

Commonwealth

Judicial  
Journal



Journal of the  
Commonwealth Magistrates'  
and  
Judges' Association

Vol 15 no. 3 June 2004

**COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION**

Established in 1970

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This journal is generously funded by The Commonwealth Foundation

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# EDITORIAL

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It is right to begin this issue of the *Commonwealth Judicial Journal* with a tribute to Nicola Padfield who has relinquished the editorship after thirteen, very successful, years. The CMJA has cause to be immensely grateful to her for all her work, done against the pressures of an academic career in the University of Cambridge and more recently of judicial duties. Residents of Cambridge are often keen cyclists, and Nicky took that enthusiasm to the lengths of cycling the busy route from King's Cross to the CMJA's offices close by Trafalgar Square. When the Editorial Board met recently, she was given presents in token of our appreciation; the less serious present was a personalised cycle repair outfit! Your new Editor is especially grateful that Nicky left a quantity of material for this issue: for future material he looks, as must all Editors, to you, the readers.

The Editorial Board has been joined by Betty Mould Iddrisu, who has come from Ghana to head the Legal and Constitutional Affairs Division of the Commonwealth Secretariat in succession to Di Stafford. Betty will have been in post for some eight months when this issue is published, months necessarily spent largely in London. She brings great warmth and enthusiasm to her new post, and will soon become even better known around the Commonwealth.

Your new Editor's involvement with Commonwealth affairs began over 25 years ago with some work on the enforcement of judgments, and especially maintenance orders, made in other Commonwealth jurisdictions. He still has happy memories of the visits he

was able to make to discuss that work in Samoa, Kenya and St Kitt's. Topics have a way of coming round again, and as this issue of the *Journal* is going to press he is preparing to attend on behalf of the Commonwealth Secretariat a further round of meetings in The Hague where attempts are being made to draw up a new international convention on the recognition and enforcement of family support orders. Judges and magistrates working in the field of family justice will be well aware of the importance of this work. The seemingly ever-greater mobility of people does mean that purely national provision for family support is inadequate. The Commonwealth's own set of arrangements for the enforcement of maintenance orders dates back over 80 years, and one result of the current work might well be that those arrangements are reviewed and brought up to date.

A pleasing feature of this issue is the wide geographical coverage, with articles from Africa and the Pacific as well as the United Kingdom and Jersey (shortly to host the CMJA's September conference), together with pieces which offer surveys of particular issues with examples from many parts of the Commonwealth. There is much evidence here of the continued strength and resilience of our common legal traditions, and of creativity in the face of new problems. It is perhaps not too early to draw attention to the next Commonwealth Law Conference, that major triennial gathering of judges and practitioners from many parts of the common law world, which is being planned for London in September 2005.

## Correction to the Malawi Conference Report

### ADDENDUM

PAGE 8: STATEMENT OF CHIEF JUSTICES AND HEADS OF THE JUDICIARY  
Should include Malta in the list of countries which were represented at the meeting

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

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## PROFILE

of Professor David McClean, C.B.E., Q.C. (Hon.), M.A., D.C.L. (Oxon.), F.B.A.

by *Jeremy Pope*

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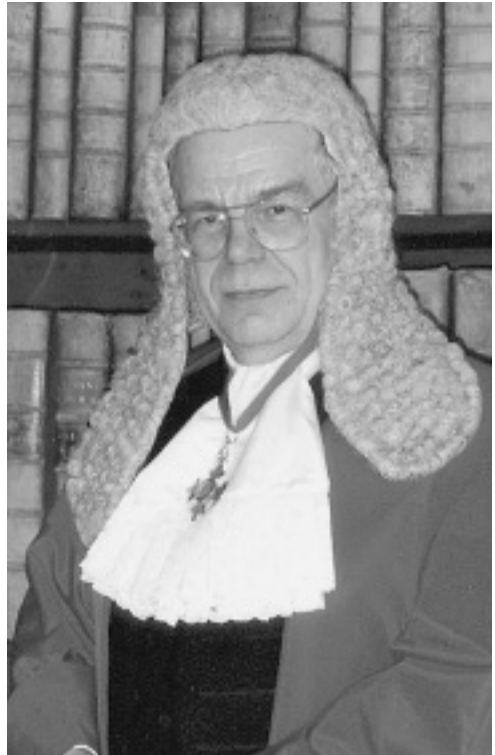
David McClean first came into my life when I was Head of the Legal Division of Commonwealth Secretariat, as one half of the “heavenly twins” – the Keith Patchett and McClean duo who, I was told, shared rooms at university and had worked together ever since. Somehow the magical Kutlu Fuad, my predecessor, had conjured up a pair of brilliant and committed lawyers, prepared to work all hours for little reward other than the satisfaction of doing what they could to make the world a better place.

Over the next 17 years their contributions to the Commonwealth and its law were prodigious. When Kutlu departed for Hong Kong, I confess I was more than happy to ride shamelessly on the reputation and achievements David and Keith earned, and continued to earn, for the Legal Division.

When you look at David’s publications list you marvel that he ever had time to teach. When you look at what he also managed to do “on the side” you wonder if he ever sleeps.

David’s contributions to Commonwealth law cover just about every aspect of mutual legal assistance imaginable – from the recognition and enforcement of judgments to the international abduction of children by a parent or guardian. David was and still is the Commonwealth’s “presence” at The Hague Conference on Private International Law, ensuring that all Commonwealth members had a “voice” – and at times even helping the French with translations of suggested wording from the English.

David and Keith’s collective and individual imaginations knew no bounds. Who would ever have thought of writing of a “do-it-yourself book” on how to ratify and implement a convention? Yet they did, and not only did it significantly accelerate the pace of Commonwealth countries’ ratifications, but the series of “accession kits” they prepared



have provided models for other, less imaginative, organisations.

And not just imagination, but patience, too. It was David who steered the Harare arrangements on mutual assistance in criminal matters through a meeting of sceptical and defensive Senior Officials in Harare in 1986. Sitting through most of the night to meet an impossible deadline, David was nevertheless endlessly patient with the more recalcitrant delegations, even as others would cheerfully have torn their hair out. Even more remarkable was the considered and methodical way in which he managed to retrieve the communiqué when it had completely vanished from the primitive computer we all, as complete amateurs, had been inadvisable enough to try to use.

David was always meticulous in his preparation. Before he successfully moved the motion for the ordination of women in the Church of England Synod (an act of no small courage in itself) he had previously taken the preparatory precaution of visiting the cathedral in New Zealand's Dunedin, where the ordination of the first woman bishop had taken place ("Just to be able to assure them that nothing untoward had befallen the site", he explained).

David also has remarkable skills as a negotiator. But even more impressive was the settlement of a fight between two taxi drivers at 3 a.m. one morning in Antigua. The hotel had inadvertently ordered two taxis for the ten dollar ride to the airport. David suggested they toss a coin. They did, and the one who called successfully beamed with pleasure. But David then gave the loser his ten dollars and suggested he go back to bed.

That particular trip to the Caribbean had been instructive in more ways than one. We had conducted a regional workshop on the recognition and enforcement of judgments and orders in the Commonwealth in which the

equivalent procedures of the civil law countries had loomed large – no less so than the institution of *huissier de justice* (the French process server). This strange animal occasioned much mirth, and so en route back to London, waylaid by an airline strike, we found ourselves on a beach in Guadeloupe – and in the midst of the annual conference of *huissiers*. There, on the beach, David was determined to capture photographic evidence of just what a real-life *huissier* actually looked like in the flesh - for the benefit of Patchett, who had disappeared directly to Guyana. Just what David's spouse made of the elegant creatures that would have appeared when the photographs were developed I can only imagine.

In all my many interactions with David over a period of some 17 or more years, I can remember, as a New Zealander, but one slightly jarring note. We were en route to Samoa, high above the Pacific Ocean. The Kingdom of Tonga was a scattering of dots on the ocean far below as the stewardess offered us "a choice" of wine. "New Zealand or French champagne?", she enquired sweetly. "Is that a choice?", David inquired sweetly.

## DOROTHY WINTON TRAVEL BURSARIES FUND CONTRIBUTIONS WELCOME

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

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

**The CMJA and the family of Dorothy Winton want to thank those who have already contributed to the this fund which currently stands at £3,631.32.**

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

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

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



# OBITUARY

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## DULLAH OMAR

by  
Benjamin Pogrund

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*Dullah Omar was the Minister of Justice of South Africa in the run up to and during the CMJA's Conference held in Cape Town in 1997. He provided assistance and support to the association and enabled the participation of many judicial officers from South Africa at the Conference. The following obituary is reprinted by kind permission of The Independent, Obituaries, 15 March 2004.*

**Abdullah Mohamed Omar, lawyer and politician: born Cape Town 26 May 1934; Minister of Justice 1994-99, Minister of Transport 1999-2004; married 1962 Farida Ally (two sons, one daughter); died Cape Town 13 March 2004.**

Dullah Omar was part of the African National Congress team in the negotiations for the end of white rule in South Africa. With the end of apartheid in 1994, President Nelson Mandela appointed him Minister of Justice.

In that role he piloted legislation through parliament to transform discriminatory laws and judicial practice. He also handled the law which set up the Truth and Reconciliation Committee whose work became the benchmark for societies emerging from tyranny in other parts of the world. In 1999 he was appointed Transport Minister by President Thabo Mbeki.

Abdullah Mohamed Omar was born in Cape Town in 1934. As a small boy, I used to walk a mile every weekday afternoon to “cheder” (Hebrew school) from my home in the Cape Town suburb of Observatory. On the way I passed a fruit and vegetable shop owned by a “coloured” family. I stopped to buy fruit and was often served by a dark-eyed boy of my own age. We had different skin-colours and in the South Africa of that time did not become friends.

Many years later the boy and I, now adults, found each other again. He was “Dullah” Omar, and was then a lawyer fighting legal cases against apartheid. I was a journalist,

focusing on reporting apartheid. Somehow we recognised each other from the years before. We overcame the racial apartheid barriers to form a friendship which remained until his death.

Merely to say that he fought cases against apartheid does not convey the courage which he displayed. Few solicitors were willing to challenge the government of South Africa. Dullah Omar, however, did not shrink: with degrees in law from the University of Cape Town he defended the accused in a range of political trials, became the legal representative of the banned Pan-Africanist Congress and acted for ANC leaders.

To keep an office in the city centre, he had to apply each year for a permit under the Group Areas Act which decreed which people of what colour could live and work where. Later he was forced to move to the suburbs.

He also became active politically. At first he was with the Unity Movement which argued for non-collaboration with the government. In 1983 he switched to the United Democratic Front (UDF), newly formed as the domestic front of the underground ANC.

By then Omar’s working life had also changed. The government withdrew his passport three days before he was due to go abroad to study for a Master of Laws degree at Harvard University. Locked inside South Africa he became a barrister, still representing apartheid victims. He led the UDF in the Cape Town area, and was also vice-president of the National Association of Democratic Lawyers, an organisation which he helped to found.

He paid a price: he was repeatedly detained without trial, and was “banned”, which meant he was restricted to a specified area of Cape Town; nothing he said could be reported; and he was barred from taking part in the UDF and attending meetings where the government was criticised.

As pressures for change mounted in South Africa, and black resistance spread day by day, Omar went back into the UDF leadership, despite suffering several heart attacks. With Nelson Mandela the focus of public attention, Omar became his widely quoted spokesperson in the months leading up to Mandela's release in 1990.

Later it emerged that Omar had been the target for government assassination attempts. On one stay in hospital, his wife, Farida, was suspicious of drugs given to him and refused to let him take them. Subsequent evidence proved her right when a commission of inquiry heard that poison pills were to have been substituted for his heart tablets.

A government agent, with the unlikely name of "Peaches" Gordon, also later came to Omar to tell him that he had stalked him in order to assassinate him. But he had been unable to get close enough to kill because of the number of Security policemen who were always following Omar.

As a cabinet minister from 1994 Dullah Omar was entitled to a luxury official house. But Farida refused to move. They had for years been living in a comfortable house in Rylands, a suburb of Cape Town which in the apartheid era had been designated for coloureds under the Group Areas Act, and Farida insisted she wanted the family to remain among their friends. And even as a minister's wife she went

early each day to run the market fruit stall inherited from her father.

Omar cracked down on burgeoning crime. That brought him into conflict with a local vigilante group which was outdoing the worst of gangsters in robberies and rapes. Under threat of attack, the Omar family had to leave their home for a while.

After five years, Mandela's successor, Thabo Mbeki, put Omar into the transport ministry. On my visits to him, we chuckled over the fact that he was now occupying the plush offices created and furnished by the previous white masters. He would eagerly tell me about the changes he was making - one of the most important was to bring order into the taxi industry which was beset by violence as competing groups fought for control.

Omar fell ill with cancer 15 months ago. He was buried on Saturday according to Muslim rites at a funeral attended by President Mbeki, former President Mandela and most members of the cabinet. Mbeki spoke of Omar's humbleness. An ANC spokesman said he would be remembered "for his modest demeanour, his intellect, compassion and unwavering commitment to the cause of freedom in this country."

I retain my memory of the dark-eyed boy and of the later years, of the adult who spoke to me with quiet passion and strength about the struggle to bring freedom to South Africa. And who lived to enjoy success.



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# PROBLEM SOLVING COURTS AS AGENTS OF CHANGE

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A recent address by

**Justice Paul Bentley**

*of the Ontario Court of Justice on therapeutic justice in practice*

Research by

**Natasha Bakht**

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Problem solving courts have expanded rapidly across the United States in an attempt to find new solutions to difficult socio-legal problems. The dispute resolution model of problem-solving courts is founded upon the principles of therapeutic jurisprudence, an approach to the law that regards legal phenomena as having therapeutic and anti-therapeutic consequences. Beginning in the area of mental health, this approach has expanded to consider matters within criminal law such as drug abuse and domestic violence and has spread from the U.S. to many jurisdictions. Canada has not yet embraced problem solving courts to the same extent as has the U.S., although there are signs that both federal and provincial governments in Canada are keen to do so. There are currently Drug Treatment Courts (DTCs) in Toronto, Vancouver and St. John and the Canadian Department of Justice announced its plan to create three new DTCs in the next 12 months. Problem solving court processes have also arisen in Canada in cases concerning mental health, aboriginal justice and domestic violence.

Problem solving courts have developed in response to the realisation that a “one size fits all” approach to criminal justice does not work in some contexts. The adversarial nature of the traditional criminal justice model cannot effectively handle the complexity of certain human and social problems, where failing to deal with fundamental causes almost guarantees re-offending. As a result, initiatives have emerged which are designed to enable courts to respond more effectively to cases where complex, often overlapping, and sometimes intractable social and personal issues are involved. Specifically, courts attempt to deal holistically with cases involving these difficult socio-legal problems by implementing the principles of therapeutic jurisprudence wherein judicial case processing is partnered with treatment providers and community groups to provide follow-up and

support for victims and offenders alike in order to reduce recidivism.

## **The Origins of Problem Solving Courts**

In many respects the roots of this new judicial approach can be traced back to indigenous and tribal justice systems of what today constitutes the United States, Canada, Australia and New Zealand. As for western judicial machinery, the origins of problem solving courts can be traced to 1989 when, at the peak of the crack cocaine epidemic, the first drug court opened in Dade County, Florida.

In August 2000, the United States Conference of Chief Justices and the United States Conference of State Court Administrators endorsed the concept of problem solving courts and calendars that utilise the principles of therapeutic jurisprudence as the future policy direction for trial courts in the United States.

In Canada, the new problem solving mechanisms have developed as a result of judicial initiative and as a result of increased community expectations of the court system. Importantly, in September 1996 the Parliament of Canada enacted comprehensive changes to the sentencing provisions of s.718 of the *Criminal Code*. The sentencing revisions as interpreted by the Supreme Court of Canada have incorporated certain aspects of restorative justice into the criminal justice system. While these provisions do not equate to the same administrative policy direction for Canadian trial courts as that which exists in the United States, these factors have created a favourable legal environment within which problem solving courts and the therapeutic principles upon which they are based can evolve.

The new Canadian sentencing legislation contains a conditional sentence option which permits non custodial sentences to be imposed where the court is satisfied that serving the

sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing (s.742.1). Two other provisions that embrace the concept of restorative justice, or community based sentencing, also form part of the new sentencing legislation. The first incorporates the notion that no person ought to be deprived of his liberty if less restrictive sanctions may be appropriate (s.718.2(d)) and the second specifically states that all alternatives to incarceration ought to be considered by the court in every case, especially in the case of Aboriginal offenders (s.718.2(e)).

In *R. v. Proulx* (2000) 140 C.C.C. (3d) 449, the Supreme Court considered the new sentencing legislation generally and the conditional sentence provision in particular. The Court held that whenever both punitive and restorative objectives can be achieved in a given case, a conditional sentence is likely a better sanction than incarceration. With respect to the concept of deterrence, the Supreme Court recognised that incarceration may ordinarily provide more deterrence than a conditional sentence, but cautioned judges to be “wary of placing too much weight on deterrence given the uncertain deterrent effect of incarceration” (at 452). In the context of problem solving courts these remarks are an encouragement for the justice system to craft effective community alternatives in sentencing whenever appropriate. The collaborative, integrated, multi-disciplinary approach utilised in problem solving court processes likely achieves these objectives more effectively than the traditional system which largely leaves these in the hands of either defence counsel or probation authorities, neither of which have the co-ordinated and directed resources available to the problem solving court processes.

### **Drug Courts: An Early Example of Problem Solving Courts**

Since 1989 drug courts have expanded rapidly across the United States. According to the National Association of Drug Court Professionals, there are currently 1,200 drug courts in existence or being planned in the United States. By the mid 1990s a number of players in the criminal justice community in Toronto realised that the traditional methods of dealing with drug dependant criminality in

Canada were a failure. In recognition that incarceration alone does little to break the cycle of drugs and crime and that prison is a scarce resource best used for individuals who are genuine threats to safety, a committee of representatives from the Federal Department of Justice, the defence bar, duty counsel, Public Health, the Centre for Addiction and Mental Health, Community Corrections, Court Services and the judiciary commenced meeting on a monthly basis.

After many months of discussions with representatives of the community the federal government agreed to fund a four-year pilot project. On December 1, 1998, the country's first Drug Treatment Court commenced operation in Toronto. The funding for the court has recently been extended for a further five years and the Federal Government has committed to expand the number of Drug Treatment Courts in Canada.

Most drug courts utilise a team based approach to treatment, that is, a co-ordinated strategy among judge, prosecution, defence, and treatment providers to govern offender compliance. This approach draws its strength from each representative providing input from their unique institutional perspective. This team based approach has resulted in the creation of new roles for the traditional judicial players. Judges play an active role in the treatment process, monitoring compliance, rewarding progress and sanctioning infractions. As Judith Kaye has written, “The prosecution and defence are not sparring champions, they are members of a team with a common goal: getting the defendant off drugs.”

### **The Use of Sanctions and Treatment in Drug Courts**

American drug courts emerged in part as a reaction to the “zero tolerance” policy of many U.S. jurisdictions in which possession of even a relatively small quantity of cocaine resulted in mandatory minimum sentences. The Toronto Drug Treatment Court, by contrast, has developed in the absence of mandatory minimum sentences for drug offences. In addition, unlike many U.S. drug courts, which are based on abstinence from all drugs, the Toronto DTC requires that participants work *towards* abstinence from illegal drugs. The programme demands that participants be free of

crack/cocaine and/or heroin before completion. In the U.S. almost all drug courts either prohibit or strongly discourage the use of both illegal drugs as well as alcohol by drug court participants. By way of contrast, in Toronto where participants have achieved a positive lifestyle change, have stopped using crack/cocaine, heroin and other non medically prescribed drugs and have at least one marijuana free urine, they may be permitted to complete Phase I of the program at the discretion of the DTC team.

It is also noteworthy that unlike most U.S. drug courts, the Toronto DTC incorporates methadone maintenance as part of its treatment arsenal for heroin addicts. The abstinence model of most U.S. courts does not permit the use of methadone. In Toronto, it is felt that methadone is an effective treatment option that should not be excluded simply because it does not fit the model of complete abstinence.

Unlike many U.S. drug courts, the Toronto DTC accepts traffickers and other offenders for whom jail would be the likely outcome of a guilty plea. Traffickers whose primary reason for possessing or trafficking in drugs is to satisfy their own addiction, rather than to profit from the transaction, can be accepted into the Toronto DTC program, offering those offenders an opportunity to deal with their substance addiction within the criminal justice system.

Abstinence from substance abuse is only one of a number of preconditions that must be fulfilled before the offender will be allowed to end his or her participation in Toronto's DTC. Participants are also required to demonstrate a fundamental lifestyle change including improved interpersonal skill development, stable and appropriate housing, and education and vocational skills. It is the belief of the Toronto DTC that these requirements are necessary to improve the likelihood that offenders will remain drug and crime free.

### **The Australian Drug Court Experience**

Unlike the Canadian and American experience, in Australia drug courts have been largely created by statute or established by government using existing statutory provisions and significant budgets. The first drug court in Australia was established in 1998 in New

South Wales. Since then, drug courts have mainly been established in metropolitan areas such as Queensland, South Australia, Victoria and Western Australia, with the promise of expansion to regional areas upon successful completion of trials. Early research on the drug court in New South Wales indicates that improvements have been found in measures of health, social functioning and drug use of participants and that the court is a more cost-effective means of reducing the rate of offending.

The success of drug courts globally has spread the problem solving model beyond the confines of drug offences. Both Canada and the U.S. have developed other specialised courts that deal with such issues as mental health, domestic violence and community justice, among others.

### **Domestic Violence Courts**

Just as the need to re-examine the criminal justice system as it deals with drug cases is obvious to many stakeholders within the justice system, so too is the need to improve the handling of domestic violence cases. Absent from the traditional court process was understanding of the complexities of domestic violence, especially the social and economic ties that bond victims to their abusers. The problem solving response is to explicitly consider the special characteristics that domestic violence cases present including: (1) domestic violence does not involve violence between strangers; (2) victims under the influence of their abusers are isolated, particularly vulnerable and reluctant to prosecute; and (3) the repetitive nature of domestic violence.

In the U.S. there are now more than 300 courts that have special processing mechanisms for domestic violence cases. In various locations within Canada more effective models for dealing with domestic violence cases are also being explored. One such model is the Domestic Violence Court in Calgary, which deals not only with spousal violence, but also assaults by parents against children and adult children against parents including elder abuse.

Both American and Canadian domestic violence courts emphasise the development of a new attitude in dealing with the first reported incidence of domestic violence. Considerable emphasis is placed on early and prompt inter-

vention in domestic violence cases because it enhances victim safety, sends a message to the defendant that the case is being taken seriously, and signals to the victims that their suffering will not be ignored. From a treatment perspective, it is also known that at the time of the violent event offenders are often remorseful. With the passage of time, excuses and the psychological state of denial set in.

### Victim Support

Domestic violence courts are designed to help victim safety and enhance defendant accountability. Judges use their authority to make victims feel welcome in the court, to express empathy for their injuries, and to mobilise resources on their behalf. Because therapeutic jurisprudence proposes that judges be sensitive to the beneficial or harmful consequences that their actions and decisions have on the parties that come before them, it has been suggested that in sentencing domestic violence offenders excessive fines should be avoided. Excessive fines can rarely be collected and typically, money is simply taken away from much needed family resources, which effectively penalises the victim(s).

In Calgary's Domestic Violence Court, victims are provided with a caseworker from a non-profit society called The HomeFront Society For the Prevention of Domestic Violence. The independence of Case Workers is thought to be important to avoid the possibility of the perception of conflict of interest allegations, since Crown Counsel and duty Defence Counsel are both employed by agencies within the Justice Department of the Government of Alberta.

Case Workers are individuals with a social work background who ensure that complainants of domestic violence and their family members receive consistent support and resource information throughout the judicial process. The Case Worker forms an integral part of the domestic violence court team, which includes the Crown, probation, police and Defence Counsel. An important function of the Case Worker is the participation in pre-court conferences by providing information pertaining to the complainant's circumstances and concerns.

### Aboriginal Courts

The problem solving model is also found in specialised courts geared toward Aboriginal peoples. As noted earlier, the Canadian *Criminal Code* makes specific reference to curbing incarceration as a sanction for all offenders, but particularly Aboriginal peoples by requiring sentencing judges to consider all available sanctions other than imprisonment. Many reports have found that Aboriginals are disproportionately represented in Canada's prison population.

In *R. v. Gladue* [1999] 1 S.C.R. 688, a case involving an Aboriginal woman who entered a guilty plea to manslaughter after killing her common-law husband, the Supreme Court of Canada carefully considered the provisions of s.718.2(e) of the *Criminal Code* and directed trial judges to take a restorative approach to justice in cases involving Aboriginal offenders. The Court held there is a "judicial duty to give the provision's remedial purpose real force."

The need for the court to become aware of other sentencing alternatives in the case of Aboriginals caused the Toronto Judges to establish a special court called The Gladue (Aboriginal Persons) Court. Judges consulted with the Aboriginal community in Toronto to create this specially structured court, which deals specifically with Aboriginal offenders and provides judges with the information they require to carry out the directives from the Supreme Court decision in *Gladue*.

The objective of the Court is to facilitate the trial court's ability to consider the unique circumstances of Aboriginal accused and Aboriginal offenders. The Court treats all Aboriginal people, including status and non status Indians, Métis and Inuit peoples. To assist the Court, Aboriginal Legal Services of Toronto has designated Court Workers to deal with the initial problem of identifying Aboriginal people, should they wish to be identified. Participation of an accused in the Court is voluntary.

The Gladue Court hears bail hearings, bail variations (with Crown consent), remands and sentencing. Trials are not held in the Gladue Court. A distinguishing feature of the Gladue Court is that all persons working in the Court, including Prosecutors, Duty Counsel, Case Workers, Defence Counsel, Probation and Judges have the expertise and a particular

understanding of the range of programs and services available to Aboriginal people in Toronto, and these services are linked to the Court through the presence of Aboriginal Legal Services' Court Workers.

Both the Aboriginal Court Worker and the Gladue "Aboriginal Persons Court Case Worker" play critical roles in the operation of the Court by proactively securing residence beds for defendants when needed, and arranging any treatment resources. The Gladue Court Worker provides critical information to the judge about the offender which aids in crafting the appropriate sentence or securing the offender's release on bail where appropriate. The sentencing report is designed to give the judge an understanding of the particular needs and circumstances of the Aboriginal defendant. It is an essential part of examining the underlying causes of the criminal behaviour, and forms part of the special effort made at the Gladue Court to implement sanctions that are appropriate given the broader systemic context in which Aboriginal peoples have come into contact with the criminal justice system. The Court is designed to take the necessary time to deal with Aboriginal cases and the pace of the Court recognises that it may require a more detailed and time consuming examination of the causes of the criminal behaviour in order to satisfy the Court's mandate of inquiring into alternatives to imprisonment.

### **The Tsuu T'ina Court and the Peacemaking Initiative**

In addition to the Gladue Court, which is a large urban response to the directive of the Supreme Court of Canada, smaller peacemaking initiatives are also found in Canada. The Tsuu T'ina Peacemaking Initiative and Court is one example of a problem solving process that is physically on Reserve property and that incorporates Aboriginal culture and resources within a specific, relatively small Aboriginal community.

In October 2000, a Provincial Court, with jurisdiction over criminal and youth matters, was established on the Reserve located adjacent to Calgary, Alberta. The Judge, Prosecutor, Court Clerks, Court Workers and Probation Officers of the Court are all Aboriginal people. Some Defence Counsel are also Aboriginal. The protocols of the Court

reflect Tsuu T'ina traditions. Among other things, the Court opens with a smudge ceremony and includes burning of sage or sweet grass signifying a prayer for help from what the Aboriginal people understand to be the Great Spirit. Outward appearances are important so that the people of the community will recognise the Court as their own system of justice designed to bring about peace and order in their community.

At the first appearance on criminal charges the case is adjourned to assess whether the case will be accepted into the Peacemaking Program, a determination made by the peacemaking co-ordinator and dependent on the accused's willingness to participate in the peacemaking.

A powerful tool utilised by the Court in accordance with Aboriginal tradition is a peacemaking circle used for the rehabilitation of offenders, the restoration of relationships, and healing. At the peacemaking circle, each person is given an opportunity to speak uninterrupted while all other participants listen. Each person is given this opportunity more than once. The first time each person speaks, they address the events that occurred. The second time around the circle, each person speaks about how they were personally affected by what occurred. The third time around the circle, each person speaks about what should be done. The process may be time-consuming but it continues until it is clear what should be done. The fourth time each person speaks they speak about what is agreed. The entire circle procedure may take from two hours to two days, but the majority are concluded within an afternoon. Typically the judge is not present during these peacemaking proceedings. Upon the conclusion of the circle, the offender signs an agreement to carry out whatever has been decided by the peacemaking circle.

After the final peacemaking circle has been held the matter is returned to court. The Peacemaker Co-ordinator reports on what has been completed by the offender. The Crown Prosecutor then assesses whether the charge can be withdrawn, depending upon the seriousness of the charge and whether the peacemaking circle outcome is an appropriate consequence. If the charge is not withdrawn, the prosecutor agrees to have the peacemaking



report as part of the information the Court ought to consider in the sentencing process. Hence the peacemaking process has a great deal of relevance to the final resolution of the case.

An important part of the process is the final peacemaking circle which is held after the offender has completed the tasks he or she has agreed to perform. At this circle there is a ceremony that celebrates the completion of the tasks. This is reminiscent of the graduation ceremonies held in Drug Treatment Courts, which also celebrate the success of the offender in a different context, but also has a restorative aspect from a community and offender perspective.

### **The Peacemaking Principles of the Courts of the Navajo Nation**

In the United States, the courts of the sovereign Navajo Nation came into existence on April 1, 1959. The Navajo Nation has developed a *Uniform Sentencing Policy* that also uses the concept of peacemaking, described by Chief Justice Robert Yazzie as “talking things out in a good way.” Like the Tsuu T’ina peacemaking initiative, the process of peacemaking at the Navajo Nation is nothing short of rigorous. The Navajo Nation sentencing policy provides for peacemaking before a charge is filed, after one is filed, before sentencing and after sentencing.

Both the Navajo Nation and Tsuu T’ina systems emphasise the important roles and responsibilities of the families of both the offender and victim. Family members for both the offender and victim may be involved in the peacemaking process in addition to community and resource people such as addiction workers or other resource agency personnel. A peacemaking circle may have anywhere from 5 to 25 people participating.

The obvious strength of the Tsuu T’ina Court and the Navajo Nation Courts is that the Courts are established by the community to meet the specific culture of that community. The Courts take place within the physical boundaries of the community and employ Aboriginal people to whom the community can relate and trust. The Courts and the peacemaking initiatives are designed to restore peace and order within the community through the restoration of relationships between members

of the community affected by the criminal activity and the offender themselves.

These courts exemplify the underlying principles of therapeutic jurisprudence and restorative healing in that they are intent upon dealing with the root causes of the criminal activity, offering treatment and counselling where needed in the case of both victims and accused persons.

### **The Geraldton Alternative Sentencing Regime**

An interesting application of therapeutic jurisprudence exists in regional Western Australia, an area with a significant Aboriginal population. The Geraldton Alternative Sentencing Regime (GASR) provides an alternative sentencing option for the court in dealing with drug, alcohol and other offending-related problems. Accused persons in criminal proceedings may choose to participate in a holistic program that attempts to address all the factors that underlie and may contribute to the offending behaviour. The court process, which includes a team based approach and judicial management of offenders, is utilised to promote the psychological and physical well being of participants.

The GASR permits adjournment of a case for up to six months in order for the accused to participate in a treatment regime that can include stress reduction and transcendental meditation. The program is available to both accused who have entered guilty pleas and those who have not. The GASR’s attempt to address the sometimes multiple contributing causes to offending behaviour may well provide an increasingly effective alternative to traditional sentencing options.

### **Mental Health Courts**

The emergence of specialised courts geared toward serving people with mental health issues stems from the view that the criminal behaviour of mentally ill people is a health issue rather than a criminal law matter. Because the criminal justice system has been established to protect society from persons whose *intentional* behaviour violates the criminal law, the fact that the number of people with mental illness in the criminal justice system has increased steadily in both the U.S. and Canada is cause for concern.

The principles of therapeutic jurisprudence have infiltrated court processes that treat the mentally ill in several parts of the world. For example, in Australia's Magistrates' Court in Adelaide a mental impairment court was created in 1999. This is not a separate court but a division of the Magistrates' Court that specialises in particular problem areas or jurisdictions with designated sitting days, support staff and services. In England and Wales, a therapeutic jurisprudence approach has been thought to be particularly relevant to the Mental Health Review Tribunals through which a patient has the right to question the legitimacy of his or her detention.

### **Toronto's Mental Health Court**

A mental health court was established in Toronto in 1998 to deal with mentally ill accused who were in custody and whose fitness to stand trial was to be determined prior to the criminal charge proceeding. In Toronto's Mental Health Court, great effort is made to improve the treatment of the mentally ill who encounter the criminal justice system through the availability of forensic psychiatrists, on site duty counsel and Health Court Workers. A main advantage of the Court is its physical proximity to adjoining holding cells and office space which allow psychiatrists, social workers, lawyers and families access to the prisoner, who can be isolated from the mainstream of offenders. A health oriented atmosphere is created instead of the atmosphere of a large remand institution with a substantial population of prisoners charged with varying degrees of criminal activity.

Forensic psychiatrists are available in the Court five days a week. When there are reasonable grounds to believe that an accused may be unfit to stand trial the person is remanded into the Court where a psychiatrist can examine him/her the same day, thus eliminating the typical eight-day delay in remand. This is a marked departure from the traditional system where a shortage of hospital beds resulted in accused persons needlessly being held in custody rather than being assessed immediately. Similarly, the Court has on-site duty counsel to provide immediate legal advice to the mentally ill accused so that the matter can be more expeditiously handled, avoiding delays during which the accused may remain in custody.

One of the most important components of the Court is the on-site presence of Mental Health Court Workers who provide extensive assistance to the accused. Health Court Workers are social workers with special knowledge of the mental health and social services available in the community and their role is to ensure the accused person is appropriately directed to these services. They assist the accused in contacting referral agencies and even assist the accused in getting to scheduled appointments. Their involvement increases the level of compliance with treatment and with court orders.

The Court creates a non-adversarial atmosphere. Rules of evidence, procedure and court room etiquette are relaxed. People who are both competent and interested in dealing with mentally disordered people are utilized in all aspects of the Court and its support staff. The dialogue concerning each case includes family members as well as the accused in recognition of the fact that family members are often the only ones who have the pertinent information about the accused required by the Court.

It is too early to tell if mental health courts are achieving the goal of reducing recidivism of participating defendants. That mental health courts treat the mentally ill more humanely however, is without a doubt and one its greatest strengths.

### **Applying Therapeutic Jurisprudence Outside the Realm of Specialised Courts**

Though the problem solving model has seen a proliferation of specialised courts as a means of addressing the underlying socio-legal needs of participants in the justice system, there is certainly nothing preventing judges from using the principles of therapeutic jurisprudence in existing court systems to better meet the needs of accused persons.

Perhaps the greatest contribution that specialised courts can make is as agents of change beyond a mere few courtrooms. There is great potential for a natural process of diffusion in which drug treatment court and other special court judges take the benefit of their experience with them when they return to civil and criminal dockets. Perhaps the most basic and informal level at which judges and courts communicate respect for defendants are by



“treating them in the round” and interacting with them as individuals.

Some applications of therapeutic jurisprudence in traditional courtrooms are based on common sense, such as speaking in simple terms. Offenders are more likely to comply with an order or sentence if they understand what they’re being told. Where the hearing serves as a forum of public commitment, that perhaps even family members may attend, compliance is likely to be enhanced.

The therapeutic effectiveness of judicial praise as a technique to further defendant compliance has been documented and endorsed by many in the judicial community. The empowering effects of graduation ceremonies, applause and even judicial hugs have become commonplace in many drug courts. Judge Peter Anderson has commented:

*You may be thinking, as I did when a colleague of mine told me about this [type of] reward, this is too hokey! It is not. I have seen men who have done state prison and women who have been selling their bodies for years glow in response to positive recognition before their peers.*

The lessons from drug treatment courts can and should be extended to ordinary criminal cases. At the successful completion of a period of probation, for example, judicial praise, family and friend attendance and/or a graduation ceremony can easily form part of a “routine” criminal proceeding. Judges should consider taking such action even when all is going well and they are not especially worried about an offender’s compliance for such a hearing could recognise and applaud an offender’s efforts and help motivate him to desist from drug use.

### **The Unique Role of Judges in Applying Therapeutic Jurisprudence**

The rise of therapeutic jurisprudence in both specialised courts and beyond raises interesting questions with respect to the role of judges. The judicial role has been transformed from detached, neutral arbiter to the central figure in a team, which in the drug court context, focuses on the participants’ sobriety and accountability. Some critics have argued that problem solving judges are simply glorified social workers.

For many judges this new cultural reality may seem counter-intuitive. For example, a team based approach to decision making requires a judge to abdicate sole responsibility in determining the outcome of a case. Similarly, a harm reduction approach to drug offences insists that judges not apply a strict interpretation of the law, but find innovative ways of treating an illness that has incidental criminal consequences. Though Fritzler and Simon have suggested that “therapeutic jurisprudence is what good judges do anyway on a daily basis”, it may be that a traditional legal background alone is ineffective training for judges playing an active role in the problem solving process that requires in addition to analytical skills and legal knowledge, effective communication and creative thinking. That judges are being pushed to unprecedented extremes with new responsibilities raises the question of whether all judges are capable of fulfilling these new roles.

### **The Independence of the Judiciary**

Problem solving courts also raise concerns with respect to the independence of the judiciary. The constitutional principles that require judges to be independent and separate from other branches of the government are, some argue, being jettisoned for a new therapeutic approach that is inimical to the judicial function.

As judges become involved in initiating problem solving courts and activities that include organising, convening meetings and lobbying, are they infringing upon the territory of the executive branch of government? It has been argued that if governments want judges to deal more effectively with certain issues then legislation ought to be passed to direct this to be done. It is not for judges to make policy decisions and to use their positions in order to bring about such change. On the other hand, it has also been suggested that judges are simply utilising the discretion they have traditionally been granted in order to craft more meaningful sentences.

As judges solicit the wisdom of social scientists, researchers and professional treatment providers, are they more likely to become engaged in *ex parte* communications? Judge Hoffman has noted that problem solving court processes force judges to “to collaborate with prosecutors, defence lawyers and therapists in a fashion that is entirely inconsistent” with the

adjudicative role. By contrast, Judge Van de Veen has noted that knowledge about any specialty merely enhances the work of a judge, providing insights, and the ability to ask questions and consider potential issues in a more educated way. She also notes that the adjudicative process of problem solving courts tends to be traditional in its maintenance of a formal legal framework. It is the post-adjudication process that is different, where judicial supervision of the accused in ongoing meetings with the judge and others may be held out of court.

## Conclusion

There is little doubt that problem solving courts and the underlying theory of therapeutic jurisprudence have revolutionised the workings of the criminal justice system. These effects have been felt in the U.S., and increasingly in Canada and globally. The problem solving model seeks to deal more effectively with the underlying factors causing criminal behaviour. Certain socio-legal problems including the use of illegal drugs and domestic violence have been dealt with through the use of specialised courts. The principles of therapeutic jurisprudence however, can and should also be used beyond the borders of specialised courts in everyday trial processes and appellate courts. Though critics of problem solving courts have cautioned against the newly intrusive role of judges and its impact on the independence of the judiciary, the problem solving model has shown signs of being a valuable agent of change. It is perhaps too early to tell how successful problem solving courts have been in transforming the way we think about courts and the results we expect them to achieve, but there is little doubt that they offer a ray of hope to ending “revolving door justice”, where the same defendants are recycled through the court system again and again.

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# REFORM OF CIVIL PROCEDURE IN VANUATU

by  
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## 1 INTRODUCTION

On 31 January 2003, Vanuatu introduced uniform rules to govern civil proceedings in the Supreme Court and Magistrates' Court of Vanuatu.<sup>1</sup> The Civil Procedure Rules 2002 replaced the High Court (Civil Procedure) Rules 1964. They are the first rules to be devised locally in the South-West Pacific. The Rules were drafted following a comprehensive review of the former rules by a Rules Committee, chaired by the Chief Justice. The Committee's brief was to overhaul the existing rules with a view to simplification and expedition of the civil process.

The overriding objective of the new rules is 'to enable the courts to deal with case justly'.<sup>2</sup> Courts are to give effect to the overriding objective when interpreting the rules or acting under them and parties are to help them to do this.<sup>3</sup> The rules are in plain English and introduce the concept of case management by the court and opportunities for settlement through conferences and mediation. This article highlights some of the most interesting features of the new Rules. It also puts forward some suggestions for additional reform.

## 2 FORMS AND FLOW CHARTS

In addition to the use of plain English, the rules have been made easier to navigate by the inclusion of flow charts. Schedule 4 includes five charts. The first two explain the sequence of events involved in enforcement proceedings; the second two the sequence of events in defended and undefended Supreme Court proceedings respectively and the last one the sequence of events in Magistrates' Court proceedings. The Rules also prescribe forms to be used for the most common procedural steps.

## 3 INITIATING PROCEEDINGS

Vanuatu has replaced the complex system which previously applied under the High Court (Civil Procedure) Rules 1964 with a

much simpler procedure. It is no longer necessary to choose between four possible originating documents. Instead, nearly all civil proceedings in the Supreme Court and Magistrates' Court are commenced by claim.<sup>4</sup> There are still some proceedings, such as constitutional petitions<sup>5</sup> and electoral petitions,<sup>6</sup> which fall outside the Rules and are required by statute to be commenced by petition. The statement of the case is set out in the claim in every case.<sup>7</sup> This avoids the confusion that often occurred between generally and specially indorsed writs under the 1964 Rules.<sup>8</sup>

### 3.1 Service

Personal service of a claim is still required by the Rules. If this is not practicable, an application may be made for substituted service. The alternative modes of substituted service specified in the Vanuatu Rules have been specifically tailored to the circumstances of the country. For example, an order may be sought to serve a document on a chief or a minister of the church who lives in the area where it is believed the person to be served is living or by local radio announcement.<sup>9</sup>

## 4 RESPONSE

The rules require the defendant to file a response (formerly known as a memorandum of appearance) to the claim within 14 days.<sup>10</sup> The response may be entered out of time,<sup>11</sup> but the rules go on to say that, 'The court may decide whether or not the document is effective for the proceeding'.<sup>12</sup> It is not clear when this decision will be made by the court or whether application by the other party is required. If the court decides the filing is ineffective it may make any order that is appropriate for the proceeding including an order for costs incurred by a party because of the late filing.<sup>13</sup>

## 5 STATEMENTS OF THE CASE

The Vanuatu Rules replace the term 'pleadings' with the term 'statements of the case'.<sup>14</sup>

Statements of the case are set out in the claim, defence or reply.<sup>15</sup>

One provision of note is Rule 4.2(1)(d), which requires custom to be pleaded, stating that a ‘party relying on custom law’ must ‘state the custom law.’ These Rules reflect the fact that, unlike other law in force in Vanuatu, customary law is not written down. It is also indicative of the fact that customary law is not one homogenous body of law, but differs from island to island and sometimes from village to village.

### 5.1 The Claim

Under the Vanuatu Rules the originating process and first pleading is combined in one document, which is known as a claim. The claim must contain a statement of the case complying with R4.2(1). The statement of the case will commonly be set out in the claim in the same way as a statement of claim drafted under the old rules. It is also provided that, if damages are claimed, the claim or counterclaim must state the nature and amount of the damages claimed, including special and exemplary damages. The statement of the case must include any matter concerning the assessment of damages that, if not included, might take the other party by surprise.<sup>16</sup>

### 5.2 The Defence

The undesirability of allowing general denials, which can be used as a tactic to delay the plaintiff obtaining judgment, even though there is no real defence, has been dealt with by providing that a denial must be accompanied by a statement of the grounds on which it is based.<sup>17</sup> Further, the practice of ‘not admitting’ is no longer allowed as the Rules provide that, ‘If the defendant does not deny a particular fact, the defendant is taken to agree with it.’<sup>18</sup> A similar approach has been taken in recent reforms in other countries.<sup>19</sup>

## 6 INTERLOCUTORY APPLICATIONS

### 6.1 Procedure

The procedure for making interlocutory applications has been changed by the new Rules. The norm is not a written application but, instead, once proceedings have started the parties must make interlocutory applications orally during a conference if this is practicable.<sup>20</sup> Applications made at any other time must be made in Form 10,<sup>21</sup> unless the applica-

tion is urgent, when it may be made orally. The application must be accompanied by a ‘sworn statement’, which is the name given by the Vanuatu rules to an affidavit.

### 6.2 Directions

The Vanuatu Rules have replaced the directions hearing with a conference, called ‘conference 1’.<sup>22</sup> The conference is arranged by a judge after a defence has been filed, on a date after the time for last pleading to be filed.<sup>23</sup> The purpose of Conference 1 is to enable the court to actively manage the proceeding. In particular, the judge may deal with any interlocutory applications or fix a date for hearing them.<sup>24</sup> The judge may make orders about any other matter necessary for the proper management of the case, such as amendment, adding or removing parties and orders dealing with experts’ evidence.

### 6.3 Disclosure

Discovery has been replaced by the term ‘disclosure’ and ‘discovery and inspection of documents’ is now known as ‘disclosure of documents’.<sup>25</sup> Interrogatories are now referred to as ‘disclosure of information’.<sup>26</sup> Unlike other regional rules, the Vanuatu Rules include a definition of document which is stated to include, ‘anything in or on which information is recorded by any means’.<sup>27</sup>

The Vanuatu Rules provide that oral application for leave to ask interrogatories, which are renamed ‘written questions’, should be made at a conference.<sup>28</sup> If this is not practicable, an oral application may be made.<sup>29</sup> The Rules state that the substance of each question must be answered without evasion or resorting to technicalities.<sup>30</sup> The Vanuatu Rules have consolidated the common law grounds of objection to answering interrogatories.<sup>31</sup>

### 6.4 Delays

The Rules take a serious approach to delay and provide that if no steps have been taken in a proceeding for three months the claimant may be given notice to appear and show cause why the claim should not be struck out.<sup>32</sup> Further, the court may strike out a claim without notice if no step has been taken for six months.<sup>33</sup>

## 7 DETERMINATION WITHOUT TRIAL

### 7.1 Judgment in Default

The Vanuatu Rules divide applications for default judgment into those where the claim is for a fixed amount and those where the claim is for damages. No provision is made for claims which are partly for a fixed amount and partly for damages. Nor is any provision made for claims for any other relief. Until the court has made a pronouncement on the procedure to be followed, the position is unclear.

The Rules provide that interest may be claimed in an application for final default judgment at a rate to be fixed by the court.<sup>34</sup> It is not clear how or when this rate will be fixed. The Rules also state that a default judgment may include costs but no mention is made of the amount to be allowed. Presumably, interest and costs must be awarded by the court in the exercise of its discretion. This means that the court must make a judicial determination, even in cases involving application in default for a fixed amount. This Rule requires amendment to save the time and cost of obtaining a judicial decision in cases where an administrative procedure is more appropriate.

### 7.2 Application for Summary Judgment

Application for summary judgment may only be made after a defence has been filed.<sup>35</sup> This is unfortunate as the Rules regulating applications in default of defence only allow application in the claims for a fixed amount or damages. Accordingly, in other types of claim the claimant cannot apply for default judgment or summary judgment in the absence of a defence being filed.

### 7.3 Striking Out

The Rules introduce a new power enabling the court to strike out a proceeding without notice or a hearing if there has been no step in proceedings for six months.<sup>36</sup> If no step has been taken for three months the court may give notice to the plaintiff to show cause why the proceedings should not be struck out and may strike out if the claimant does not appear or show cause.<sup>37</sup> There is no requirement to give notice if no step has been taken in the proceedings for a specified period of time. Presumably, this was thought to be unnecessary, as delays should be picked up by the court and a show cause notice issued after a three month delay. It

has yet to be seen whether the Vanuatu court will instigate an effective case management system which will pick up delays in all proceedings.

The Rules also confer power to strike out proceedings if the claimant does not take a step required by the Rules or fails to comply with a court order.<sup>38</sup> Proceedings to strike out under this Rule are expressed to apply in the event of a claimant's default and would appear to be unavailable to deal with a defendant's breach of the Rules. However, a claimant may apply for a penalty to be imposed for failure to comply with the Rules.<sup>39</sup>

## 8 MEDIATION

The new Rules have introduced a system of referral for mediation by the court. In particular, a judge may make a mediation order at a conference if it may help resolve some or all of the issues in dispute and neither party raises a substantial objection.<sup>40</sup> Although the court has the power of referral to mediation, participation is voluntary and a party may withdraw at any time.<sup>41</sup> If one party is unwilling to cooperate this may make a referral a pointless exercise. In other jurisdictions, a more robust approach has been taken.<sup>42</sup> Sanctions may be imposed against a defaulting party in the form of a stay of that party's claim or an unfavourable costs order.<sup>43</sup>

## 9 TRIAL

### 9.1 Pre-trial conference

An excellent innovation in the new Rules is the 'trial preparation conference'. Its purpose is to identify the issues, to identify the evidence, to ensure the matter is ready to be tried, and to see whether the matter can be resolved by alternative dispute resolution.<sup>44</sup> The judge may also carry out the following tasks at the conference:<sup>45</sup>

- (a) *fix dates for the exchange of proofs of evidence<sup>46</sup> and agreed bundles of disclosed documents, if this has not been done; and*
- (b) *give directions for the further preparation for trial; and*
- (c) *if possible, decide any preliminary legal issues that need to be resolved before the trial, or fix a date for hearing these; and*
- (d) *fix a date for the trial.*

The purpose of the provision for the exchange of 'proofs of evidence' in paragraph (a) is



unclear, as proofs of evidence are covered by legal professional privilege. There is nothing in the Rules to suggest an intention to restrict this privilege. The Rules do display an intention that expert's reports should be disclosed, but these are not usually referred to as proofs of evidence.<sup>47</sup> The civil procedure rules in some Australian jurisdictions empower the court to order the parties to serve each other with written statements of the evidence they propose to call and the Vanuatu provision may have been copied from such a rule.<sup>48</sup> Until this provision is clarified by the court or by amendment, the reference can only be taken to refer to proofs in respect of which privilege has been waived.

The judge must also fix the date and time within which any order made at the conference is to be complied with and record the order in writing.<sup>49</sup> If a party does not comply with an order made at a conference within the time fixed the judge may order costs against the non-complying party or his or her lawyer.<sup>50</sup> The judge is also empowered to order that the party's claim or defence be struck out for failure to comply with an order made at the conference.<sup>51</sup>

## 9.2 Order of Proceedings

The normal order of events at trial has been changed in Vanuatu. The claimant presents his or her case first. The defendant will only open if he or she bears the burden of proof on every question.<sup>52</sup> However, the claimant does not have the right to the final closing address. Instead the claimant, or whoever has opened will make the first closing address, followed by the defendant or whichever party opened second.<sup>53</sup>

## 9.3 Evidence at trial

The Vanuatu Rules have changed the position regarding evidence at trial. Evidence in chief in the Supreme Court is to be given by sworn statement in Form 3, although the court retains the right to order oral evidence to be given.<sup>54</sup> Sworn statements must be filed and served at least 21 days before the trial. A party who wishes to cross-examine a witness must give the other party notice of this at least 14 days before the trial<sup>55</sup>

The Rules have also introduced important changes designed to bring the procedural rules relating to evidence from children and other

vulnerable witnesses into line with England, Australia, and many other jurisdictions.<sup>56</sup>

Under the new Rules, a party who intends to call an expert witness must inform the other side and give them a copy of the expert's report at the first conference.<sup>57</sup> Parties are restricted to one expert witness in a field unless the court orders otherwise.<sup>58</sup> Whilst these matters are not covered by other regional Rules directions may be given placing restrictions on the right to call expert evidence. The Rules also provide that the court may appoint its own expert witness.<sup>59</sup> If it does so, a party may not call an expert witness in that field unless the court orders otherwise.<sup>60</sup> The expert's costs are to be payable by the parties equally unless the court orders otherwise.

The Rules allow evidence to be given evidence by telephone, video or any other form of communication if the court is satisfied that it is not practicable for the witness to come to court to give oral evidence or to be cross-examined.<sup>61</sup> The court may do this whether the witness is in or outside Vanuatu.<sup>62</sup> A party wishing to present evidence by link must apply in writing, and file a sworn statement in support.<sup>63</sup>

## 9.4 Judgment in Default of Attendance

Unlike the previous position, the defendant does not automatically have the right to have the claim dismissed if the plaintiff does not attend at trial. Instead, the court may adjourn the trial to a fixed date instead.<sup>64</sup> Where it is the defendant who does not attend, again, the claimant does not automatically have the right to prove the claim, as the court may choose to adjourn the trial to a fixed date.<sup>65</sup> However, the court also has the power to enter judgment for the claimant without requiring evidence.<sup>66</sup> This power could be used to enter judgment without proof in liquidated claims.

## 10 COSTS

The general rule that costs follow the event has not been altered. However, the rules make more specific provision regarding the discretion to deprive a successful party of costs. This power may be used where a party has started litigation in a court higher than necessary. For example, the Rules provide that the Supreme Court may determine lower costs where, because of the small nature or amount of the claim and of any final order made, it would

have been more appropriate to sue in the Magistrates Court.<sup>67</sup> This Rule does not apply if the claim involves an important issue or a complex question of law.<sup>68</sup>

A specific provision has been introduced to deal with the situation where costs have been incurred unnecessarily. Costs may be awarded against a party who does not appear at a conference or hearing after receiving notice of the date; a party who does not file a document within the time ordered by the court; or has otherwise wasted the court's or other party's time.<sup>69</sup> The Rules also provide for a costs order to be made against a party's lawyer personally if, for example, a proceeding is commenced that is lacking in legal merit and which a reasonably competent lawyer would have advised the party not to bring.<sup>70</sup>

The Rules contain a scale of costs for magistrates' court costs but, surprisingly, they do not contain a scale for Supreme Court costs.<sup>71</sup>

## 11 ENFORCEMENT

The Vanuatu Rules replace the term 'execution' with the plain English term, 'enforcement'.<sup>72</sup> Writs of execution have been renamed enforcement warrants. A flow chart of the procedure for the enforcement of money judgments is contained in Schedule 4 of the rules. Schedule 4 also includes a separate flow chart of the procedure for the enforcement of non-money judgments.

## 12 CONCLUSION

The Vanuatu Rules Committee has replaced the existing rules with rules which are more responsive to the circumstances and needs of the country. Without departing from the general, introduced pattern of civil procedure, the rules have been made simpler and more effective. Whilst the Committee has made use of some recently reformed rules operating in other jurisdictions in putting together its proposals, it has not slavishly followed any of these. Further, an admirable effort has been made to introduce case management techniques and to offer the opportunity for alternative dispute resolution. There are a few discrepancies in the Rules, but this is only to be expected with such an ambitious innovation. The Rules Committee planned to review the Rules at the end of 2003 and, no doubt, these wrinkles will soon be ironed out.

## Endnotes

- 1 The Rules do not apply to constitutional petitions brought under the Criminal Procedure Code (Van) s 218, or any proceeding for which rules are provided by statute: R1.6(2).
- 2 Rule 1.2(1). Further details of the overriding objective are set out in chapter 15.
- 3 Rules 1.3 and 1.5.
- 4 Rule 2.2 Civil Procedure Rules 2002. A claim must be in Form 5 with the heading in Form 1: R4.3(1)(c) and R2.6(1) Civil Procedure Rules 2002.
- 5 See Criminal Procedure Code Cap 136 (Van), ss 218-220 and the rules made under s 220.
- 6 Representation of the People Act Cap 146 (Van), ss 54-65 and the Rules made under s 59.
- 7 R4.1 Civil Procedure Rules 2002.
- 8 For an explanation of this distinction, see Corrin Care, J, *Civil Procedure and Courts in the South Pacific*, 2004, London: Cavendish, pp101 to 102.
- 9 Rule 5.9(2) Civil Procedure Rules 2002.
- 10 R4.13(1)(a) Civil Procedure Rules 2002.
- 11 R4.1(1) Civil Procedure Rules 2002; *Harrison's Timber v Haster* (1969) 22 Federal Law Reports 258.
- 12 R4.14(2) Civil Procedure Rules 2002.
- 13 R4.14(4) Civil Procedure Rules 2002.
- 14 R4.1(1) Civil Procedure Rules 2002.
- 15 R4.1(1) Civil Procedure Rules 2002.
- 16 R4.10(2) Civil Procedure Rules 2002.
- 17 R4.5(4) Civil Procedure Rules 2002.
- 18 R4.5(5) Civil Procedure Rules 2002.
- 19 For example, in Queensland, the Uniform Civil Procedure Rules 1999 now provide that a denial or non-admission of an allegation of fact must be accompanied by a direct explanation for the party's belief that the allegation is untrue or cannot be admitted. Otherwise, the allegation will be taken to have been admitted: UCPR, R166(5) and (6).
- 20 R7.2(2) Civil Procedure Rules 2002.
- 21 R7.1(3) Civil Procedure Rules 2002.
- 22 R6.4(2) Civil Procedure Rules 2002.
- 23 R6.3(1) and (2) Civil Procedure Rules 2002.
- 24 R6.4(2) Civil Procedure Rules 2002.
- 25 Part 8, division 1 Civil Procedure Rules 2002.
- 26 Part 8, division 2 Civil Procedure Rules 2002.
- 27 R20.1 Civil Procedure Rules 2002.
- 28 R8.20(1) Civil Procedure Rules 2002.
- 29 R8.20(2) Civil Procedure Rules 2002.
- 30 R8.23(3)(a) Civil Procedure Rules 2002.
- 31 R 8.24(2).
- 32 R9.10(3) Civil Procedure Rules 2002.
- 33 R9.10(2) Civil Procedure Rules 2002.
- 34 R9.2(4)(b) Civil Procedure Rules 2002.
- 35 R9.6(1) Civil Procedure Rules 2002.
- 36 R9.10(2)(d) Civil Procedure Rules 2002.
- 37 R9.10(3) Civil Procedure Rules 2002.
- 38 R9.10(1) Civil Procedure Rules 2002.
- 39 R18.10 Civil Procedure Rules 2002.
- 40 R10.3(1) and (3) Civil Procedure Rules 2002.
- 41 R10.6 Civil Procedure Rules 2002.
- 42 See, eg, Supreme Court Act 1991 (Qld), s 103(1). See also UCPR 324 to 328.
- 43 Supreme Court Act 1991 (Qld), s 103(2).
- 44 R6.6(1) Civil Procedure Rules 2002.



- 45 R6.6(4) Civil Procedure Rules 2002.
- 46 It is unclear why proofs of evidence would be exchanges, as these are privileged. See below, at note 69 to 70.
- 47 R11.12(1) Civil Procedure Rules 2002.
- 48 See, for example, Supreme Court Rules 1970, New South Wales, Pt 36r4A
- 49 R6.7 Civil Procedure Rules 2002.
- 50 R6.8(1) Civil Procedure Rules 2002.
- 51 R6.8(2) Civil Procedure Rules 2002.
- 52 R12.1(3) (b) Civil Procedure Rules 2002.
- 53 R12.1(4)(f) and (g) Civil Procedure Rules 2002.
- 54 R11.3 Civil Procedure Rules 2002.
- 55 R11.7(4) Civil Procedure Rules 2002. The court may extend or abridge this period.
- 56 See, for example, Evidence Act 1977 (Qld) s 21A.
- 57 R11.12(1) and (3) Civil Procedure Rules 2002. The first conference is governed by R6.3 Civil Procedure Rules 2002.
- 58 R11.12(4) Civil Procedure Rules 2002.
- 59 R11.13 Civil Procedure Rules 2002.
- 60 R11.13(4) Civil Procedure Rules 2002.
- 61 R11.8(1) Civil Procedure Rules 2002.
- 62 R11.8(2) Civil Procedure Rules 2002.
- 63 R11.8 (3)(b) Civil Procedure Rules 2002.
- 64 R12.9(2)(a) Civil Procedure Rules 2002.
- 65 R12.9(1)(a) Civil Procedure Rules 2002.
- 66 R12.9(1) Civil Procedure Rules 2002.
- 67 R15.9(1) Civil Procedure Rules 2002.
- 68 R15.9(2) Civil Procedure Rules 2002.
- 69 R15.25 Civil Procedure Rules 2002.
- 70 R15.26(1) Civil Procedure Rules 2002.
- 71 R15.10(3) and sch 2 Civil Procedure Rules 2002.
- 72 Part 14 Civil Procedure Rules 2002.

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# GENDER-BASED VIOLENCE

by

**Tina Johnson**

*This article is drawn from a background paper for the Commonwealth Secretariat's Human Rights Expert Group Consultation in February 2004*

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Gender-based violence is violence that is directed at individuals on the basis of their gender, with women and girls making up the vast majority of victims (though boys and men can also be the target). It is indiscriminate, cutting across racial, ethnic, class, age, economic, religious and cultural divides. Gender-based violence takes place throughout society: in the home, in the community and in state institutions (including prisons, police stations and hospitals). It can be grouped into five main, though not exclusive, categories:

- sexual violence – e.g. rape, incest, forced prostitution and sexual harassment;
- physical violence – e.g. wife battering and assault, 'honour' killings, female infanticide, child assault by teachers and gay bashing;
- emotional and psychological violence – e.g. threats of violence, insults and name calling, humiliation in front of others, blackmail and the threat of abandonment;
- harmful traditional practices – e.g. female genital mutilation (FGM), denial of certain foods and forced and/or early marriage;
- socio-economic violence – e.g. discriminatory access to basic health care, low levels of literacy and educational attainment, inadequate shelter and food, economic deprivation, armed conflict and acts of terrorism.

Violence against women is described in the United Nations Declaration on the Elimination of Violence against Women as "a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women," and as "one of the crucial social mechanisms by which women are forced into a subordinate position compared with men". Women's lack of social and economic power, accepted gender roles and the low value put on women's work perpetuate and reinforce this subordinate position. Early marriage, inheritance of

widows and male control of property encourage female dependency, particularly in regions with high under- and unemployment of women and poor access to social welfare services, and limit women's ability to escape violent situations.

## **Intimate partner violence**

The most widespread form of gender-based violence is physical abuse of a woman by a present or former intimate male partner. Thirty-five studies from a wide variety of countries show that, in many of them, one quarter to more than half of women report such abuse. Forty per cent of all female homicide victims are killed by their intimate partners in the United Kingdom; while every year thousands of women suffer dowry-related deaths or are disfigured by acid thrown in their faces by rejected suitors in Bangladesh, India, Nigeria or Pakistan. There is also a considerable overlap between physical, emotional and sexual violence. Sexual abuse or rape by an intimate partner is experienced by between 12 and 25 per cent of women at some time in their lives. This is not considered a crime in most countries, since it is assumed that a marriage contract provides a husband with the right to sex with his wife whenever he chooses.

## **Violence against girls**

A growing number of studies, particularly from sub-Saharan Africa, indicate that girls' first sexual experience is often unwanted and frequently forced. Research has shown that 36-62 per cent of all sexual assault victims are aged 15 or less. In addition, cross cultural data from rape crisis centres reveal that 40-58 per cent of the sexual assault cases they deal with involve girls aged 15 and under, including girls younger than 10. In fact, the younger a girl is at first sexual intercourse, the more likely that sex is forced. The abusers are frequently male relatives, family friends or other men in influential positions, such as teachers.

## **Harmful traditional practices**

It is estimated that some 130 million women and girls, mainly in Africa, the Middle East and Asia, have undergone some form of FGM, which has both immediate and long-term negative health and psychological effects. Early marriage also exposes girls to physical violation and trauma as well as greater health risks during pregnancy and childbirth.

## **Sex work and trafficking in women and girls**

Women often take up sex work because they have no other way of supporting themselves or their children, or their entry into sex work may itself be as a result of violence. They are then at risk of further physical violence and rape, especially where this work is against the law as the police may assault rather than protect them. In a survey of prostitutes in Bangladesh, for example, 83 per cent had been raped and 91 per cent had been beaten by the police. Trafficking is now among the fastest growing criminal activities. The International Organisation for Migration estimates that 700,000 women are transported, mostly involuntarily, across international borders each year for the sex trade. Two million girls between the ages of five and 15 are introduced into the commercial sex market each year.

## **Violence against women in armed conflict**

In situations of armed conflict, currently experienced by some 30 countries, women and girls are often systematically targeted for abuse, and rape and sexual assault are widespread. Rape has been used as a deliberate weapon of war in many conflicts, including in Central Africa and the Balkans. Women and girls make up 75 per cent of the world's 22 million refugees, asylum seekers or internally displaced persons, putting them at particular risk of gender-based violence.

## **Gender-based violence and HIV/AIDS**

Gender-based violence and HIV/AIDS are intersecting epidemics. Women's relative lack of control over their sexual lives and methods of preventing HIV and other sexually transmitted infections due to violence or fear of it is one of the main factors behind the spread of AIDS. This lack of control is experienced not only by women who are sexually assaulted but also by those in relationships where they are

unable to negotiate condom use with their partners. Violence both exposes women to HIV infection and limits their ability to participate in and benefit from HIV/AIDS prevention methods and treatment.

## **Consequences of gender-based violence**

Gender-based violence adversely affects victims, family members, perpetrators, communities and nations on profound emotional, physical, psychological and economic levels. It accounts for more death and ill health among women aged 15 to 44 worldwide than cancer, obstructed labour, heart disease, respiratory infections, traffic accidents and even war.

Some of the consequences of gender-based violence include feelings of hopelessness and isolation, guilt and depression, or suicide. The more severe or longer term the abuse and violence the greater the impact on women's autonomy, sense of worth and ability to care for themselves and their children. In concrete terms, it may lead to bruises, cuts, broken bones or limbs, unwanted pregnancies, sexually transmitted infections (including HIV/AIDS), permanent disabilities or death. Rape and domestic violence are major causes of disability and death among women of reproductive age in both developed and developing countries. In the latter, it is estimated that gender-based violence accounts for 5 per cent of the healthy years of life lost to women of reproductive age.

Victims may also suffer from personal economic hardship and depressed overall development. Violence – and the threat of violence – reduces women's and girls' opportunities for work, their mobility and their participation in education and training, community activities and wider social networks. There are direct economic costs to the country as a whole. The direct annual cost of violence against women in Canada has been estimated at \$684 million in the criminal justice system and \$187 million for police. Counselling and training in response to violence is an additional \$294 million, totalling over Canadian \$1 billion a year. The Governor of the Reserve Bank of Fiji Islands estimated the costs to that country to be \$300 million, or 7 per cent of the gross domestic product.

## **Gender-based violence on the international agenda**

The 1989 Convention on the Elimination of All forms of Discrimination against Women (CEDAW) does not refer specifically to gender-based violence. However, lobbying and advocacy work undertaken primarily by women's non-governmental organisations (NGOs) led to increasing international understanding of this as a human rights issue. In 1992, the CEDAW Committee adopted General Recommendation 19, which identifies gender-based violence as a form of discrimination against women that seriously inhibits their ability to enjoy rights and freedoms on a basis of equality with men.

At the 1993 UN Conference on Human Rights, governments recognised that this was an urgent issue and called for the drafting of the UN Declaration on the Elimination of Violence Against Women, adopted unanimously by the General Assembly in December 1993. Violence against women was one of the Critical Areas of Concern of the Beijing Platform for Action, the document agreed to by governments at the UN Fourth World Conference on Women in 1995. This outlines three strategic objectives: to take integrated measures to prevent and eliminate violence against women; to study the causes and consequences of violence against women and the effectiveness of preventive measures; and to eliminate trafficking in women and assist victims of violence due to prostitution and trafficking.

Commonwealth governments further agreed in the 1995 Commonwealth Plan of Action on Gender and Development that women's human rights and the elimination of violence against women, the protection of the girl-child and the outlawing of all forms of trafficking in women and girls would be priority areas for action. Eliminating gender-based violence is also integral to the achievement of the Millennium Development Goals, adopted by 189 governments across the world in September 2000, and formally endorsed by Commonwealth Heads of Government in the Coolum Declaration of 5 March 2002.

## **Legislative changes**

Substantial progress has been made to enact laws that address family violence and abuse, rape, sexual assault, FGM, trafficking and other gender-based violence. UNIFEM reports

that at least 46 nations now have laws that explicitly prohibit domestic violence and 13 more are drafting laws to do so, while in many others criminal assault laws have been amended to cover domestic violence. Marital rape is now recognised as a crime in 45 countries.

Commonwealth Law Ministers expressed their support in May 1999 for Commonwealth co-operation around the UN Convention to combat transnational organised crime (including its Protocols on preventing, suppressing and punishing trafficking in women and children, and on the illegal trafficking of migrants). An opportunity was also identified for co-ordinated, collective action to fight the commercial sexual exploitation of children using existing Commonwealth schemes for mutual assistance and co-operation in criminal matters.

In the Caribbean, the Commonwealth Secretariat and the Caribbean Community (CARICOM) Secretariat collaborated on the development of model legislation on women's human rights. The legislation covers eight areas: domestic violence, sexual offences, sexual harassment, equal pay, inheritance, citizenship, equality for women in employment and maintenance. National governments in nine Caribbean countries have used the model legislation to introduce new legislation and/or revise existing laws. Guyana, Jamaica and St Lucia, for example, enacted new domestic violence legislation. The Domestic Violence Act 1999 of Trinidad and Tobago widens the definition of 'domestic abuse' found in the 1991 Act to include psychological, emotional and financial abuse, as well as physical and sexual abuse. It also recognises that many couples in the country are part of 'visiting' or 'cohabitating' relationships rather than being married, and gives the police greater powers to arrest the perpetrators of violence.

Model legislation was also developed in the Asia-Pacific region, where the first Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime was held in Bali in February 2002. It was intended to assist governments in drafting laws on trafficking in persons.

Under Malaysia's Domestic Violence Act 1994, domestic violence is attached to the Penal Code

under definitions and procedures for hurt, criminal force and assault. This enables it to be classified as 'criminal behaviour' under federal jurisdiction applicable to all Malaysians. A recently-added section 114A in the Indian Evidence Act makes it an offence for persons in a custodian situation (policemen, public servants, managers of public hospitals and remand homes and wardens of jails) to have sex with people for whom they are responsible.

In Southern Africa, Mauritius, Namibia, Seychelles and South Africa passed legislation to deal specifically with domestic violence. In Mauritius, under the Protection from Domestic Violence Act 1997, victims may report cases of domestic violence to enforcement officers, who provide a range of services from transportation to help with preparing an affidavit for presentation to a magistrate. The magistrate can issue an interim occupation or protection order to protect the victim while the case is being heard. Botswana, Seychelles and Tanzania each amended their laws to allow evidence to be given *in camera*, to widen the definition of rape, to deny bail to persons charged with rape and to provide for stiffer sentences for convicted rapists. Malawi and Tanzania strengthened their penal codes on prostitution and trafficking in women. In 1999, the High Court of Malawi ruled that arresting a woman for prostitution but leaving her male partner free was discriminatory and unconstitutional. Mauritius has adopted provisions for severe penalties for trafficking in children.

In the Pacific, the criminal code in Papua New Guinea has been amended to include domestic violence as a criminal offence. Legislation on sexual violence has also been passed and an amendment made to the Evidence Act to make it easier for victims of sexual violence to testify and to achieve justice.

### **Government policies**

National plans of action to tackle violence against women have been instituted in many countries. In East and Southern Africa, these plans were developed at national workshops on gender-based violence that were held in ten countries. The plan of action that emerged from the Mauritius workshop, for example, later endorsed by Cabinet, committed government and non-governmental stakeholders to create legislation, services and preventative

programmes to assist victims in a co-ordinated and efficient manner, and to sensitise the public on the law and its procedures.

The National Family Violence Networking System was developed in Singapore in 1996 to integrate the management of family violence. This system links police, prisons, hospitals, social service agencies, the courts, prisons and the Ministry of Community Development and Sports. Programmes include mandatory counselling for victims and perpetrators, training of social workers and police, public education and court, police and community programmes.

Several approaches have been taken to making the courts more accessible to the victims of gender-based violence. Family courts have been established in Belize, Grenada, Jamaica, St Lucia and St Vincent and the Grenadines, in line with a suggestion in the CARICOM model legislation that domestic violence cases should be heard at the magisterial level. The courts are staffed by trained judiciary and supported by social services.

In the Pacific, the Chief Magistrate of Vanuatu introduced new rules in the Magistrates Courts in 2001 which provide for the granting of domestic violence protection orders and the provision of some security for survivors of domestic violence, and for the faster tracking of cases. In Papua New Guinea, good behaviour bonds, implemented by the Magisterial Service, assist victims of domestic violence.

The Fiji Islands Ministry of Women and the Fiji Women's Rights Movement are developing a policy on sexual harassment in the workplace. In Botswana, the Public Service Act was amended to include sexual harassment as misconduct.

### **Examples of good practice**

Several countries have developed integrated approaches to address gender-based violence. For example, the Partnerships Against Domestic Violence Programme is a collaborative effort between the Australian Government and the States and Territories, and the business sector, NGOs and the community. Key projects include: community education campaigns; national competency standards for workers dealing with domestic violence; prevention workshops for young people; a clearinghouse for information and best practices; and pepe-

trators' programmes. In Bangladesh, the Multi-Sectoral Programme on Violence Against Women is a government project led by the Ministry of Women and Children's Affairs with the participation of several related ministries. Naripokkho, a women's NGO, provides technical assistance in detailed project formulation, implementation and evaluation.

Malaysia's Women Against Violence Campaign was launched at federal and state levels in July 2001. The Ministry of Women and Family Development co-ordinates the initiative and fosters co-operation between government agencies, NGOs and the private sector. Training of volunteers includes management of domestic violence, rape and sexual harassment cases by hospitals, police and the welfare department. Once trained, the volunteers are placed in the Ministry where they handle telephone calls and make appointments in the Ministry's counselling unit.

In Papua New Guinea, the Family and Sexual Violence Action Committee meets on a regular basis. Its members come from government agencies, the private sector, NGOs, community groups and donor agencies.

### **Using international law at the national level**

National courts are increasingly looking to international norms. In 1999, the Supreme Court of India stated that international instruments – CEDAW, the International Convention on Economic, Social and Cultural Rights (ICESCR), the Beijing Platform for Action – “cast an obligation on the Indian state to gender sensitise its laws, and the Courts are under an obligation to see that the message of international instruments is not allowed to be drowned”.<sup>1</sup> In East Africa, the International Women Judges Federation has been working with universities and judiciaries to promote the use of international human rights instruments in national settings.

### **Improving the police response**

Several countries have set up special units in the police force to deal with violence against women. For example, trained women police officers in the Victim Support Unit in Barbados provide counselling to victims of rape and child abuse, helping them to cope with their experience and preparing them to testify in court. In addition, a Regional Training

Programme for Police Officers and Frontline Workers dealing with domestic violence is being co-ordinated by the Caribbean Association for Feminist Research and Action.

In Bangladesh, the Centre for Women and Children's Studies has brought together NGOs and police to design a training manual for law-enforcement personnel on gender-based violence, and trained more than 400 police officers in 12 regions.

An integrated Community Safety Strategy for safer homes, streets and schools has been developed by Cook Islands. Important aspects of this include working with the police ‘from the inside out’; challenging police leadership and organisational culture; and collecting, analysing and sharing information with key partners.

### **Gender-awareness training for the judiciary**

Gender Judges and Equality is a regional project in Asia that was conceived and initiated by Sakshi, an NGO in New Delhi. Workshops are held to sensitise senior members of the judiciary to women's issues and help them view matters from a woman's perspective. The strategy is to allow judges to exchange views and points of law as well as initiate debates with their peers on issues related to violence against women. There have been several positive rulings by the sensitised judges on cases related to violence.

At the national level, workshops were held in Jamaica in 1998 to sensitise justice system personnel – including judges, police, clerks of the court, lawyers, probation officers and social workers – to a gender perspective. In Canada, the Western Judicial Education Centre organises continuing education programmes for judges from the west and northwest. While a key element is ‘peer leadership’ (i.e. judges are trained by other judges), other interested people, including women and members of racial minorities, can participate in the sessions. At a workshop on gender equality, for example, survivors of sexual assault and crisis centre workers gave judges first-hand information about violence against women.



## **Advocacy and public education**

There are numerous examples of advocacy and public education initiatives from many different countries. Among the more innovative is the series of Grade 1-10 textbooks produced by the Simorgh Women's Resource and Publication Centre in Pakistan to promote equality and equity in gender relations as well as to teach children about violence in the context of power relations. The NGO carried out teacher training to familiarise teachers with the whole process and methodology of participatory teaching. It started with four schools but is now supplying books to over 30.

Other public education activities from various regions include a national 'One Act Play' competition by women at the grassroots in Mauritius; the development, production and distribution by fem'LINKpacific in Fiji Islands of media materials as community education tools to bring violence issues into the public sphere, particularly in rural areas; and the use of radio and television programmes, school and community discussions, information pamphlets and leaflets in St Vincent and the Grenadines to promote public awareness.

Several countries have made an effort to make the law accessible to more people. In Botswana, for example, after a review of the Children's Act in order to harmonise it with the Convention on the Rights of the Child, the Act was translated into Setswana, the local language. The Government of Bangladesh has attempted to popularise and disseminate CEDAW by translating it into Bangla.

## **Men's initiatives**

In Malawi, the Network on Violence Against Women and the Malawi Human Rights Resource Centre, which coordinate non-governmental activities within the country, hold an annual Men to Men Symposium that brings more men into the issue. UNIFEM's End Violence Campaign encouraged men to demonstrate against violence in Kenya and South Africa, and helped to increase the involvement of men worldwide in the White Ribbon Campaign working to end men's violence against women. Other initiatives led by men include Men Against Abuse and Violence in Mumbai, India, focused on ending domestic violence, and Men Against Violence Against Women in Trinidad and Tobago, which runs community-based programmes and

produces leaflets on anger management and bumper stickers against battering.

## **Monitoring and indicators**

In the Caribbean, the Third Ministerial Meeting on Women (1999) identified the need for ongoing review, monitoring and implementation of legislation to counteract and eradicate violence against women. The Economic Commission for Latin America and the Caribbean later conducted a study to evaluate the implementation of domestic violence legislation in Antigua and Barbuda, St Kitts and Nevis, St Lucia and St Vincent and the Grenadines.

International Women's Rights Action Watch Asia Pacific has developed a framework to monitor governments' implementation of CEDAW. The Asia Pacific Research and Resource Centre for Women has developed a framework of indicators for monitoring violence against women.

At the national level, the NGO Naripokkho in Bangladesh monitors the incidence of violence against women in the country through scanning of national newspapers, collection of nationwide information on reported cases from Police Headquarters, and reports from members of Naripokkho's networks. In addition, 22 police stations in Dhaka Metropolitan Area, two public hospitals and the Special Court trying cases under the Repression of Women Act are monitored regularly on their handling of cases of violence against women. Partner organisations in 30 small towns are being trained and provided with technical assistance to carry out similar monitoring at district level. Findings are regularly shared in workshops with police, health-care personnel, lawyers and public prosecutors.

## **Gaps, constraints and opportunities**

National policy and institutional and legal frameworks are still often inadequate, and co-ordination among different parts of government is lacking. Women's human rights have not been fully realised due to non-harmonisation of laws, lack of domestication of international treaties and the absence of a human rights framework for planning and programming. Stakeholder interventions generally remained fragmented, uncoordinated and isolated.



According to UNIFEM, only 17 nations have distinct legislation referring to sexual assault, while as few as three have legislation that specifically addresses violence against women as a category of criminal activity in itself. Laws tend to focus on domestic violence and rape and not deal with other violence such as sexual harassment and traditional practices such as FGM (only 14 countries have adopted laws on sexual harassment and nine have specific legislation outlawing FGM). Moreover, many countries do not recognise spousal rape in domestic violence laws, and those that do have laws against it often provide exemptions.

Civil laws that may appear to have little to do with violence may also limit women's ability to protect themselves and to leave violent situations – for example, if they have no legal access to divorce, and discriminatory laws on inheritance and property rights. Some countries require mediation or other forms of alternative dispute resolution for family law matters, leaving women open to further abuse. Laws against trafficking may punish women for being illegal immigrants rather than prosecuting the traffickers.

### **Law enforcement**

Law enforcement officers, medical officers and judicial personnel can be insensitive to the needs of threatened and abused women and children. Despite the prevalence of violence against women, research from many countries – including Australia, Bangladesh, Canada, India, New Zealand and the United Kingdom – shows that it tends to be treated less seriously by the police than crimes against men or property. Domestic violence continues to be seen as a private matter. Victims may face further abuse if judges think that women call sexually abuse or harassment on themselves by the way they dress or act.

The dissemination of judicial decisions and insights from other jurisdictions can be important. Commonwealth judicial colloquia focusing specifically on the promotion of the human rights of women and the girl-child through the judiciary produced recommendations recognising the duty of the judiciary to interpret and apply national constitutions and laws in conformity with women's human rights. Gender sensitivity training for all levels of the court system and for the police have had encouraging results. Reforms of criminal

justice systems may make evidence of the woman's past history inadmissible (as, for example, in The Bahamas and Barbados) and prohibit aggressive questioning and harassment in court.

### **Women's knowledge of and access to the law**

Laws are of limited use if women do not know they exist or cannot take advantage of them. Due to economic, religious, social and cultural constraints, women's legal literacy and consciousness about their rights is generally low in developing countries, particularly among rural women.

Without access to legal information or legal aid, women may stay in abusive relationships or fail to apply for protection orders or maintenance for their children. A study in the Eastern Caribbean found that applicants and respondents in domestic violence matters were generally under-represented by lawyers, who did not consider such cases financially viable. A lack of legal assistance has a marked effect on success in court, and the personal and financial consequences for women can be far-reaching.

There is a need for legal aid and advisory services. Government-funded specialist women's legal services could play an important role in providing advice, information and referrals. They could also help overcome the attitudinal barriers that women confront in the legal system, and help courts dominated by male judges and lawyers to understand female perspectives. National women's organisations could be instrumental in the systematic dissemination of information to women about their rights.

### **Human and financial resources**

Government budgetary allocations for programmes addressing gender-based violence are limited. There are serious gaps in service provision, particularly for the victims of rape and other sexual violence, and services are not widespread enough to cover rural communities. Those services that do exist are handicapped by chronic shortages of human and financial resources.

Governments have largely depended on women's groups and other NGOs for the provision of services and programmes, yet

NGOs in many countries do not receive financial support from governments. They are often donor dependent, which threatens the viability and sustainability of their programmes.

There is inadequate participation by women in the formulation of policies, strategies and activities designed to ensure their economic empowerment. Capacity and information to engage the political leadership, as well as support structures for women in power, are inadequate. In the absence of high-level political commitment they face difficulties developing policy frameworks and action plans, let alone co-ordinating with other key ministries.

It is important for gender-based violence to be seen as a national issue, not a 'women's issue'. The problem is not so much that the necessary resources do not exist but the manner in which they are allocated. Gender-responsive budgets provide an opportunity to examine the effects of government expenditure and revenue policies on women and men. They can also reveal the gaps between policy and budget.

### **Traditional norms, beliefs, practices and attitudes**

In a statement to the 2001 session of the UN Commission on Human Rights, the Asian Legal Resource Centre noted that progress to stop violence against women in Asian countries was seriously hampered by governments' failure to recognise that cultural values and traditional patterns had not changed. This problem is not limited to the Asian region but is widespread.

Such customs and traditions may lead to a high level of acceptance of and justification for gender-based violence, particularly that occurring in the home. Women as well as men often perpetuate stereotypical gender roles and adhere to a belief in women's inferiority. Practices such as early marriage and FGM that attempt to control women's sexuality may continue even if formally legislated against. Judges in many countries in sub-Saharan Africa continue to apply discriminatory customary laws with regard to women's inheritance or ownership of property despite law reforms that give women equal rights. Traditional systems of conflict reconciliation, such as *bulubulu* in Fiji Islands, may be used to

protect the honour of perpetrators of crimes rather than to bring justice for female victims.

States parties to CEDAW are obliged to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices" based on ideas that one sex is superior or inferior to the other or on stereotyped gender roles (article 5). One important entry-point is education about gender equality from an early age. Another is community-based work and advocacy to influence attitudes and customs. A workshop in Southern Africa, for example, identified elders – as traditional advisors or marriage counselors – as a special target for community-based education programmes to prevent the perpetuation of gender-based violence. NGOs in Kenya have successfully introduced alternative rituals to FGM to celebrate the passage of girls into womanhood. They have also involved men and boys as advocates for change.

### **Inadequate data**

A major obstacle in the search for solutions to violence against women has been the lack of reliable data on the root causes, magnitude and consequences of the problem. Countries will not be able to eliminate gender-based violence until they identify the true incidence and causes of types of violence that are most prevalent in their own society. It is currently difficult to compare data between countries because statistics are not collected in a standardised way. Countries may have looked at different populations, and abusive acts are differently defined and/or are considered crimes in some countries but not others. Police records may include gender-based violence under a general heading such as assault, making it difficult to extrapolate the number of incidents involving women. In addition, sexual crimes tend to be under-reported, making it hard to come up with accurate figures. While women's groups may be able to collect more data, UNIFEM points out that few of them have the means to provide the level of statistical evidence that is needed to build a valid record.

### **Conclusion**

Despite legislative, administrative, judicial, educational and other efforts by governments, regional and inter-governmental agencies, and non-governmental and civil society organisa-

tions to address gender-based violence, it remains endemic throughout the Commonwealth and other parts of the world. Clearly a different approach is needed to tackle this cross-cutting and complex phenomenon on all fronts.

The Commonwealth Integrated Approach to Eliminating Gender-based Violence was developed as a guide to government planning and action at the national level, and also involves collaboration with NGOs and civil society. It includes enactment of laws, co-ordination of key government ministries and the setting up of government systems. An integrated approach is intended to respond to the needs of all, while ensuring that those of the victim – whether to trained medical attention, counselling or legal recourse – are paramount. It enables different stakeholders to work in a co-ordinated manner to understand the problem, develop strategies to address it and take joint action at the local and national level. It promotes efficiency and adequacy of services and service delivery so that women are facilitated at all levels through a variety of organisational networks. The resource base is increased and the expertise and experience of the organisations involved are maximised.

Stakeholders include victims and their families, communities, institutions such as the police, cultural and religious leaders, employees,

educational institutions and perpetrators. Within each category there are those interested in maintaining the status quo and those who wish to change it. Often, agencies and support systems work in isolation from each other, resulting in duplication and fewer achievements as well as wasting limited resources. The criminal justice system is generally punitive rather than preventative, and while women need the protection of the law, “the limitations of a predominant reliance on the legal system to eradicate violence against women has been pointed out repeatedly”<sup>2</sup>. Gender-based violence is not a ‘women’s issue’. It is a human rights violation as well as “an obstacle to the achievement of the objectives of equality, development and peace”<sup>3</sup>. Addressing it within a holistic framework can change the societal values, attitudes and behaviours that condone or encourage it, and eventually bring about its elimination.

#### Endnotes

- 1 Chinkin, Christine (2000) *Gender Mainstreaming in the Legal and Constitutional Sector*. London: Commonwealth Secretariat, p 60.
- 2 Clarke, Roberta (1998). *Violence Against Women in the Caribbean: State and Non-State Responses*. New York: UNIFEM.
- 3 United Nations (1993). Declaration on the Elimination of Violence against Women, G.A. res. 48/104, 48 UN GAOR Supp. (No. 49) at 217, UN Doc. A/48/49.

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# THE END OF THE LAW LORDS?

by

David McClean

*The new Editor of the Journal, reports on the major and controversial proposals for the reform of the highest courts and judicial offices in Britain*

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On Monday 12 June 2003, I attended a meeting of 'Pension', the governing body of Gray's Inn. The Health Secretary had unexpectedly resigned from the Government, precipitating a 're-shuffle' of Cabinet portfolios. As we assembled for our meeting, we heard that the Lord Chancellor, Lord Irvine of Lairg, was to lose office. There was a certain amount of teasing of the senior judges present; had any of them been asked to take over? As the meeting broke up, there was a much greater surprise: the Prime Minister had announced the abolition of the office of Lord Chancellor, an office which had been in existence for well over a thousand years.

Of course, not even a Prime Minister could make such a change by way of a press release from Downing Street. The initial announcement said that the first holder of the new office of Secretary of State for Constitutional Affairs would be Lord Falconer of Thoroton, who would 'operate as a conventional Cabinet Minister' but who, for the period of transition, would 'exercise all the functions of Lord Chancellor as necessary'. Once officials had recovered from the immediate shock, they made sure that Lord Falconer was duly installed as Lord Chancellor and, as the formal language has it, was given custody of the Great Seal.

A Consultation Paper issued in September 2003 by the new Department of Constitutional Affairs on the new arrangements for the office of Lord Chancellor contains a convenient reminder of the history of the office. As secretary to the medieval Kings of England, the Chancellor was responsible for the supervision, preparation and dispatch of the King's letters, which entailed the use of the Sovereign's seal. As a leading member of the King's Council, the Lord Chancellor came to preside over Parliament, and in modern times sits as presiding officer or Speaker of the House of Lords (though with many fewer powers than his counterpart in the Commons).

As all lawyers know, the Chancellor came to exercise a judicial role in what became the Court of Chancery, creating the system of equity to temper the increasing rigidity of the common law.

The modern Lord Chancellor has retained titular presidency of the Chancery Division of the High Court, but his principal judicial activity has been in the appellate work of the House of Lords. This latter has greatly reduced owing to fears that his role in Cabinet and in presenting legislation made it improper for him to sit judicially. In the last half century the Lord Chancellor's Department has acquired functions akin to those found in most Ministries of Justice, with responsibilities for the administration of the higher courts, legal aid, oversight of some tribunals, electoral law and relations with the Church.

The scale of the constitutional reforms sketched out in the press release of June 2003 gradually became clearer through a series of Parliamentary questions, statements and debates. The details were revealed in the Constitutional Reform Bill introduced in the House of Lords in February 2004. It not only seeks to abolish the office of Lord Chancellor but also to create a Supreme Court of the United Kingdom, in place of the present system of Lords of Appeal in Ordinary operating as a committee of the House of Lords. It would create an institution known in many Commonwealth countries but not thus far in the United Kingdom, a Judicial Appointments Commission.

As Lord Chancellor, Lord Falconer has already refused to act as head of the judiciary. The procession into Westminster Abbey for the service which marks the start of the legal year was led instead by the Lord Chief Justice. The enhanced role for the Lord Chief Justice is one feature of the Bill which, having ended the office of Lord High Chancellor of Great Britain, would create a number of new (and rather unimaginatively named) offices. The

Lord Chief Justice also becomes President of the Courts of England and Wales, and president of a range of courts including the Court of Appeal (a function normally associated with the Master of the Rolls, who continues as Head of Civil Justice). He is also to be Head of Criminal Justice, though he may appoint some other person to assume that role. The President of the Family Division of the High Court becomes additionally Head of Family Justice. The new head of the Chancery Division (currently in practice the Vice-Chancellor) would be styled Chancellor of the High Court, and there would be a new post of President of the Queen's Bench Division.

There is no doubt that the present role of the Lord Chancellor, as a senior member of the Cabinet, a Great Officer of State outranking even the Prime Minister in formal protocol terms, as Speaker of the House of Lords, as a judge and head of the judiciary, is anomalous in terms of the doctrine of the separation of powers. Indeed, the office is always cited as proof that in the United Kingdom there is no strict doctrine of that sort. Many recognise a case for transferring some of the Lord Chancellor's functions to other office-holders, but a significant body of opinion greatly regrets the total abolition of the office.

In part this latter view draws strength from a sense of history: 'modernisation' need not overthrow traditions of great antiquity. But there are practical arguments as well. Some have argued that the presence of a senior lawyer, whose office commands respect, in the Cabinet does much for the Rule of Law, for he can argue against any tendency on the part of other Ministers to autocracy. Indeed, Lord Irvine was reported to have had several sharp disagreements with the present Home Secretary who has been very critical of judges whose decisions in judicial review cases have overruled his decisions. A future Secretary for Constitutional Affairs would not necessarily be a lawyer, and would probably sit in the Commons; some see this is a serious downgrading of the place of Law in the political world.

Certainly Lord Woolf, the Lord Chief Justice, speaking extra-judicially, took this line:

*'If the Constitutional Reform Bill becomes law in its present form, we cannot take the continued individual, or collective,*

*independence of the judiciary for granted. Fairly recent events cause me to still have real concerns for the future. The Government has made no secret of the fact that in the future the Secretary of State for Constitutional Affairs is likely to be a member of the Commons and could well be a non-lawyer. Particularly because of a perceived need for a joined-up approach to criminal justice, I am worried about the Department for Constitutional Affairs becoming a subsidiary of the Home Office or unable to compete with the dominance of the Home Office. The result could be the Home Office being in a position to dictate the agenda for the courts which would not accord with the need for independence . . . I hope my fears are unjustified, but it is worrying when changes are advocated without apparent appreciation of their significance'.<sup>1</sup>*

Baroness Kennedy of The Shaws QC spoke in a debate in the House of Lords of the various claims on the loyalty of a Lord Chancellor:

*'When someone becomes a Lord Chancellor, no doubt because of political connections, first and foremost they may feel themselves to be there for political reasons. ... Of course, what a Lord Chancellor learns in our constitution is a greater loyalty – a loyalty to the constitution. The weight of that loyalty is probably not there in the beginning. It comes as you feel the weight of the role; you are more than a member of the Cabinet, you are the guardian of the Great Seal, the protector of the judiciary, the protector of an independent legal profession, careful of access to justice and mindful of the special role that you play. Because of your life in the law, you know about those checks and balances. Because of your life in the law, you know why law matters. Because of your life in the law, you have come to understand that you cannot only consider the short term in policy-making when it comes to law'.<sup>2</sup>*

The Bill does contain an opening section headed 'Guarantee of continued judicial independence' and providing that 'Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the



continued independence of the judiciary'. In part this is a response to points similar to that made by the CMJA in its comments on the earlier consultation paper:

*'In many parts of the Commonwealth there have been the gravest threats to judicial independence notwithstanding constitutional arrangements made at independence, and subsequently, which were designed to protect that independence. There are many examples where those arrangements have proved of little value. Notwithstanding the present opaque constitutional position of the judges and the Lord Chancellor, judges in the constituent parts of the U.K are universally, and rightly, regarded as being independent. Successive generations of government officers, political leaders, and indeed judicial officers, have a duty to ensure that the principles of judicial independence are not lost. It is to be expected that the UK government will at all times formulate their plans to ensure that the spirit as well as the letter of judicial independence in the UK is fully protected from future threats, which may come from unexpected quarters.'*

The Bill's provision goes to the letter of judicial independence; anxieties about the spirit remain.

The most important change proposed in the structure of the courts is the creation of the Supreme Court of the United Kingdom. Oddly, the Court of Appeal and the High Court will continue to be 'the Supreme Court of England and Wales'. The new Supreme Court of the UK will have a President, a Deputy President and 10 other Justices. The first justices will be those holding office as Lords of Appeal in Ordinary when the new system is introduced, but there is a special procedure for the appointment of their successors. A Commission existing solely for this purpose would produce a list of between two and five names, and the Secretary of State, after prescribed consultations, would select one name which would then be transmitted by the Prime Minister to the Queen. It is difficult to see what reality this procedure has, as most vacancies in the highest court, given the need to include justices with differing judicial experience, will have only a handful of possible appointees; the Government's choice

will almost certainly not be circumscribed in any way by the new procedure. As the CMJA observed, 'In many parts of the Commonwealth appointments to the Supreme Court can be highly controversial. Any involvement by Ministers of the Crown in such appointments should be kept to the absolute minimum.'

The Bill specifies that the Supreme Court must sit with an uneven number of justices, at least three in all, of whom at least one must be a permanent justice as opposed to one on a panel of retired or other senior judges eligible to sit in a temporary capacity. 'Specially qualified advisers' may be invited to sit with the court.

There has been a good deal of concern about the cost of the new court, and especially that of a building worthy of it. The Latimer House Guidelines (and the footnotes to the Guidelines) emphasise the importance of proper funding for the courts. There is a real risk that, coupled with the requirement for the civil courts to be funded out of the receipts of court fees, a situation could be reached where resources are stretched so far that the effective and efficient administration of justice is threatened.

The Latimer House Guidelines state that 'Judicial appointments should be made on merit by a judicial services commission or by an appropriate officer of state acting on the advice of such a commission' and that 'the judicial services commission should be established by the constitution or by statute, with a majority of members drawn from the senior judiciary'. The Judicial Appointments Commission proposed in the Bill would have a chairman and 14 other members, of whom only 5 would be judicial members, with 2 from the legal profession, 6 lay members and 1 holder of office in a specialist tribunal. The Commission would replace the existing Commission on Judicial Appointments established by Order in Council on 2001 with limited powers: it has no role in selection but monitors and advises on procedures and examines complaints.

The Commission would be required to 'have regard to' any guidance issued by the Secretary of State for Constitutional Affairs, who would have power to reject any recommendation made by the Commission or a selection panel operating under its oversight, but who could

not appoint anyone not so recommended. The Bill provides that 'Selection must be on merit' but in the Bill as introduced the Secretary of State 'may by order specify considerations that are to be taken into account in assessing merit'. The latter idea was dropped before the Bill was even debated, after negotiations between the Government and the senior members of the judiciary.

Judicial opinion is divided on the case for a new Supreme Court. In a debate in the House of Lords on 12 February 2004, Lord Nicholls of Birkenhead, one of the Lords of Appeal, spoke against what he described as a proposal that, lest the Lord Lords' continuing membership of the House of Lords be misunderstood by anyone, they should all be taken away to a place of safety in their very own judicial ivory tower that will be purpose built or, at least, specially selected.<sup>3</sup> He judged that proposal unnecessary, because it would achieve nothing of real value. He recognised the argument that judges whose responsibility is to interpret and administer the law should also not be able to participate in making the law, but argued that there was no lack of transparency in the British practice. The general principles applied by the Law Lords in deciding whether to participate in the legislative business of the House were reported to the House by the senior Law Lord in June 2000. Lord Nicholls continued

*'Other countries order their affairs differently. We should not fear to be different. What we should fear is sacrificing on the altar of conformity a valuable feature of our constitutional heritage, which has worked so well and still does. I believe that the Law Lords will be better placed to continue to serve this country if they continue as they are.'*<sup>4</sup>

One of the Lords Spiritual (themselves an endangered species in the House of Lords), the Bishop of Worcester, had similar doubts:

*'I do not believe myself that it is a guarantee of the integrity of the judiciary that it should be sent up the road or perhaps it is down the river, to a building that is separate from this House. I do not believe that that guarantees any kind of independence. For the well-being of our society we require inter-action with integrity. The presence of the Law Lords in this House, whether they speak or*

*whether they are silent, is itself a statement about the integrity of our society at the highest level in the land. I believe that that is of the profoundest importance.'*<sup>5</sup>

On 15 March 2004, after a long debate the House of Lords gave the Bill a second reading but immediately, by 216 votes to 183, referred it to a Select Committee. This was a most unusual step to take on a major Government Bill, but there was a strong feeling that it needed much closer scrutiny than the usual procedures would guarantee. It was later agreed that the Select Committee would report by the end of June 2004 and that, were consideration of the Bill not complete by the end of the Parliamentary session, consideration could resume at the point reached; without that agreement, the end of the Session would kill the Bill.

So it remains to be seen what the eventual legislation will contain, though it seems likely that the main features of the Bill will survive. Some of the issues are essentially matters of British politics: the present Government seems anxious to reduce the power and influence of the House of Lords and that may well have played a part in the formulation of the proposals. Deeper issues concern the place of Law in the body politic: the continued existence of the office of Attorney-General cannot compensate for the loss of that of Lord Chancellor, a veritable embodiment of the Rule of Law in the innermost councils of the Kingdom.

From a wider Commonwealth perspective, the disappearance of 'the House of Lords' as a judicial body will remove a familiar landmark. The Law Lords have always formed one of the most respected courts in the common law world. Although the personnel will be the same, appearances and labels matter: a new Supreme Court of the United Kingdom would have to earn its own reputation, as the High Court of Australia and the Supreme Court of Canada have done.

## Endnotes

- 1 'The Rule of Law and a Change in the Constitution', the Squire Centenary Lecture, Cambridge University, 3 March 2004.
- 2 *Parliamentary Debates (Lords)*, 12 February 2004, col. 1280.
- 3 *Parliamentary Debates (Lords)*, 12 February 2004, col. 1227.
- 4 *Ibid.*, col. 1229.
- 5 *Parliamentary Debates (Lords)*, 8 March 2004, col. 1028.



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# JERSEY AND 1204 – THE DEVELOPMENT OF LEGISLATIVE AND JUDICIAL AUTONOMY

by  
Sir Philip Bailhache, Bailiff of Jersey

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## Introduction

During 2004, Jersey has been celebrating 800 years of autonomy. Jersey is not part of Great Britain, nor part of the United Kingdom, nor is it within the European Communities, nor the European Union. What is the nature of this autonomy and how did the Island acquire its peculiar constitutional status? The answer to these questions lies deep in the Island's constitutional history. One could say that the story begins in 911 AD, when Rollo the Dane,<sup>1</sup> swept across Northern Europe with any army of Norsemen and carved out for himself a Duchy which was called Normandy. Or one might take the year 933, when William Longsword, successor of Rollo, annexed the Channel Islands which became part of the Duchy. Or again, one might start in 1066 when William the Conqueror, Duke of Normandy, crossed the channel and defeated Harold at Hastings, and was crowned King on Christmas Day at Westminster.

Most historians would agree, however, that the constitutional history of the Channel Islands really begins in June 1204. In that month, King Philip Augustus of France secured the castle at Rouen and continental Normandy was lost to the English Crown. For nearly 600 years the Islands were destined to become outposts of the English and later the British Empire, heavily fortified and defended, lying in a hostile sea within fifteen miles of France.

## Early history

Why was it that the Islanders threw in their lot with the English King and remained steadfastly loyal to the Crown in the face of many and continuing adversities?<sup>2</sup> They spoke Norman-French, they traded with the Normans, used the same currency as the Normans, their extended families were in Normandy, and they were bound ecclesiastically to the diocese of Coutances. There are many answers to this perennial question. Some lie in the area of

macro-politics – in the influence of powerful courtiers holding office under the Crown, and tensions arising from the ownership of land in Normandy and in England. But other answers are to be found in the nature of the insular character. The King of England was also, in the eyes of Jersey people, the Duke of Normandy, to whom loyalty was naturally owed. King John prudently reinforced that natural loyalty by conferring a number of constitutional privileges upon the Islanders, including the privilege of being governed by the laws currently in force, that is to say the customary law of Normandy and certain local customs and rules. King John also declined to incorporate the Channel Islands into the realm of England, but established a separate administration under an official called the Warden who was directly accountable to the King. These decisions must have alleviated the catastrophe of defeat in that the Islanders, notwithstanding their severance from the mainland of Normandy, found some continuity of tradition and local existence.

Although the King originally appointed one warden for both Jersey and Guernsey, it was not long before the Islands were separately administered. It was clearly not possible for one man, the Warden, to carry out all the duties of government, i.e. military, administrative and judicial. It is clear that from the beginning he had subordinates and it is possible that by as early as 1235 there was a Bailiff for Jersey and another for Guernsey.<sup>3</sup> However, the most significant document issued by King John is thought to have come into existence shortly after 1204 and is today called the Constitutions of King John. By this document, the King ordered, *inter alia*, that the Islanders should elect their 12 best men ('*duodecim optimatos juratos*') to keep the pleas. These elected elders became known as jurats and, once elected, held office for life. Together with the Bailiff, they formed a court from which, during the 13th century, the Royal

Court emerged. Although in the early years following 1204 itinerant justices were sent from England, they had ceased to come to the Islands during the early part of the 14th century. By that time the Royal Court of Jersey had established its authority to hear and determine all cases, both criminal and civil, arising in the Island.<sup>4</sup> Initially the only limitation on the jurisdiction of the Royal Court was in relation to treason where authority was retained by the Court of the King's Bench. It is doubtful whether that reserved power any longer remains. By the middle of the 14th century, it is possible that the Bailiff was no longer a subordinate of the Warden, but was appointed directly by the King. He was certainly known as the King's Bailiff. At the same time, the accounts of the Receiver General show salaries paid to the King's Attorney and the King's Advocate, the officials known today as the Attorney General and Solicitor General respectively.

King John's decision, shortly after the loss of Normandy, that the Channel Islands should continue to be governed by their own customary laws, created the separate legal systems which exist today. Jersey and Guernsey have developed as separate Bailiwicks, each with its own system of law, and judicial and administrative structures. The existence of separate legal systems enabled the Islanders to claim that they should not be bound by Acts of the English parliament.

In the beginning, the Royal Court was therefore not only a law enforcing body, but also a law making body. Legislation took the form of a petition to the King by the Royal Court; if granted the petition was incorporated into a Royal order and sent down as an Order in Council for registration in the Royal Court.<sup>5</sup>

During the course of the 14th and 15th centuries a legislative assembly began to emerge. Before petitioning the King for any change in the law, the Royal Court adopted the practice of consulting with the representatives of the twelve parishes. The jurats would meet with the rectors and *connétables* (mayors) of the Parishes in order to ascertain the views of the people before petitioning the Crown. The three estates thus represented, the court, the clergy and the people, gave rise to the name *Les Etats de Jersey*, the States of Jersey, in imitation no doubt of the parliamentary

assembly of Normandy which was then known as *Les Etats de Normandie*. The minutes of the States of Jersey were first recorded in 1524 but were then intermingled with the records of the Royal Court. It was only in 1603, probably under the influence of Sir Walter Raleigh, the Governor, (by that time the title of the Warden had changed) that the minutes of the States were separately kept.

### The seventeenth century

Two anecdotes from the 17th century are worth recalling as illustrating the constitutional development of the Island. Although, as mentioned above, King John could have incorporated the Channel Islands into the realm of England in 1204, he chose not to do so and established separate administrations for the Islands. Since 1204 there has been only one attempt to coerce the Island into becoming an English county. That attempt was made during the protectorate of Oliver Cromwell whose logical and teutonic mind could see no merit in these separate administrations. In 1653 he issued an edict, written in English, commanding the Islanders to elect two representatives to sit in the House of Commons. The States of Jersey considered anxiously how best to reply to this order, for it was clearly undesirable to risk incurring the Protector's wrath.<sup>6</sup> Eventually the reply went back thanking the Protector for his communication, but regretting that Islanders could not understand it, for their language was French. By that time, Cromwell had more pressing matters in mind, and the proposal was not pursued. To this day, therefore, the people of Jersey have no parliamentary representation at Westminster.

The second anecdote concerns an acrimonious dispute between the Bailiff, Jean Herault, and the Governor, Sir John Peyton. The separation of military and civil power, which by that time had been achieved, had brought about a demarcation dispute. Ostensibly the dispute concerned the question of precedence; did the Bailiff or the Governor enjoy a superior position? Both Herault and Peyton were men, it seems, of uncompromising temperament and both asserted the primacy of their respective offices in the governance of Jersey. It was in raw terms a struggle for power between the Crown (in the sense of the English government) and the States, presided over by the Bailiff. The dispute eventually reached the

Privy Council and on 15th June 1618 an Order in Council issued in the following terms –

*PRECEDENCE OF BAILIFF AND GOVERNOR*

*It is ordered first that the Bailiff shall, in the Cohue and seat of justice and likewise in the Assembly of the States, take the seat of precedence as formerly, and that in all other places and Assemblies, the Governor take place and have precedence which is due unto him as Governor, without further question’.*

In effect, the Privy Council had reaffirmed the right of the Islanders to self-determination, both in terms of the administration of justice and in terms of domestic affairs. The Governor, who was commander in chief of His Majesty’s forces in the Island, retained responsibility for the defence of the Island and for relations between Jersey and the outside world.

### Later constitutional changes

In 1771 an attempt was made to codify several areas of law. The so-called Code of Laws for the Island was sent down by Order in Council of 28th March 1771. The Order rather doubtfully decreed that ‘all other political and written laws ... shall be from henceforward of no force and validity’. More importantly, however, it also decreed that the Royal Court would no longer have the power to legislate.<sup>7</sup> The work of separating judicial and legislative power, which was not to be completed for nearly two hundred years, had begun. From that time on, the only insular institution which had the power to enact legislation was the States Assembly. The States was still, however, composed of the three estates, twelve jurats, twelve rectors and twelve *connétables*, presided over by the Bailiff. The Lieutenant Governor and the law officers had the right to attend meetings of the States and to participate in debates.

During the 19th century there was, following the conclusion of the Napoleonic wars, a considerable increase in the population of the Island. By 1856 the word ‘deputy’ had entered the political vocabulary when a bill was passed making provision for the election of fourteen additional members of the States, three deputies for St Helier and one for each of the other parishes. In 1924 a bill was passed

authorising women to stand for election as deputies.

In 1940, the Island was invaded by German forces and subjected to five years of occupation. After the liberation, a distinguished Privy Council Committee was established, at the request of the States, to consider the constitutional arrangements then in force. In 1948 major reforms were enacted. The jurats and the rectors were removed from the States and were replaced by twelve senators and a greater number of deputies. Today there are fifty-three elected members of the States, *viz* twelve senators, twelve *connétables* and twenty-nine deputies. The *connétables* are the sole survivors of the original three estates. They are not elected to the States. They are elected as *connétables* by their parishioners and they sit in the States Assembly by virtue of their office. The law officers of the Crown remain members of the States with the right to speak, but not to vote. Traditionally they speak only to give legal advice or on matters relating to criminal justice or on issues of constitutional importance. The Dean of Jersey is also a member of the States *ex officio* with the right to speak but not to vote. The Bailiff remains the president of the States. He has, however, no political functions and exercises the office of speaker by enforcing the rules of debate, but not otherwise participating in the proceedings.<sup>8</sup>

### Changes to the machinery of government

Government of the Island is entrusted to a number of committees composed of a president and up to six other members. The Committees are supported by civil service departments in much the same way as ministers in the United Kingdom. The committee system has been found to be increasingly unwieldy and inefficient, and the States appointed a Review Panel under the chairmanship of Sir Cecil Clothier QC to enquire into the desirability of change. The Clothier Report, which was published in December 2000, recommended fundamental changes to the machinery of government. *Inter alia* it recommended the abolition of the committee system and the establishment of a ministerial system of government with political responsibility vested in a number of ministers headed by a Chief Minister. In September 2001 the States adopted those recommendations and directed one of its committees to bring forward

legislation to give effect to these changes. It is expected that the draft legislation will be debated early in 2005 and that the new system of government will come into force after the elections in November and December 2005. Great change is also in prospect for the civil service. The rather loose and informal co-operation between Departments will be replaced by a system in which each departmental head is directly accountable to the Chief Executive of the Council of Ministers. Furthermore, Departmental Heads will find themselves liable to examination by scrutiny panels composed of members not holding ministerial office.

It is thought that the new ministerial system will enable government business involving relations with the United Kingdom government and with the European Union to be dealt with more expeditiously and efficiently.

### **The constitutional relationship with the UK**

As mentioned above, it has long been established that the Island enjoys domestic autonomy. The UK is responsible for the Island's defence and for the Island's international relations. The constitutional relationship has not been defined in any written document, and may be said to contain a number of ambiguities and uncertainties. One of the classic uncertainties is whether, ultimately, the UK parliament at Westminster has the right to legislate for Jersey without the consent of the States, even in respect of domestic matters. The traditional view, which was expressed in the Kilbrandon report<sup>9</sup> in 1973, is that the answer is ultimately yes. The Kilbrandon report stated –

‘Our own conclusion therefore is that in the eyes of the courts, Parliament has a paramount power to legislate for the Islands in any circumstances, and we have proceeded on this assumption. This does not, of course, mean that Parliament should be any more ready than in the past to interfere in the Islands’ domestic affairs and any less mindful of the need to preserve their autonomy. On the contrary, in the changed international situation, greater vigilance may be needed. But if, exceptionally, circumstances should demand the application to the Islands without their consent of measures of a kind hitherto regarded as domestic, then Parliament would, in our view,

have the power to enact the necessary legislation.’<sup>10</sup>

Doubt has recently been cast on this traditional view by an eminent authority, Professor Jeffrey Jowell QC.<sup>11</sup> Jowell argues that this approach is heavily dated and reflects the attitudes and assumptions of a colonial and imperial age. He suggests that the relationship between the UK and Jersey should now be examined against a background of firmer democratic standards. ‘No legislation without representation’ embodies a fundamental tenet of the European Convention on Human Rights. To assert the power of the UK parliament to legislate for Jersey without the consent of the States is, in Jowell’s view, to deny democratic principle.

It is perhaps sufficient to conclude by stating that this interesting question has never been judicially determined. There have been disputes in the past, but they have all been compromised. One might perhaps express the hope that this method of dispute resolution will continue. Let us turn then to the current court system in the Bailiwick.

### **The Royal Court**

The Royal Court remains a collegiate court constituted by the Bailiff<sup>12</sup> and the twelve jurats. Until 1948 the different functions of the Bailiff and the jurats had not been defined. The constitutional reforms of that year also brought about a formal division of responsibility between the Bailiff and the jurats which had been recommended by Royal Commissioners many years before. Article 13 of the Royal Court (Jersey) Law 1948 provided that –

- (1) In all causes and matters, civil, criminal and mixed, the Bailiff shall be the sole judge of law and shall award the costs, if any.
- (2) In all causes and matters, civil, criminal and mixed other than criminal causes tried before the Criminal Assizes, in which causes the jury shall, as here-to-fore, find the verdict, the Jurats shall, subject to paragraph (2) of Article 13(B) of this Law, be the sole judges of fact and shall assess the damages, if any.’

Article 13(B)(2) allows the Bailiff to sit alone in certain circumstances where mixed issues of law and fact arise, but the issues are predominantly issues of law.

The Royal Court can be constituted either as the Inferior Number or as the Superior Number. The Inferior Number is constituted when the Bailiff sits with two jurats (unless it is a matter of law when he can sit alone). The Superior Number is constituted when the Bailiff sits with a minimum of five jurats. In practice, the court sits as an Inferior Number for most purposes. When exercising its criminal jurisdiction, however, the court cannot impose a sentence of more than four years imprisonment if it is constituted as an Inferior Number. If the Court is to impose a sentence of more than years, it must be constituted as a Superior Number with a larger number of jurats forming the court. The practical result is that a sentence of (say) ten years imprisonment for a serious drug trafficking offence will receive the consideration of at least six judges, ie the Bailiff and five jurats.<sup>13</sup>

The jurats are now elected by an Electoral College, composed of the jurats, all the members of the States and all the advocates and solicitors admitted to practise before the Royal Court. The College now numbers nearly three hundred persons. When a vacancy arises, any person may be nominated for election by a member of the College, provided that the person nominated has attained the age of forty and fulfils the five years' residence qualification. A jurat holds office until the age of seventy-two, but may be appointed by the Bailiff to act as a jurat for any further period, or in relation to any cause or matter unless the jurat has attained the age of seventy-five. The jurats are highly regarded in the Island and the office is held in great respect. Those currently holding the office of jurat have a diversity of professional qualifications, skills and experience which makes them a formidable body of judges. Apart from their judicial functions, the jurats act as prison visitors and perform other duties relating to the administration of justice.

The reader will have noted from the statutory reference cited above, that there is a jury system in Jersey. Juries are summoned to try cases where the defendant is charged with an offence at customary law. Most serious offences, eg murder, rape, burglary and grave and criminal assault are customary law offences. The *Loi (1864) sur la procédure criminelle* provides, however, that statutory offences should be tried by the Inferior

Number *sans enquête*, ie without a jury. The tribunal of fact for such trials is the two jurats sitting with the Bailiff. Formerly most statutory offences were of lesser significance, but some now carry heavy penalties up to life imprisonment. Examples are offences of trafficking in class A drugs and genocide. Notwithstanding the gravity of such offences, the defendant has no right to be tried by jury, but must stand trial before the two jurats.

### **The Magistrate's Court**

The Magistrate's Court, originally called the *Cour pour la répression des moindres délits* was constituted by a law of 1853. Its jurisdiction was at that time very limited, but has been progressively expanded. The maximum powers of the magistrate are now a fine of up to £5,000 and/or imprisonment for up to twelve months. The court is presided over by professionally qualified stipendiary magistrates, although the Bailiff has power to appoint advocates or solicitors to act as a relief magistrates on a part-time basis. Appeal lies from the Magistrate's Court to the Royal Court.

### **The Youth Court**

The Youth Court was established by the Criminal Justice (Young Offenders) (Jersey) Law 1994. It has jurisdiction to hear charges against persons under the age of eighteen except that a charge made jointly against a young person and an adult is heard before the Magistrate's Court. The Youth Court is constituted by the Magistrate sitting with two other members, one of whom must be a woman. Other members are persons from a panel appointed for the purpose by the Superior Number of the Royal Court. No person may remain a member of the Panel for more than ten years, nor beyond his or her sixtieth birthday. An appeal lies from a decision of the Youth Court to the Youth Appeal Court which is constituted by the Bailiff sitting with two members of the Panel who were not involved in the original decision.

### **The Court of Appeal**

Reference is occasionally, but erroneously, made to the Channel Islands' Court of Appeal. This Court did once exist, but its existence was short and inglorious. It was constituted by an Order in Council entitled the Court of Appeal (Channel Islands) Order 1949 which was regis-



tered in the Royal Courts of both Jersey and Guernsey, although curiously it seems not to have been intended to have the force of law in Jersey. There were apparently differences of opinion between the two Bailiwicks as to how the court would operate, and eventually it was agreed between the authorities of both Islands that there should be a separate court of appeal for each Bailiwick. The Channel Islands' Court of Appeal never sat, and the 1949 Order was revoked in May 1961.<sup>14</sup>

The Court of Appeal (Jersey) Law 1961 constituted the Jersey Court of Appeal, although it did not sit until 1964. The Bailiff and Deputy Bailiff are president and vice-president respectively *ex-officio* of the court, which is also composed of ordinary judges appointed by the Crown. The number of such ordinary judges varies between twelve and fifteen. The Court sits six times per annum to hear both civil and criminal appeals from decisions of the Royal Court. The ordinary judges are either distinguished members of the English, Scottish and Northern Irish Bars, many of whom go on to hold the highest judicial offices in the United Kingdom, or persons who have held high judicial office.

Appeal lies, with leave, from the Court of Appeal to the Judicial Committee of the Privy Council.

## Conclusion

The eight centuries which have elapsed since 1204 have witnessed the transformation of Jersey from a remote and relatively inaccessible Island in a backwater to a vibrant, economically viable and democratic small state committed to the rule of law. The institutions of the Royal Court, and later the States of Jersey, have evolved to serve the needs of a community which has earned its living in a variety of ways. Originally the Island depended on subsistence agriculture and fishing; later the production of cider became a major industry, then knitting<sup>15</sup>, shipbuilding<sup>16</sup> (perhaps a little privateering), tourism and more recently the provision of financial services. The bench of jurats, originally created to resolve straightforward disputes in the absence of professional judges from England, has evolved into a collegiate court, where legal and lay elements are combined to deliver an effective and highly accountable system of justice, particularly in the sphere of a criminal law. The German

occupation of 1940-1945, when the Channel Islanders were left entirely alone to cope with the stress and humiliation of invasion, helped to strengthen the already rugged and independent insular character. Since the constitutional reforms of 1948, the Channel Islands have developed relatively sophisticated legal and judicial systems, certainly in the context of small states. Law reports began in Jersey in 1950 and the Jersey Law Review was first published in 1997. The Jersey Legal Information Board, an organisation involving a partnership between different organs of the States of Jersey and the Island's judiciary, publishes a wide range of legal information online at [www.jerseylegalinfo.je](http://www.jerseylegalinfo.je). JLIB, which also acts as the research and development limb of the Royal Court, is also working to develop the use of IT in the judicial and legal systems<sup>17</sup>.

One thread runs unbroken down the centuries, and that is the loyalty of Jersey men and women to the Crown. That loyalty has not been without its price; but it has also yielded important rewards. The constitutional privileges conferred by King John, and renewed and supplemented by subsequent monarchs, have enabled the Islanders to enjoy an autonomy which has in turn engendered independence of spirit and prosperity. What the future holds in terms of the Island's constitutional relationships may be unclear. But one thing is certain. For so long as the descendants of King John sit on the throne which they inherited from William, Duke of Normandy, the loyal toast in Jersey will continue to be *La Reine, notre Duc* – the Queen, our Duke.<sup>18</sup>

## Endnotes

- 1 Rollo gave his name to a procedure, which still exists, called the *Clameur de Haro*, 'Haro' being a corruption of Rollo. By this procedure an aggrieved landowner whose property rights are being infringed can obtain an immediate injunction against the wrongdoer without the intervention of a judge. The landowner confronts the wrongdoer and, on bended knee and in the presence of at least one witness, recites the ancient appeal for justice: '*Haro, Haro, Haro, a l'aide mon Prince, on me fait tort*' (Rollo, my Prince, come to my aid; I am being wronged). The result of this appeal is to injunct the wrongdoer. The Attorney General is informed and convenes both parties before the Court. If the wrong is established, the wrongdoer may be fined and ordered to pay costs. If, however, it is established that the *Clameur* was wrongly raised, the person who raised it may



- himself be fined. See AG v Williams 1968 JJ 991 and AG v de Carteret 1987-88 JLR 626.
- 2 The fascinating period between 1200 and 1259, and the part played by the Channel Islands in the struggle between the Plantaganet empire of King John and the King of France, Philip Augustus, has been authoritatively examined in a recently published book *Jersey 1204 – the forging of an island community* by J A Everard and JC Holt, Thames and Hudson, 2004.
  - 3 For an account of the office of Bailiff see Bailhache, *The cry for constitutional reform – a perspective from the office of Bailiff* (1999) 3 JL Review 253. The article can be found at [www.jerseylegalinfo.je](http://www.jerseylegalinfo.je).
  - 4 This exclusive authority was definitively confirmed in a Charter of Elizabeth I of 27th June 1562 whereby it was ordered that no inhabitant might in future 'be cited apprehended or drawn into any lawsuit by any writs or process issued from any of our Courts ..... within our Kingdom of England.'
  - 5 The form of the original petition is retained in the customary preamble to every law adopted by the States – 'The States, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law:-'.
  - 6 The Royalist Bailiff, Sir George Carteret, had been removed from office by Cromwell in 1653 and replaced by one of the Protector's sympathisers, Michael Lemprière. On the restoration of King Charles II in 1660 Carteret was himself restored to office. For an account of Carteret's colourful career see Balleine, *All for the King*, Société Jersiaise, 1976.
  - 7 'His Majesty doth hereby order that no Laws or Ordinances whatsoever, which may be made provisionally or in view of being afterwards asserted to by His Majesty in Council, Shall be passed but by the whole Assembly of the States of the said Island'.
  - 8 See States of Jersey Law 1966.
  - 9 *Report of the Royal Commission on the constitution*, HMSO 1973, Cmnd 5460
  - 10 *Ibid* paragraph 1473
  - 11 Jowell, *The scope of Guernsey's autonomy – a brief rejoinder* (2001)5 JL Review 271
  - 12 The Royal Court may also be presided over by the Deputy Bailiff (a permanent judge also appointed by the Crown), a Lieutenant Bailiff (appointed by the Bailiff under customary law powers) or a Commissioner (appointed by the Bailiff pursuant to article 11 of the Royal Court (Jersey) Law 1948). References to 'Bailiff' in the text should henceforth be taken in context to include any such judge competent to preside over the Royal Court.
  - 13 Indeed the Court will also have the benefit of *conclusions*, that is the recommendation of the Attorney General or the Crown Advocate acting on his behalf, as to what sentence the Court should impose. In this respect the practice in Jersey follows the continental tradition. For a discussion of the duties of the Attorney General, and advocates acting on his behalf, see Bailhache, *Aide-mémoire to a Crown Advocate* (2001) 5 JL Review 278.
  - 14 See Sowden, *The origins of The Jersey Court of Appeal* (2000) 4 JL Review 61.
  - 15 The pullovers known as 'Jerseys' and 'Guernseys' originated from the economic activity which was at its height in the eighteenth century.
  - 16 Newfoundland in Canada was colonised by a number of Channel Island families, many of whom made fortunes from cod fishing. This activity led to a flourishing shipbuilding industry. In the later part of the eighteenth century about a third of the fish exported from Newfoundland was being carried in Jersey vessels. See Syvret and Stevens, *Balleinés History of Jersey*, Phillimore 1981, page 206 *et seq* and *A people of the sea*, edited by A G Jamieson, Methuen 1986.
  - 17 Susskind, *The Electronic Pillars of Justice* (2000) 4 JL Review 117
  - 18 For an account of the claims to the Duchy of Normandy after 1204 see Matthews, *Lé Rouai, nouot Duc* (1999) 3 JL Review 177.

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# JUDICIAL INDEPENDENCE AND JUDICIAL ACTIVISM AMIDST SOCIO-ECONOMIC CHALLENGES

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by

**Belinda Molamu**

*Senior Magistrate, South Africa*

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The gist of my paper will refer to the challenges for the South African Judiciary in giving effect to socio-economic rights enshrined in the Bill of Rights. I will also endeavour to put a case forward as to what our role as judicial officers should be? How do we maintain the balance between judicial independence and judicial activism in giving the judgments which address the socio-economic challenges and resonate within the hearts and minds of the people affected thereby. This mindset would, therefore, inform the way in which we interpret and ultimately apply the Bill of Rights and legislation giving effect to socio-economic rights in our courts. As judicial officers we need to remind ourselves that we are charged with making the ultimate decisions which affect the lives, freedoms, rights, duties and properties of people.

The United Nations Basic Principles on the Independence of the Judiciary state that the judiciary shall decide matters before them impartially, on the basis of the facts and the law, without any restrictions, pressures, threats or interference from any quarter. The principle of judicial independence entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

In line with the Constitution, Judicial Officers in South Africa take an oath that they shall uphold and protect the Constitution and the human rights entrenched in it. That they will administer justice to all persons without fear, favour or prejudice, in accordance with the Constitution. I believe, the same applies to most jurisdictions represented here.

How do Judicial officers in South Africa for example interpret the rights and the law they have to administer and uphold? The interpretation and adjudication of the law has changed dramatically since the inception of the new dispensation. A literal, textual approach to interpretation had been replaced by a contex-

tual, purposive approach. In the case of *S v Makwanyane*<sup>1</sup> it was stated that "...the Constitution makes it particularly imperative for courts to develop the entrenched fundamental rights in terms of a cohesive set of values ideal to an open and democratic society." These values, stated in section 1 of the South African Constitution<sup>2</sup>, include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism, non-sexism, supremacy of the Constitution and the rule of law.

It has often been stated that the alleviation of poverty and the social and economic transformation of the lives of the poor and marginalized masses in South Africa hinge, to a great extent, upon the realisation of socio-economic rights. This was reiterated by the Constitutional Court in the case of the *Government of RSA v Grootboom*<sup>3</sup>, where the Court held that the realisation of socio-economic rights is "...the key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential."

Not all constitutions, e.g. Australia, include socio-economic rights. The question can therefore be asked whether it is really necessary to have socio-economic rights entrenched in a Bill of Rights? In South Africa there has been a political tradition of support for social and economic rights in the national struggle for liberation. The struggle for political liberation was inextricably linked to a struggle for the material conditions of a dignified human existence. The history of land dispossessions and apartheid did not only deprive millions of Black people of the vote, it has also systematically deprived them of the basic social rights enjoyed by citizens in most modern democracies: access to land, housing, security of tenure, a decent education, equal access to medical care, social grants and benefits. One of the important rationales behind constitutional

rights is to protect the vulnerable, and there is no one so vulnerable as those who lack basic shelter, food, water and health-care.

Various arguments were heard against the inclusion of socio-economic rights in the South African Bill of Rights during the Constitutional Court's certification of the final Constitution. The objectors argued that the inclusion of socio-economic rights would result in the courts dictating to government how the budget should be allocated. They argued further that this would amount to a breach of the principle of the separation of powers. In *re Certification of the Constitution of South Africa*<sup>4</sup>, the Court held that, although the enforcement of socio-economic rights may result in orders with budgetary implications, the enforcement of civil and political rights may also result in orders which might affect the budget.

The difference between socio-economic rights and civil and political rights is often said to lie in the nature of the obligations they impose on the state. Socio-economic rights are considered to be imposing positive obligations upon the state, while civil and political rights impose negative obligations. In terms of section 7(2) of the South African Constitution, the state must respect, protect, promote and fulfil the rights in the Bill of Rights. This obligation on the state is with regard to all the rights in the Bill of Rights, including socio-economic rights.

The objectors to the inclusion of socio-economic rights into the Bill of Rights in the South African Constitution also challenged the justiciability of these rights. The Constitutional Court held that these rights were at least to some extent justiciable, and could at the very least be negatively protected from improper invasion.

One of the difficulties associated with the judicial enforcement of socio-economic rights under the constitutions of many countries is actually the fact that such rights are not directly entrenched in those constitutions. This leads to a debate as to whether or not these 'rights' are rights in the true sense. As socio-economic rights are clearly entrenched as justiciable rights in the South African Constitution, this debate does not arise in there. Being justiciable rights, however, does not necessarily make it easier to realise these rights. Judicial enforcement in itself, cannot, on its own, bring about changes in a society.

Courts would also be reluctant to interfere with decisions that are regarded as political in nature or that seek to dictate to government how to prioritise policies.

Courts can however play an important role by putting government to terms and requiring it to account for what it has done to achieve the progressive realisation of socio-economic rights. The court, in a watchdog role, can ensure that the state fulfils its obligations to respect, promote, protect and fulfil these rights. It is, however, necessary, that a constitutional ethos permeates all government decision-making processes and structures.

The decision by the Constitutional Court in *Minister of Health v Treatment Action Campaign*<sup>5</sup> is said to have dispelled any doubts about the value of socio-economic rights, and their ability to influence the policy of government. Commentators not only welcomed the practical outcome of the case, but also stated that the Court's order that the government must provide the antiretroviral drug, Nevirapine, to pregnant mothers and their children where this is medically required. This demonstrates that socio-economic rights can offer protections to the vulnerable against unreasonable government policies.

In this case, as in the decisions in the *Grootboom* case and *Soobramoney v Minister of Health, KwaZulu-Natal*<sup>6</sup>, the court held that it cannot expect of the state more than is achievable within available resources. In *Grootboom* the court further indicated that available resources only qualify the extent of the obligation in relation to the rate at which it is fulfilled as well as the reasonableness of the measures employed to achieve the results. In *Soobramoney* the court held that the failure of the state to provide renal dialysis facilities for all persons suffering from chronic renal failure, was not a breach of the right to health care. In *Grootboom*, where people were evicted from informal homes, the court held that the state has to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.

Constitutional challenges do not comprise the only route through which socio-economic rights can be enforced. One of the most important tools in the realisation of socio-economic rights is the right to administrative action that is lawful, reasonable and procedurally fair. The

right to administrative justice, which includes the right to written reasons, is also entrenched in the SA Constitution. Lawful, reasonable and procedurally fair decisions by those in authority are the basis of socio-economic rights. The right of courts to review the decisions, including the reasons for the decisions, of state in regard to administrative actions either affecting an individual, or the public, as a whole, or as a specific group or class, is one of the most important ways for people to actually enforce their socio-economic rights. It is through reviewing decisions such as those dealing with the granting of social benefits or housing, for example, that ordinary people can see justice done: in the words of the late South African Chief Justice Mohamed<sup>7</sup>, “*justice which is procedurally fair and seen to be fair in its execution and justice which is substantially fair in its impact on those affected by its operation.*”

Like Australia, a considerable number of constitutions do not include the right to administrative justice. However, administrative law, and the right of courts to review administrative actions, forms part of common law. In entrenching administrative justice as a constitutional right in the Bill of Rights, South Africa recognised the importance of this right, and has given credence to the importance of the role of the courts in reviewing administrative decisions by the state.

Another very important right that impacts on socio-economic rights is the right of access to information. Article 9 (1) of the African Charter on Human and Peoples’ Rights states that every individual shall have the right to receive information. In the South African Constitution the right of access to information includes the right to any information held by the state, as well as the right to information held by other persons, and a need to access the right has to be proved. By being able to access to information people are empowered with the knowledge to understand decisions, and to make informed decisions themselves, as well as being able to participate in for example, policy-making in an informed manner.

In order for people to be able to exercise and enforce their socio-economic rights they must also be able to have access to justice. People, who are the most vulnerable, are often the ones whose socio-economic rights are infringed. For example, people who might

encounter problems accessing state pensions, will, invariably not be in a position to afford litigation, towards the enforcement of their rights. This is where class actions can be of great assistance. As the judiciary, we should be activist in approach to ensure that our application of the rules does not result into a denial of justice or equity for the benefit of the indigent. The same approach should apply with regard to the making of cost orders.

Without wishing to delve too deeply into a few other aspects, I would also like to point out that the role of the Judiciary is overwhelmingly crucial in pushing back the frontiers of poverty. We have to deal sternly with corruption and white-collar crime in order to ensure both economic growth and poverty alleviation. In Africa we are inundated with “Get Rich” schemes that are targeting the poor, and these should not be allowed to flourish at the cost of the economic survival of our communities. Closely associated with this is the micro lending industry and the unregulated interest rates that go with them. The Judiciary should step in to ensure justice and equity in these cases. If we fail, all efforts by government to issue grants and stage feeding schemes will just feed into the aspirations of shrewd money lenders and criminals who run “get rich” schemes.

In conclusion, it is clear that it is possible to maintain a balance between judicial independence and judicial activism when giving judgments that address the socio-economic challenges of our countries. As judicial officers, we need to be careful not to tread over the line and usurp the functions of the executive. We must ensure that all rights, including socio-economic rights, are promoted, respected, fulfilled and protected, without fear, favour or prejudice. Our judicial activist role should conduce to the eventuality of access to justice for the benefit of all those who require it regardless of their economic means or standing.

## Endnotes

- 1 1995 (3) SA 391 (CC)
- 2 Act 108/1996
- 3 2001 (1) SA 46 (CC)
- 4 1996 (10) BCLR 1253 (CC)
- 5 2002 (5) SA 721 (CC)
- 6 1998 (1) SA 765 (CC)
- 7 Addressing the International Commission of Jurists in Cape Town, July 1998.

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# ACCESS TO JUSTICE FOR PEOPLE WITH PHYSICAL AND MENTAL DISABILITIES

by

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## EQUAL ACCESS TO JUSTICE

1. Our role as magistrates and judges is to dispense justice to those who appear before us. It surely follows that we must, by our conduct and procedures, ensure that there is equal access to justice for all manner of people. Have you ever thought about how your court appears to ordinary people? A survey of the civil courts in my country showed that we were seen as ‘unfriendly and inaccessible’ and ‘engender fear and anxiety’. If this is how the courts appear to the typical litigant, how much worse do they appear to those who start from a position of disadvantage? Is it fair and just that they always have to cope with the courts rather than the courts with them? Should we be considering a different approach?

### Discrimination

2. Discrimination is a potential obstacle to justice but may not be intentional. A judge may not even be aware that he is behaving in a discriminatory manner, because this includes:

- *unwitting prejudice* – allowing our prejudices to get in the way;
- *ignorance* – failing to appreciate where people are coming from;
- *thoughtlessness* – treating people in an insensitive way;
- *stereotyping* – assuming without question that because people meet particular criteria they behave in a particular way.

So we need to be assisted to recognise our prejudices and educated about the lifestyles and beliefs of other people, so that we do not display ignorance and thoughtlessness and avoid stereotyping.

### Judicial training

3. In England the training of judges is arranged by the *Judicial Studies Board*. It is

called ‘studies’ because it was not thought that judges should admit to needing training – the reality is otherwise. There is an *Equal Treatment Advisory Committee* which was previously the *Ethnic Minority Advisory Committee* but its remit now extends beyond issues of race to discrimination on account of gender, sexual orientation and disability. But we should not restrict our concerns to these categories because there are underlying issues of general application and I prefer to talk of *judgecraft* – or the art of being a fair and impartial judge – which also covers poverty, social exclusion and dealing fairly with unrepresented parties.

### Equal opportunity

4. We should be tackling the underlying problem rather than focusing on particular categories of person. It is not just a matter of *prejudice* and *discrimination*, although these remain problems that must be addressed especially in respect of ethnic minorities and sexual orientation – and now religion. If we treat everyone the same, some people will still be at a disadvantage, especially those with physical or mental disabilities. Everyone is entitled to a fair hearing and there must be effective two-way communication with every party, whatever the obstacle. So we are not talking about equal treatment but *equal opportunity*!

5. The starting point is to understand the perspective of unrepresented parties who are too often regarded as a problem for the courts rather than the persons for whom the justice system exists. It is, after all, the best case that should win, not the strongest litigant. Social exclusion should not extend to exclusion from justice in the courts. But the judge must remain fair and impartial and that means balancing the interests of the parties – not an easy task.

Compensating for the disadvantages of one party may be interpreted as favouring that party.

### Level playing field

6. The aim is to create that so called *level playing field*. To achieve this we must identify the special needs of those who because of impairments encounter a handicap in society but do not expect this to be re-inforced by the legal system. We now adopt a social model of disability, which sees the problem in the barriers constructed in society rather than in the physical or mental impairment of the individual (that was the former medical model). So to the wheelchair user the problem is that the court building has steps but no ramp and to the hearing impaired person the problem is that the court does not have the loop system. Try looking at this from the perspective of people with disabilities who are inevitably disadvantaged but do not expect unnecessary barriers to be put in their way. How do you bring, or defend, a claim if you could not contemplate attending or speaking up in a courtroom or if you could not understand what was going on?

## PEOPLE WITH DISABILITIES

### Who are these disabled people?

7. We are not talking about a special class of people. It could be your infirm parent, a mentally ill sister or physically disabled brother, a friend who has suffered brain damage in an accident or my own son who has severe learning disabilities. Any of us could suffer from a serious disability at some stage in our lives.

8. Disabilities come in many forms and may be due to a physical impairment, a mental impairment or a combination of the two (as in the case of infirm elderly people). Defective vision, hearing impairment, speech defects, limited concentration spans and the need for regular medication all affect the ability of an individual to participate in court proceedings unless compensated for by a considerate approach and the use of available aids. And that means the aids that could be available, not just those that happen to be available. But this alone is not sufficient. In our procedures we must ensure that the disability

does not amount to a handicap in the attainment of justice. Judges need to have adequate powers, and to know what these are and how and when to use them.

9. How we refer to people is important too. There are medical or legal terms but sadly these tends to become words of abuse - *lunatic, cretin, moron, idiot* and *imbecile* are all words that I picked up in the school playground. There is a constant search for new, neutral terms. We should not make comparisons with 'normal' or refer to '*the disabled*' or '*the handicapped*' as if they are a class of person. This is not just political correctness: it is also an attitude of mind. We should recognise the person rather than the disability. The main point is we should be wary about attaching labels to people and then using these to take away their rights.

### The social and legal climate

10. We now have a new social climate that favours *care in the community*. The needs of people with disabilities are assessed and should be met (that is the theory but lack of funding frustrates this objective). A consequence is that disabled people and their carers have become more visible in society and have greater expectations - we must cope with their needs. We also have a new legal climate that recognises the rights of the individual.

### Disability discrimination

11. Discrimination in any form is disapproved of and this has resulted in our *Disability Discrimination Act 1995*. Civil remedies are available for discrimination and a *Disability Rights Commission* is running test cases. It has been held that the court can make a declaration that there has been discrimination even where there is an attempt to buy off the claim with compensation. It is important to view these as distinct remedies because the claimant usually wants the acknowledgement that he has been wronged more than the money. The aim is to prevent other disabled people encountering similar treatment in the future.

12. Our courts are not excluded and if we do not modify our approach we could find ourselves in breach of this legislation. To the disabled individual it does not matter



whether the problem is physical access to the court building, understanding what is going on or actually being heard and understood by the judge. A failing in any of these areas would be seen as discrimination.

### *Human rights*

13. We also have the *Human Rights Act 1998* which incorporates the European Convention into our law. People with disabilities are proving to be among the first to benefit - their rights have been overlooked for too long. Now they must be interpreted and may be enforced in a way that does not involve discrimination. The Convention was intended to ensure that the violation of liberties perpetuated by the Nazis would not recur – people with disabilities were exterminated.
14. You will be familiar with the old phrase: ‘*Justice must not only be done but seen to be done*’. Perhaps the most significant impact of the Human Rights Act is that this must be seen not only by those working within the justice system but also those outside including people with disabilities. If from their perspective a hearing appears to have been unfair then it was unfair even if it complied with standard procedures. This is a fundamental concept under the *European Convention on Human Rights*.

### **Role of the law**

15. What is the role of the law in regard to disabled people in a civilised society? Basically people with disabilities are vulnerable to neglect, abuse and exploitation. The law must do three things for their benefit: regulate the support that is available from the state, provide protection and ensure empowerment.
16. The problem is that the support available is inadequate and there is a conflict between protection and empowerment because protection invariably involves taking away the personal autonomy that you seek to preserve. These problems are frequently encountered in our courts when dealing with vulnerable adults – in general children are better provided for and a paternalistic approach is more acceptable. But I do not suggest that we treat disabled people like children.

### **Support for disabled people in court**

17. What assistance can we give to physically or mentally disabled litigants or witnesses to ensure that a trial is fair to all concerned? It is essential that our procedures ensure that any special needs are identified in advance because it may be too late to do anything about this at the hearing. Where wheelchair access is required the case should be moved to a suitable court and if someone is hard of hearing suitable aids or an interpreter should be available.
18. The following challenges may present themselves to magistrates or judges:
- should you allow a *communicator* or *intermediary* to assist with other communication problems?
  - is it appropriate to arrange shorter hearings or allow more breaks which means longer time estimates? There may be a need to attend a toilet, take medication or otherwise recover concentration;
  - where do you position people using wheelchairs in the courtroom;
  - should a party without a lawyer be allowed a friend to guide him at the hearing?
  - should you go further and allow a *lay representative* to act as advocate? A suitable person may be of considerable assistance but we must be wary of those who are pursuing a separate agenda. We are back to the balance between protection and empowerment but we must act in the best interests of this disadvantaged party;
  - should you allow the evidence of a witness who is unable to attend court to be taken in advance of the hearing or by video-link?
  - what if a party is too infirm to attend the hearing? Should you take the trial to such person, for example in a residential care home or mental hospital? As judges we work with our minds and the props that we find in the courtroom are not essential for the fair disposal of civil and family disputes. Again a video link can assist where an infirm party cannot travel far. The President of our Family Division adopted both these procedures in the

recent ‘right to die’ case when she attended at the hospital and then continued by video-link;

- on what basis should you decide that a party is not capable of bringing their own proceedings?

## MENTAL DISABILITY

19. It is essential to recognise the distinction between those who are *mentally ill* and those who have *learning disabilities* (previously referred to as *mental handicap*). The former may benefit from medical treatment whereas the latter need social training and support. Cutting across these categories, we must also identify those who are mentally incapable of managing their own affairs – we call them ‘patients’.

20. Most legal systems fail to address mental incapacity. It is necessary to have legal procedures for decisions to be taken on behalf of those who cannot make their own decisions. We have the Court of Protection, and I am a part-time judge of that Court, but its jurisdiction only extends to financial affairs. The result is often that ‘he who controls the purse controls the person’ but this is often inappropriate and does not help to resolve disputes in families as to the care or welfare of an infirm or disabled member. Situations also arise where it is not clear what may be lawfully done and the courts should be able to provide the answer.

21. In England & Wales we continue to wait for the Government to implement the comprehensive proposals of our *Law Commission* which would extend the jurisdiction of the Court of Protection to social welfare and health care decisions and make the procedures more accessible. Individuals would also be able to anticipate lack of capacity by appointing continuing attorneys to make their decisions for them. Scotland has already moved forward with legislation. To fill the vacuum the House of Lords has held in high profile decisions concerning adult sterilisation and withdrawing life preserving medical treatment that the High Court has power to make declarations as to the best interests of the individual. What a nonsense that we have to resort to this device because no-one, not even a senior judge, has power to

make decisions on behalf of an incapacitated adult! And our High Court is hardly accessible for everyday decisions and disputes. How is it in your jurisdiction? Are you awaiting law reform or have the problems not been recognised yet?

## Assessment of capacity

22. In the past decade we have become much more sophisticated in assessing capacity and clear principles have emerged:

- capacity is not an ‘all or nothing’ concept – a person may be capable of making one decision but not another (for example, getting married is quite different from making a Will);
- capacity depends on understanding and the ability to make and communicate a choice rather than status or the outcome of decisions, so a person does not lack capacity just because they:
  - are ‘learning disabled’ or live in a residential care home or even a mental hospital. This is where labels become so dangerous – if you categorise someone as ‘learning disabled’ you are in danger of denying them capacity without making a proper assessment; and
  - make decisions that others would regard as foolish – we are all entitled to do that! But constantly making illogical decisions may cause capacity to be questioned and the appropriate test should then be applied.
- in the first instance the person who needs to know assesses capacity. This happens all the time: the parent for a disabled child, a son or daughter for an infirm parent, a doctor for a patient and the carer for a person cared for;
- capacity should be assessed in the most suitable environment and at best time for the individual. (If considering whether a decision was validly made the test is applied when the alleged decision was actually made).
- in case of dispute capacity is a question of fact for the court to decide on the basis of all the evidence:
  - there is a presumption of capacity with the onus of proof resting with the person who alleges lack of capacity;

- the court decides on the balance of probabilities – not beyond all reasonable doubt; and
- a doctor's view is sought as expert evidence but will only be persuasive if based on relevant information and the appropriate test of capacity.

23. There is a significant human rights dimension in these situations because an outcome that the individual lacks the capacity to make his own decisions has the effect of depriving that individual of the control of his own life.

### **Making decisions**

24. On what basis do we make decisions for those who lack capacity? We should not imagine that we always know what is best and them from the decision-making process. They (to the extent possible) and their relatives and carers – the persons who know them best - should be allowed to par-

ticipate in the decision making process. Decisions should be made in the best interests of the individual which is a different concept from what the decision-maker thinks is best – which may mean what is best for him or her. Conflicts of interest can and do arise in families.

25. It might be thought that the absence of legal procedures for decisions to be taken on behalf on mentally incapacitated adults is the worst form of discrimination against people with disabilities.

### **CONCLUSION**

26. We should never allow ourselves to forget that:

**The person who cannot cope with the facilities and procedures of the court is as entitled to justice as those who know how to use the legal system to their own advantage.**

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