirely clear by commenting that the affidavit was '*a bit gelatinous*'. He did not understand the interruption because he would not have appreciated that, as Mr Randall correctly submits, the judge was setting himself up to deliver the punch line to his joke, '*a bit like Turkish Delight*'.

A test in respect of apprehended bias has been enunciated in the United Kingdom along similar lines to that applied by the High Court of Australia. In a recent House of Lords decision of *R v Abroikof* ([2007] UKHL 37 (17 October 2007)), Lord Bingham of Cornhill observed 'the accepted test is that laid down in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 at para 103: 'whether the fair-minded and

informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'.

In the *El-Farargy case*, the proceedings had been set down for a five week trial to commence in October 2007. After considering the background of the proceedings and its painfully slow progress, Lord Justice Ward stated 'I was aghast at the prospect that allowing the appeal would have the effect of putting the hearing back another year....' His Honour then went on to provide an insight as to a number of behind the scenes discussions that took place following the making of the application for recusal:

'...Because I was so appalled by this prospect, I spoke to the President [of the Family Division] very shortly before he departed on holiday. I have his permission to disclose what happened. Singer J. was rightly concerned about the application and the effect it would have on the fixture. Very properly he consulted the Head of his Division to discuss the predicament and see whether anything could be done about the listing of the final hearing before another judge of the Division but the emphatic information given by the then Clerk of the Rules was that no other judge could be found to replace him. If he could not hear it, the hearing would have to be vacated and further delay would ensue. I mention this in fairness to the judge because, if the inference could not have been drawn from paragraphs 6 and 7 of his judgment which I have already cited, it surely now can be drawn that he would (and, this is my guess, would willingly) have released the case to another judge of the Division if that could have been arranged. That not being possible, he had to get on with deciding the application and making up his own mind on the merits as he saw them. He was right to make it plain that listing difficulties could have no impact on the outcome.'

The *El-Farargy case* is a further example of how an allegation of apparent bias can place a judge in a difficult position of having to rule upon their own conduct. The Judge in that case, not being able to refer the application to a colleague for determination due to a very busy Court, was placed in the unenviable position of having to decide on his own conduct in circumstances when he knew that substantial delay (along with associated cost)

to the proceedings was an inevitable result of such an application being granted.

On a separate issue however, the application for recusal in *El-Faragy* would most likely have failed in Australia. In *El-Faragy* the Judge's decision not to recuse himself, would in Australia, of itself, be found not to be a judgment or order that could properly be the subject of an appeal. A recent decision of the NSW Court of Appeal in *Jae Kyung Lee v Bob Chae-Sang Cha & Ors.* followed the High Court decision in *The Queen v Watson; ex parte Armstrong*, and rejected an application to disqualify a judge for apprehended bias on that basis. In Australia, the third respondent in *El-Faragy* could have sought such relief as a ground in his appeal, by raising it as the first ground.

Judicial Humour

Lord Justice Ward, whilst expressing his 'belief that the injection of a little humour lightens the load of high emotion that so often attends litigation', continued however 'I fully appreciate the conventional view that jokes are a bad thing. Of course they are when they are bad jokes - and I am sure I have myself often erred and committed that heinous judicial sin. Singer J. certainly erred in this case. These, I regret to say, were not just bad jokes: they were thoroughly bad jokes'.

On the topic of courtroom humour, the Chief Justice of Australia, the Honourable AM Gleeson AC in an extra-judicial speech, commented on 'what might generously be described as judicial humour':

'Some judges, out of personal good nature, or out of a desire to break the tension that can develop in a courtroom, occasionally feel it appropriate to treat a captive audience to a display of wit. Sometimes this is appreciated by the audience, but sometimes it is not. When it is not the consequences can be very unfortunate. Judges and legal practitioners may underestimate the seriousness which litigants attach to legal proceedings, and they can become insensitive to the misunderstandings which might arise if the judge appears to be taking the occasion lightly or, even worse, if the judge appears to be making fun of someone involved in the case. Without wishing to appear to be a killjoy, I would caution against giving too much scope to your natural humour

or high spirits when presiding in a courtroom. Most litigants and witnesses do not find court cases at all funny. In almost ten years of dealing with complaints against judicial officers to the Judicial Commission of New South Wales I have seen many cases where flippant behaviour has caused unintended but deep offence.'

The Guide to Judicial Conduct - Handling an application for recusal

In a 'postscript' to his judgment in the *El-Faragy case*, Lord Justice Ward laments as to the increasing number of applications for recusal arising from apprehended bias and suggests how a Judge might best respond:

'It is an embarrassment to our administration of justice that recusal applications, once almost unheard of, are now so frequently coming to this Court in ways that do none of us any good. It is, however, right that they should. The procedure for doing so is, however, concerning. It is invidious for a judge to sit in judgment on his own conduct in a case like this but in many cases there will be no option but that the trial judge deal with it himself or herself. If circumstances permit it, I would urge that first an informal approach be made to the judge, for example by letter, making the complaint and inviting recusal. Whilst judges must heed the exhortation in *Locabail* not to yield to a tenuous or frivolous objection, one can with honour totally deny the complaint but still pass the case to a colleague. If a judge does not feel able to do so, then it may be preferable, if it is possible to arrange it, to have another judge take the decision, hard though it is to sit in judgment of one's colleague, for where the appearance of justice is at stake, it is better that justice be done independently by another rather than require the judge to sit in judgment of his own behaviour.'

In Australia steps have been taken to formulate a process in order to assist Judges when responding to an application for recusal. The *Guide to Judicial Conduct* states at chapter 1.1 that its purpose is, inter alia, to 'give practical guidance to members of the Australian judiciary at all levels....Importantly, this publication seeks to be positive and constructive, and to indicate how particular situations might best be handled...'.²

After considering various circumstances when an apprehension of bias may be founded, the *Guide to Judicial Conduct* refers to the High Court's comments in *Ebner*:

'The application of these principles, and the making of a decision whenever issues of possible bias are raised, call for a good deal of care and common sense. It is useful to bear in mind the remarks of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner* at [20]:

This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable.'

The *Guide to Judicial Conduct* then sets out the following procedure for when an application for recusal is made:

Disqualification procedure

- (a) If a judge considers that disqualification is required, the judge should so decide. Prior consultation with judicial colleagues is permissible and may be helpful in reaching such a decision. The decision should be made at the earliest opportunity.
- (b) In cases of uncertainty where the judge is aware of circumstances that may warrant disqualification, the judge should raise the matter at the earliest opportunity with:
 - (i) The head of the jurisdiction;
 - (ii) The person in charge of listing;
 - (iii) The parties or their legal advisers;not necessarily personally, but using the court's usual methods of communication.
- (c) Disqualification is for the judge to decide in the light of any objection, but trivial objections are to be discouraged.
- (d) It will generally be appropriate in cases of uncertainty for the judge to hear submis-

sions on behalf of the parties and that should be done in open court.

- (e) The judge should be mindful of circumstances that might not be known to the parties but might require the judge not to sit, and of the possibility of the parties raising relevant matters of which the judge may not be aware. It is not appropriate for a judge to be questioned by parties or their advisers.
- (f) If the judge decides to sit, the reasons for that decision should be recorded in open court. So should the disclosure of all relevant circumstances.
- (g) Consent of the parties is relevant but not compelling in reaching a decision to sit. The judge should avoid putting the parties in a situation in which it might appear that their consent is sought to cure a ground of disqualification. Even where the parties would consent to the judge sitting, if the judge, on balance, considers that disqualification is the proper course, the judge should so act.
- (h) Even if the judge considers no reasonable ground of disqualification exists, it is prudent to disclose any matter that might possibly be the subject of complaint, not to obtain consent to the judge sitting, but to ascertain whether, contrary to the judge's own view, there is any objection.
- (i) The judge has a duty to try cases in the judge's list, and should recognize that disqualification places a burden on the judge's colleagues or may occasion delay to the parties if another judge is not available.

There may be cases in which other judges are also disqualified or are not available, and necessity may tilt the balance in favour of sitting even though there may be arguable grounds in favour of disqualification.

Conclusion

Whilst there is, as in the *El-Farargy case*, some degree of judicial lament at the increasing occurrence of allegations of apparent judicial bias, there is no doubt that the preparedness to entertain such applications (at least those with some merit) clearly exemplifies judicial impartiality to the community.

In a further extra-judicial speech, Chief Justice Gleeson considered the positive aspects of a society in which individuals have an ever increasing awareness of their rights:

‘Modern lawyers, litigants, and witnesses, and the public generally, are much more ready to criticise judges whose behaviour departs from appropriate standards of civility and judicial detachment. This is a good thing. If judges behave inappropriately, they should be criticised. Of course, on occasions, some judges are exposed to wrongheaded, extravagant, or unfair criticism. That is the price that has to be paid to remind all judges of the necessity to conduct themselves with dignity and decorum.’

In a paper entitled ‘*Judicial Qualities and Corruptive Good Customs*’, published in ‘*Justice According to the Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE*’, Justice Dowsett of the Federal Court of Australia wrote:

‘Some litigants-in-person have realized the benefit of the strategic allegation of apparent bias when they want adjournments or to escape sticky situations. Very often, a judge who attempts to identify any valid point in a mass of patently unarguable points will afford ammunition for such an allegation. The problem is not limited to self-represented

litigants. Some practitioners have not been as careful as they should have been. On occasions it has been difficult to avoid the conclusion that they have mounted allegations of perceived bias for tactical reasons, or at least have not been sufficiently industrious in seeking to dissuade their clients from instructing them to do so. Justified and unjustified allegations of perceived bias cause great damage. Public confidence is a fickle thing.’

As Justice Dowsett suggests, there is an obligation upon practitioners to properly advise their clients so as not to bring applications that are frivolous or based on ulterior motives. Circumstances may dictate the most appropriate course, however precedent, obiter dictum, extra-judicial and academic papers and publications such as the *Guide to Judicial Conduct* will provide learned guidance to all parties involved when attempting to work through the maze of conflicting issues that often attends such an application.

I respectfully suggest that practitioners will be assisted by having regard to the *Guide to Judicial Conduct* should they find themselves having to consider making an application for recusal of a Judge for an apprehension of bias, or any other issue involving impartiality. This in turn will assist the Court through what are often difficult circumstances.

MORE ON JUDICIAL BIAS

David McClean

In his article John Meredith cites Ward LJ's comments on the increasing frequency of recusal applications. There has been something of a flurry of cases on recusal in a number of Commonwealth jurisdictions, and an account of some of them may be of interest to readers of this *Journal*.

Muir v Commissioner of Inland Revenue [2007] NZCA 334

This was a case before the Court of Appeal of New Zealand (William Young P, Hammond and Wilson JJ). The facts are not of general interest, but the case is important as settling the approach of New Zealand law to the question of apparent bias on the part of the judge, and for its helpful review of the development of the law in other Commonwealth jurisdictions.

Hammond J, giving the judgment of the Court, spoke first of the two different obligations, to be impartial and to sit when required:

'From at least the time of John Locke in the late seventeenth century, adjudication of legal disputes by impartial and independent Judges has been recognised as an essential underpinning of western society. ... On appointment to office in New Zealand, a Judge takes an oath to 'do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will'. Lord Bingham has said:

'If one were to attempt a modern paraphrase [of that oath], it might perhaps be that a judge must free himself of prejudice and partiality and so conduct himself, in court and out of it, as to give no ground for doubting his ability and willingness to decide cases coming before him solely on their legal and factual merits as they appear to him in the exercise of an objective, independent, and impartial judgment.' (Bingham, 'Judicial Ethics', in *The Business of Judging: Selected Essays and Speeches* (2000), p 74.)

An equally important function for the Judge, in the view of Lord Devlin, is to remove any sense of injustice - something more easily aroused by the apprehension of unequal treatment than by anything else. As his Lordship put it in the fourth Chorley Lecture:

'The social service which the judge renders to the community is the removal of a sense of injustice. To perform this service the essential quality which he needs is impartiality and next after that the appearance of impartiality. I put impartiality before the appearance of it simply because without the reality the appearance would not endure. In truth, within the context of service to the community the appearance is the more important of the two. The judge who gives the right judgment while appearing not to do so may be thrice blessed in heaven, but on earth he is no use at all.'

(‘The Judge as Lawmaker’, in Devlin, *The Judge* (1979), p 3. See also Allars, ‘Citizenship Theory and the Public Confidence Rationale for the Bias Rule’ (2001) 18 *Law in Context* 12.)

The requirement of independence and impartiality of a Judge is counterbalanced by the Judge's duty to sit, at least where grounds for disqualification do not exist in fact or in law. This duty in itself helps protect judicial independence against manoeuvring by parties hoping to improve their chances of having a given matter determined by a particular Judge or to gain forensic or strategic advantages through delay or interruption to the proceeding. ...

As very general propositions, the law may require a Judge to sit if there is no other option or the parties expressly or by their conduct waive an objection on the ground of apprehended bias. Both of those propositions are stated only to set matters in their full context, and are subject to considerable qualification in the case law. ...'

His Honour then went on to examine the test for apparent bias. He described the law in this area as being in an awkward state in New Zealand. Hitherto the New Zealand courts had followed the approach developed by Lord Goff of Chieveley in *R v Gough* ([1993] AC 646 at p 670), which speaks of ‘a real danger of bias’. This test had been rejected in Australia where the High Court was anxious to emphasise not the Court’s own view of the facts, but rather the likely public’s perception of what had occurred (*Webb v R* (1994) 181 CLR 41 at pp 50 - 53). The Australian test is one of ‘reasonable apprehension of bias’. In England, the *Gough* test has been refined in *Porter v Magill* ([2001] UKHL 67, [2002] 2 AC 357) where Lord Hope asked ‘whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased’. The difference between the *Porter v Magill* test and the approach in the High Court of Australia is one of ‘reasonable apprehension’ of bias as opposed to a ‘real possibility’ of bias.

The Court of Appeal noted the Australian *Guide to Judicial Conduct* (cited by John Meredith in his article), and that the ‘reasonable apprehension of bias’ test was well established in Canadian law and that a similar approach prevailed in the Supreme Court of the United States. It was time to depart from the *Gough* test in New Zealand.

‘In our view, the correct inquiry is a two-stage one. First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the Judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the ‘bias’ ball in the air. The second inquiry is to then ask whether those circumstances as established might lead a fair-minded lay observer to reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the instant case. This standard emphasises to the challenged Judge that a belief in her own purity will not do; she must consider how others would view her conduct’.

The Court endorsed the procedural guidelines in the *Guide to Judicial Conduct*.

Bolkiah (HRH Prince Jefri) v State (No 3) [2007] UKPC 62

In November 2007, the Privy Council, sitting to hear an appeal from Brunei Darussalam, had to consider the application of the test developed in the earlier cases. The case concerned a dispute between HRH Prince Jefri Bolkiah and the State of Brunei concerning certain transfers of public funds to the Prince and his family. Shortly before the issues were dealt with by the courts in Brunei, the Sultan, who has absolute legislative power, amended the Supreme Court Act, requiring the Supreme Court to hold proceedings in camera if any party or the Supreme Court in any judgment made reference to any act, decision or exercise of power by the Sultan or referred to any issue pertaining to the inviolability, sanctity or interests of the position, dignity, standing, honour, eminence or sovereignty of the Sultan, and prohibited the publication of any judgment in any proceedings that might have the effect of lowering or adversely affecting the position, dignity, standing, honour, eminence or sovereignty of the Sultan.

The Privy Council noted that the governing test of bias used the concept of the fair-minded and informed observer. The requirement of fair-mindedness meant that the observer must be taken to have a balanced approach, neither naive or complacent nor unduly suspicious or cynical. The requirement that the observer be informed meant that he does not come to the matter as a stranger or complete outsider; he must be taken to have a reasonable working grasp of how things are usually done.

Prince Jefri applied for the trial to be conducted by judges from outside Brunei, arguing that the Chief Justice and all other Brunei judges should, in effect, recuse themselves for apparent bias. The Chief Justice and later the Court of Appeal rejected this application. The Chief Justice followed the test in *R v Gough*; the Court of Appeal (like the New Zealand CA in *Muir*) preferred the test in *Porter v Magill*.

It was argued for the Prince that the fair-minded and informed observer, appreciating that the Chief Justice’s prospects of further appointment (he was aged 74 and any extension of tenure was discretionary) depended on the goodwill of the Sultan, and that the Sultan could procure a reduction of his salary (against

which there was no statutory protection), would apprehend a real possibility that the Chief Justice would be biased in favour of the Sultan in any matter in which his interests conflicted with those of Prince Jefri. The Board rejected this:

‘The fair-minded and informed observer must be taken to understand that the Chief Justice was a judge of unblemished reputation, nearing the end of a long and distinguished judicial career in more than one jurisdiction, sworn to do right to all manner of people without fear or favour, affection or ill-will and already enjoying what he described as ‘reasonably adequate’ pension provision. Such an observer would dismiss as fanciful the notion that such a judge would break his judicial oath and jeopardise his reputation in order to curry favour with the Sultan and secure a relatively brief extension of his contract, or to avoid a reduction of his salary which has never (so far as the Board is aware) been made in the case of any Brunei judge at any time. The Chief Justice must be seen as a man for whom all ambition was spent, save that of retiring with the highest judicial reputation’.

Metramac Corporation Sdn Bhd v Fawziah Holdings Sdn Bhd

A decision which had a sensitive political background is that of the Federal Court of Malaysia in *Metramac Corporation Sdn Bhd v Fawziah Holdings Sdn Bhd* (2007). What makes this an unusual, almost unprecedented, case is that it was the language used in the actual judgments of the Court of Appeal which were claimed to give rise to apparent bias.

The appellant company won the right to effect the privatization of certain roads in Kuala Lumpur, with the right to collect tolls. However when the road works were completed, and the tolls began to be collected, public demonstrations took place leading the Federal Government to step in to deal with the situation. The collection of tolls was halted. The company was then in dire financial straits and its shareholders accepted an offer from another company for their shares. The complex transactions gave rise to a number of issues, the appellants succeeding at first instance but the Court of Appeal unanimously reversing the judgment. The appellants took the case to the Federal Court, arguing that in both the judgments of the Court of Appeal

there were remarks and findings made by the learned judges that could be construed as adverse, disparaging and unwarranted. Hence they exhibited a real danger of bias on the part of the Court of Appeal against the appellant.

The essence of the appeal was that the judgments in the Court of Appeal had indicated that the purchase of the shares in a company in critical financial trouble had no commercial justification, and that it was possible only because those who controlled the bidding company had the patronage of the then Minister of Finance, Tun Daim Zainuddin, and that once the take-over was complete federal funds were injected. Counsel for the appellant argued that when viewed objectively, the Court of Appeal’s written judgment painted a picture of economic duress and the purchasers of the shares and Tun Daim Zainuddin as oppressors.

The Federal Court held that the real issue was whether, premised on the remarks and findings made by the Court of Appeal in the judgments, the element of real danger of bias has been established hence rebutting the presumption of impartiality. Some of those remarks and findings are related to third parties who are not parties to the litigation between the appellant and the respondent. The court noted that, in its view, the relevant remarks and findings were unnecessary and irrelevant in determining the issues and claims before the court. Judges were entitled to indicate their views, but their criticisms or remarks were not without limit. In the present appeal the claims were not in the nature of public interest litigation or having an element of public law so as to warrant remarks and findings as found in main judgment of the Court of Appeal.

It was not the case that real danger of bias could never be found arising from a judgment delivered by a court of law. The stage at which bias was said to have arisen was quite immaterial. However, any allegation of real danger of bias based on a judgment delivered should not be readily entertained by an appellate court. The reason was simple. A losing party would only be too willing to allege bias. Unless there existed in reality remarks and statements in the judgment delivered indicating on the face of the record a real danger of bias such allegation should be rejected summarily.

Referring to the issue of judicial independence, the Federal Court said that a judge must accept that the freedom attached to his adjudicative independence imposes concurrent responsibility to address only those issues properly before him, along with a duty to make every effort to maintain impartiality and objectivity in dealing with the issues and parties before him.

Having examined the language of the judgments in the Court of Appeal, the Federal Court held that the scenario painted by the Court of Appeal judges

‘came about from their own inferences and imagination. Sadly, reading objectively the main and the supplementary judgments one cannot avoid the sense that at the outset the learned judges had the preconceived minds that the primary issue was about the powerful (Goliath) taking advantage of the weak (David). ... In our view it was their inferences and imagination that took the centre stage leaving the evidence adduced on the back seat. With respect we find that the Court of Appeal went on a frolic of its own’.

There was no basis for the Court of Appeal to make the remarks and findings that there were economic duress, patronage, abuse of governmental positions and powers in complete disregard to taxpayers’ money and misappropriation of funds. The exceptional strong and emotive language used meant that a reasonable person would be persuaded to conclude that ‘there was a real danger of bias on the part of the relevant members’ of the Court of Appeal.

The decision and judgments of the Court of Appeal were set aside and the High Court judgment restored.

R v Abdroikov; R v Green; R v Williamson [2007] UKHL 37

Allegations of bias can involve jurors where the jury is used. The House of Lords had to decide in October 2007 whether the presence of a serving police officer or of a solicitor

employed by the Crown Prosecution Service established a reasonable apprehension of bias. The House was divided on the facts of one of the cases, but held that the presence of serving police officers on the jury did not automatically lead to such an apprehension of bias.

The House noted that serving police officers remain ineligible for jury service in Scotland, Northern Ireland, Australia, New Zealand, Canada, Hong Kong, Gibraltar and a number of states in the United States, the remainder of the States providing a procedure to question jurors on their occupations and allegiances. In England and Wales, Parliament had decided that they were in principle eligible. In certain cases, this could lead to an apprehension of bias, and the majority of the House (Lord Rodger of Earlsferry and Lord Carswell dissenting) held that in one case, which involved a crucial dispute on the evidence between the defendant and the police sergeant, the instinct, however unconscious, of a police officer on the jury to prefer the evidence of a brother officer would be judged by the fair-minded and informed observer to be a real and possible source of unfairness, beyond the reach of standard judicial warnings and directions.

Over a similar dissent, the House held that it was clear that justice would not be seen to be done if a person discharging the neutral role of juror was a full-time, salaried, long-serving employee of the prosecutor.

The minority view, as voiced by Lord Carswell, was that unconscious prejudices and bias could be insidious in their operation on people’s minds, but the number and diversity of people on a criminal jury constituted a safeguard against such prejudice or bias on the part of any one juror exercising sufficient influence to determine the outcome of the trial. A fair-minded and informed observer would not necessarily conclude that the mere presence on a jury of a police officer or CPS staff member would create such a possibility of bias as to deny the defendant a fair trial.



Commonwealth Magistrates' & Judges Association

CMJA Conference
Cape Sun Hotel, Cape Town, South Africa
5-9 October 2008

"Constitutional Independence for the Magistrate and Judge with reference to the Separation of Powers"



Registration is available now at:
www.paragon-conventions.com/cmja2008

COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION

(Registered Charity 800367)

AIMS

- to advance the administration of the law by promoting the independence of the judiciary;
- to advance education in the law, the administration of justice, the treatment of offenders and the prevention of crime within the Commonwealth;
- to disseminate information and literature on all matters of interest concerning the legal process within the various countries comprising the Commonwealth.

MEMBERSHIP

Associations of the judiciary of Commonwealth countries are Members whilst individual magistrates, judges and court administrators may become Associate Members

ACTIVITIES

Pan-Commonwealth Conferences; Regional Meetings and Workshops facilitating communications and co-operation between the different countries of each region; Study Tours and Exchange Visits; Judicial education seminar

PUBLICATIONS

"The Commonwealth Judicial Journal" and the "CMJA News" (both twice yearly and complimentary to members); Reports of proceedings of major conferences and seminars; specialised information books on particular topics (printing or copying costs may apply)

APPLICATION FOR ASSOCIATE MEMBERSHIP

Name:
Address:
.....
.....
Judicial position:
Annual Subscription @ £28.00 / 5 Year Membership @ £120.00
10 Year Membership @ £220.00 / Life membership @ £500.00
CMJA Tie (s) @ £10.00 each
CMJA Cufflinks @ £9.50 each
CMJA Lapel Badges @ £5.00 each
CMJA Key Fobs @ £4.50 each
CMJA Plaque @ £19.50 each: SALE PRICE £15.00
CMJA Notelets @ £14.50 each
CMJA Business card holders @ £12.00 each
Memorabilia: packing/postage charge of £1.50 per order
I enclose my cheque for £..... (prices include postage)
Signed..... Date.....

Please send this form and payments to:

The Secretary General

Commonwealth Magistrates' and Judges' Association

Uganda House, 58-59 Trafalgar Square, London WC2N 5DX, United Kingdom

Cheque and banker's draft should be made payable to "CMJA". If you wish to pay by credit card (Mastercard, Access or Visa) please give card holder's full name, billing address, card number and expiry date. Also please state whether it is a Visa, Access or Mastercard. There will be a 2.45% surcharge on all credit card payments.

Justice Reform in the 21st Century

RIPA International's judicial faculty is a key component of our overall learning solutions in which we examine new and modern approaches to law, while examining and considering its traditional content. Key elements in legal and judicial reform programmes now include promoting judicial independence through improved appointment, financing, and disciplinary procedures; modernising judicial administration and case management. The suite of judicial programmes examines and contemplates those elements providing expert techniques and strategies for success for demonstrative and tangible 'real world' solutions.



RIPA International's Open Training Programmes

Judicial Administration

This programme examines key concepts in the management and administration of court systems through a combination of lectures, workshops and court visits. You will learn about new strategies for judicial administration and customer service and see at first hand how these ideas have been put into practice in the England and Wales court systems.

Leadership

This programme assists participants in developing practical strategies for establishing, promoting and sustaining ethical change in their organisation. It seeks to advance a more pragmatic style of leadership and management that encourages employees to work towards the desired organisational future.

Modernising the Human Resource Function

This programme enhances the value of your Human Resource function and develops the knowledge needed to improve current HR processes within the organisation. Upon completion you will make recommendations to improve the contribution of the Human Resource function, in particular by making it more strategic.

Speech – Writing and Speech – Making for Leaders

Participants will be equipped with a sound understanding of the methods used to write and present finely crafted speeches. You will gain an insight into the techniques that make a great speech, both in its content and delivery, allowing winning arguments to be constructed and drafting speeches with impact.

To reserve your place on any of the above programmes or to receive further details on any of our open training programmes, call now on **+44 (0)20 7808 5300** or email ripa.training@capita.co.uk. Alternatively, visit the website at www.ripainternational.co.uk and quote ref: **CMJA/0508**