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**COMMONWEALTH
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CONTENTS

EDITORIAL		2
PROFILE	His Worship Dan Ogo	3
<i>Nazhat Shameem</i>	Women and the Criminal Justice System	4
<i>Collected papers</i>	Judicial Integrity and Judicial Corruption in the Commonwealth	8
<i>David Carruthers</i>	Restorative Justice in New Zealand	14
<i>Tim Workman</i>	The Trials and Tribulations of Summary Justice	21
<i>Vincent Lunabek</i>	Adjudication of Customary Law in the Pacific	25
LAW REPORT		36

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Vol 15 No 4 December 2004

EDITORIAL

One of the strengths of the Commonwealth association is the close co-operation between the Commonwealth Secretariat and its Divisions and ministerial meetings on the one hand and the partner bodies such as the CMJA on the other. This was evidenced recently at two meetings in London, first of Senior Officials of Commonwealth Law Ministries and then on 'Ministers' and Attorneys General from Small Commonwealth Jurisdictions. The CMJA was represented at both meetings and its assistance included the preparation of a paper and of a written and oral report on recent activities.

There is a special quality to such gatherings. Because so much is shared, in terms of legal and political traditions and understandings, the sharp differences – notably of course in the level of available resources – can be discussed freely and without embarrassment. Some of these differences are in technological capacity; others are matters of human resources, for example legislative drafters who are notoriously difficult to find and to retain. Both can have an impact on the work of judges and magistrates: technology (at least when it works) eases the management of cases and the work of the courts generally; poorly drafted statutes add to the burdens on judges.

There was a sharp debate on the Small Jurisdictions meeting about human rights and the judicial role in their identification and enforcement. As the published Communiqué records, 'Ministers' emphasised their commitment to the protection of fundamental human rights, 'universal legal guarantees protecting all individuals and groups, simply by virtue of being human, against actions and omissions that interfere with fundamental freedoms and human dignity'. Their discussion reflected strongly-held concerns over some aspects of current human rights rhetoric. There was

anxiety in particular over the assertion of new human rights which emerged not from considered action by all states but from organisations with no democratic mandate. Although the international conventions on social and economic rights accepted that progressive realisation of those rights must take account of the available resources, there was concern that ideals and aspirations could be too readily translated into justiciable guarantees requiring sovereign states to commit themselves to particular patterns of expenditure.

'Ministers' discussed the role of human rights courts in the interpretation of the scope of human rights. They recognised that State power had to be subjected to scrutiny as part of the system of checks and balances between the branches of government, but were concerned at the undue global influence of some regional human rights courts, as they reflected an activist approach to the interpretation of treaty obligations and were not subject to appeal to 'any global body'.

It is good to have this debate in the public domain: it goes to the heart of one of the most sensitive aspects of the work of the higher courts.

There was no disagreement in the London meetings on the importance of judicial integrity and, alas, the need to be alert to the threat of judicial corruption. It was on this topic that the CMJA made its major contribution, and part of this issue of the *Journal* pulls together a number of papers addressing Commonwealth experience.

Articles in this issue include, as usual, material from meetings and conferences, either of the CMJA or in which the CMJA has participated, including the recent and well-attended conference in Jersey.

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.

PROFILE

His Worship Eje Daniel Ogo, Esq
Magistrate, Nigeria

His Worship Dan Ogo has been Ag.Chief Magistrate of the High Court of Justice in Markurdi, Benue State, Nigeria since 1995.

His initial working years were spent in the education system in Nigeria. He was an Instructor at the Federal Girls School. During his time as lecturer for the Advanced Teachers' College (1983-1986), he received a commendation by the Ahmadu Bello University, Zaira for his standard of lecturing. Then he became an Education Officer in Makurdi, moving on to become Senior Education Officer in 1987, a post he held until 1990.

He gained his LLB with Honours in 1989 and then became a barrister at law qualifying from the Nigeria Law School in 1991. Soon after qualifying as a barrister became a magistrate in Makurdi. He completed his Masters in Public Administration in 2003 from the University of Benue State.

He was the Secretary General of the Magistrates' Association of Nigeria from 1994-1999 and became National President of the Association, a post he held until recently this year (2004). He is a member of the Red Cross Society of Nigeria and is Patron of the Boys Brigade of Nigeria and State Patron of the Boys Brigade in Benue State.

In 2000, His Worship Dan Ogo was elected Council Member of the CMJA. As all Council Members and Trustees of the CMJA know this is an onerous responsibility. Since his election in 2000 and especially since Nigeria regained its democracy, he has worked tirelessly to increase the membership of the CMJA in Nigeria to such an extent that Nigeria now boasts the second largest membership after England and Wales. He represented the CMJA at the Commonwealth Heads of Government Meeting (CHOGM) held in Abuja in December 2003, an important role bearing in mind that it was at this meeting that the Commonwealth Principles on the Accountability of and Relationship Between



the Three Branches of Government (based on the Latimer House Guidelines) were endorsed by Heads of Government.

His diligence and dedication was put to the test during the CHOGM when he was required to assist in organising a joint CLA/CMJA evening meeting at the Supreme Court which had been kindly agreed to by the Chief Justice of Nigeria. He also assisted the Secretary General of the CMJA in promoting the aims of the Association tirelessly throughout the week to judicial officers and members of the public (through the Nigerian Television Network). The CLA President, Colin Nicholls QC, an artist in his spare time, has now immortalised His Worship Dan Ogo, Esq in an oil painting (see picture) which was exhibited at the Royal Institute of Oil Painters from 27 October -7 November 2004.

His Worship Dan Ogo is married to Gladys, and has four children (three boys and one girl).

WOMEN AND THE CRIMINAL JUSTICE SYSTEM

by
Justice Nazhat Shameen,
Fiji

A Paper presented at the Workshop on Gender and Human Rights Commonwealth Secretariat, Nadi, Fiji held on 28/29 May 2004

It has always been a source of conjecture and comment that women are so sparsely represented in criminal offending figures globally. In contrast, they are over-represented in victim statistics. And, until fairly recently, they were almost invisible in law enforcement and criminal justice agencies, as officials of the criminal justice system. This paper discusses some of the issues which have traditionally been seen as explaining these discrepancies. In particular I will discuss some of my own experiences with women who have interacted with our justice system.

Women as Offenders

For many years, male crime was explained in terms of human biology. Cesare Lombroso (the Female Offender 1895) for instance had a theory that one was born with criminal tendencies (determined by the shape of one's head and one's hormones) and that criminal behaviour was inevitable if a person had those physical characteristics. That theory very soon lost its popularity, particularly when it became obvious that people with normally-shaped heads were also offending. The theory became replaced by the socially deterministic theory, that one's social background and family upbringing determined criminal behaviour. This second theory has also been much criticised, because of the number of crimes committed by the rich and powerful, many of which often escape detection. However, for male crime, human biology as an explanation became discredited over a hundred years ago.

Yet for female crime, human biology continues to be part of our law as a component of the criminal offence. Pre-menstrual syndrome as mitigation for instance became very popular for a period in Canada and the United Kingdom, and the offence of infanticide, which

is the only offence committed exclusively by women is based on the belief that women kill their babies because of mental illness. Fiji's definition of infanticide was inherited from the English definition. It reads:

Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder, she shall be guilty of felony, to wit, infanticide, and may for such offence be dealt with and punished as if she had been guilty of manslaughter of the child.

This definition of infanticide is problematic for several reasons. First, it requires proof that as a result of post-natal depression, the balance of the mind was disturbed. Second, it has a "cut-off" point of twelve months after which the offender must be charged with either murder or manslaughter. Third, medical studies of post-partum depression show that environmental stress is a major factor in understanding the offence of infanticide.

Smith & Hogan (Criminal Law) state that mental illness is no longer a significant cause of infanticide. In 1975 the Butler Committee in the United Kingdom found that the definition of infanticide under the **Infanticide Act 1938** was defective in that it did not apply to the killing of older children. It recommended that the gender neutral defence of diminished responsibility would in practice cover all cases of infanticide without requiring the court to stretch the meaning of the section to cover environmental and social stress. It recommended the abolition of the offence. However

the Criminal Law Revision Committee retained the offence in the U.K. No attempts have been made in Fiji to introduce the defence of diminished responsibility.

The law on infanticide is an example, of the tendency of the justice system to medicalise female crime, and to explain female crime by the ever-present unchanging and all-encompassing female hormones. It is this attitude which leads to sexual stereotyping of women generally in society. If a woman cannot control her hormones and her behaviour, how will she become a judge? Or a prosecutor? Or a Prime Minister? It does not occur to those who perpetuate this type of thinking that not all women who have babies kill them and that not all women commit crimes during menstruation. Nor are all women criminals the same. There are no “typical” criminal women because people, irrespective of gender, commit crimes for different reasons. There is no theory that satisfactorily explains the small numbers of convicted women. However, the way the law treats women who do offend, simply feeds the myths which exist in society about women and female behaviour.

Women Victims

Women are more likely to be victims than offenders. However for those of us who have worked in the justice system, it is apparent that available figures of crimes against women are inaccurate. There is a dark figure of unreported crimes against women, the extent of which we will never know. Only a victim survey, or a self-report survey could give us a better picture of the numbers of women and girls who are offended against. Domestic violence is infamously under-reported. So are sexual offences especially against the girl-child. In Fiji the figures show that rape is on the increase. However we do not know if more women are being raped, or whether the media and organisations like the Women’s Crisis Centre and the Women’s Rights Movement which have worked towards greater consciousness about sexual offences, have led to greater reporting of rape.

Experience tells us however, that there are still tremendous pressures on the victim not to report crimes committed against her. Shame, fear of being blamed, ostracism, community reconciliation, lack of access to justice, lack of family support and fear of the justice system

are all factors which lead either to non-reporting or to the dropping of the complaint shortly after it is lodged.

For those brave women who take the system on to make a statement, attend identification parades and give evidence in court, the consequences are not encouraging. Fiji preserves the rule on corroboration. The court must direct itself that “it is dangerous to convict on the complainant’s evidence alone,” and “women who complain of sexual assault may lie for many reasons, out of fear or shame. Their evidence is not considered reliable without corroboration.”

The law of recent complaint is based on a belief that a woman who is raped is bound to make a fuss about it immediately and tell the first person she meets. In reality, we know this is nonsense. Yet in court, the failure to tell someone about the rape shortly afterwards is seen as something which weakens credibility. It is one of the few exceptions to the rule against the admissibility of previous consistent statements.

Cross-examination on “character” and previous sexual history is usually allowed, there being too fine a line between cross-examination as to credit and cross-examination as to credibility. The trial process itself often proves to be too traumatic to endure. If a case proceeds to conviction, despite the corroboration warning, then a light finally appears at the end of the tunnel. Fiji did, in the past, go through a period of suspended sentences for rape and sexual assault, but the judiciary now imposes more or less uniform lengths of sentences. The tariff for the rape of an adult is between 5 to 10 years imprisonment, and of a child, between 10 to 13 years.

However, the appellate process has further hurdles. So complicated is the law now on the mens rea for rape, on corroboration and on recent complaint, that errors of law in judgment and summing up are common. A resulting successful appeal will usually be followed by a re-trial, and a regurgitating of all the problems already encountered by the victim.

Judges, have on many occasions, recommended the abolition of the corroboration rule. The Court of Appeal said in **Daniel Azad Wali v. The State** Crim. App. AAU0053/99S:

We consider that time has come to examine the current law in Fiji on this subject. We first note that corroboration as a rule of law was abolished in New Zealand many years ago and more recently in England. We are also aware that recommendations were made to Fiji to the Fiji Law Reform Commission to abolish the law on corroboration and to replace it with a general judicial discretion to give whatever weight the Court thought it should be given to evidence which might be considered unreliable for various reasons. Unfortunately we do not know how far these recommendations have progressed.

I would go further than the Court of Appeal, and say that any statutory abolition of the rule should include a provision that a judge should not treat a witness as potentially unreliable if the only ground for such a finding is that she is a woman who complains of sexual assault.

As we all know, judges and magistrates are not always immune from sexual stereotyping in the interpretation of statute and the common law.

The rape trial does not give one an impression of a victim-friendly environment. Of course many would argue that it is not the role of the court to be anyone-friendly. However, how victims are treated particularly in a society where the reporting of sexual crimes is not easy, and where traditional pressures are brought to bear on the victim to drop her allegations, a hostile court environment coupled with hostile rules of evidence based on archaic myths about women and morality, is an indication as to the ability of a justice system to deliver justice.

Women as Criminal Justice Professionals

The jobs available in the criminal justice system are usually perceived as being “male” in character. A successful police officer is often seen as big, strong, aggressive, and pro-active. A woman is usually considered to be soft, indecisive, and gentle. We will pass over the number of indecisive and gentle men we know (and the aggressive females!) and consider the stereotypical view of a judge. That view would be that a judge is firm, patient, fair and honest. A prison officer is seen as a strong person who is able to deal with potentially violent situations.

For many years women were not encouraged to consider professions within the justice system. When I became a lawyer, everyone I knew (except my parents) wondered how I would cope with rape and murder trials, with the cut-and-thrust of adversarial life at the bar, with the violent crime I would encounter everyday. They wondered because prosecution was seen as a male domain, requiring “male” qualities for survival.

In reality there was very little violence, and certainly in the courtrooms of Suva, no cut-and-thrust atmosphere requiring great aggression on my part. In order to succeed as a lawyer, male or female, a person needed and needs, tenacity, preparation, courtesy and analytical skills. No accused person ever raised his/her voice to me. No male counsel showed me anything other than courtesy and respect. The image of a successful male lawyer requiring great physical strength and force, was a myth. And so it is for the police force and the prison service. We now know that problems are solved better with dialogue, mediation and patience. Women have never lacked these qualities. They have greatly enriched the criminal justice system by using these qualities to create a better criminal justice system, one which uses mediation and persuasion to get results. The justice system as a whole has greater respect for discussion, conferencing, mediation and arbitration than it has had in the past.

On the bench too, women have been extraordinarily effective. We now have two women judges and five women magistrates. Three out of five members of our National Judicial Education Committee are women, and are directly involved in making innovative changes to the way the judiciary operates. A woman magistrate has been working for some years to make the Juvenile Courts more child-friendly, and another woman magistrate has drafted and produced a bench book for all magistrates.

Out of our experiences of exclusion, attitudes based on sexual myths and stereotypes and of the continuous under-estimation of the female intellect, comes a greater sensitivity to issues experienced by the disadvantaged, the disabled and the belittled. Inevitably the result must be a different, better and more equal criminal justice system.

Conclusion

Women, whether they are defendants, victims or law enforcement professionals, are subjected to the same myths and beliefs about female behaviour. Women are so often portrayed as weak, driven by their hormones and biology, and irrational, that the justice system has been unable to exclude this image in the way it operates. However, greater sensitivity to the issues which affect women, and an awareness of the falsity of those myths has led to some changes in the justice system. These changes are more marked in other countries, but even in Fiji, the greater participation of women in the justice system and greater knowledge of the way the law affects women, have led to a transformation of how society sees criminal justice. I conclude with the findings of the Bangladesh High Court in *Al Amin & Others v. State* 51 DLR (1999) 154:

Victims of sex crimes have to undergo certain tribulations, beginning with the treatment by the police and continuing through a male dominated criminal justice system. More female police officers could be appointed to investigate offences of sexual assaults and female doctors should medically examine victims of rape. Rape cases should be tried in camera in order to protect the victim and safeguard privacy interests, and the court should ensure that cross-examination of the victim does not amount to harassment and cause humiliation. It would also be desirable, wherever available and possible, for cases of sexual assault on women to be tried by female judges.

The CMJA is interested in receiving any judgements or details on cases of judicial corruption which you feel other Commonwealth jurisdictions might be interested in knowing about.

Please let us know and do submit copies of any incidents so that we may compile the information for a project we are participating in with the Commonwealth Legal Education Association and Transparency International

JUDICIAL INTEGRITY AND JUDICIAL CORRUPTION IN THE COMMONWEALTH

A: Corruption in practice

*Part of an address by the Hon. Derek Schofield
Chief Justice of Gibraltar, at the CMJA
Conference in Jersey.*

I have been asked to give my views on the responsibility of the senior judges to the other members of the judiciary and I hope I shall be forgiven for concentrating on my experience in and knowledge of Kenya where I served as a Magistrate from 1974 to 1982 and thereafter as a High Court judge until 1987. I should add that what I have to say here about judicial responsibility I have already said in Nairobi when I addressed the Law Society there in February this year.

The Kenya judiciary has been in disarray. As a result of the new Government's avowed intention to stamp out corruption in every corner of society, 18 of the 25 High Court judges, 5 out of the 9 Court of Appeal judges and a large number of Magistrates have resigned or are under suspension and will be subjected to disciplinary procedures. Kenya is a country in which corruption was allowed to become endemic, and successive Chief Justices must take responsibility for the extent to which it became ingrained in the Judiciary.

When I first went to Kenya as a Magistrate in 1974 the Chief Justice of the day fervently believed that his role was to safeguard a nation which had only been independent for eleven years. He perceived his role as supporting the Government and if this involved ensuring the occasional case went a particular way, then that was the price to be paid for stability. Thus was created an environment where a corrupt Government could have its way in the courts. The scene was set: the Courts became compliant.

When President Moi came to power the level of corruption within the country gradually increased. There was a succession of Chief Justices, some of whom valiantly tried to keep the boat on an even keel, but some of whom allowed themselves to be completely beholden to the Government.

The Judicial Service Commission, responsible for the appointment or recommendation for appointment of judges and magistrates became a tool of the President and appointments were made on his instructions for tribal or political reasons. Those judges and magistrates so appointed had the President's protection. Government land was allocated to the favoured. The scene was set for those judges and magistrates to join in the general scheme of corruption pervading the country. If judges took the Government line, they not only received favours from the Government but they became immune to the consequences of corrupt practices.

Of course all this took place over a period of years. Not all judges were corrupt and it was the rare case in which the Government directly interfered. And of course a Chief Justice amenable to pressure would know to which judge to allocate a particular case so that most of his judges were immune from pressure. However there were occasions when an independent judge or magistrate had the file taken away from him and there was always the threat that expatriate judges who were on contract could have a renewal refused or a Kenyan judge or magistrate could be transferred to an unpopular or remote station. There was thus created a culture of fear within the Judiciary.

By 1986 the Kenya Judiciary had reached a situation where the Chief Justice of the day could openly ask me to make a decision in favour of the Head of CID because he, the Head of CID, had the President's protection. Very briefly it was an application for habeas corpus in which the police had to admit they had shot a person whilst in police custody and where they told the Court they had buried the body in an up-country cemetery without notifying his family. An order for exhumation and independent post mortem was fruitless because the police failed to locate the grave and an order that the respondent, the Head of CID, report on what had happened produced nonsense. Hence the application by the widow

for his committal. I do not know what order I would have made on that application because on failing to give the Chief Justice the assurances he sought the file was taken away from me. Of course I had no alternative but to resign from the Bench and leave Kenya.

The Head of CID survived, the Chief Justice survived, and the President survived and the Judiciary continued to deteriorate until President Moi resigned and was replaced by the present President who has declared a determination to root out corruption. A new Chief Justice with a similar determination has been appointed.

The point I make is that successive Chief Justices in Kenya should have maintained the independence of the Judiciary, stood up to the President and protected their judges. An independent and apolitical Chief Justice sets the tone for the rest of the Judiciary. A weak Chief Justice sends the wrong signal throughout the whole court system. Judges and magistrates are strengthened by the knowledge and confidence that their Chief Justice will stand up for them if they are pressurised.

A Chief Justice cannot always expect to have a comfortable relationship with the Executive. There may come a time when he has to let it be known that the rule of law requires him to differ from the Government. There is, from time to time, inevitably some friction between the Government and the Judiciary. It is not something which should be encouraged: neither is it something which needs to be avoided by the abandonment of principle. Such friction is often a sign that the relationship between the various arms of government is in a healthy state.

Having made the point that the Chief Justice has a special responsibility I should say that judges and magistrates cannot be excused for lack of partiality purely because the head of the Judiciary is weak or political. Each judge and magistrate in Kenya had taken an oath of office and had a moral obligation to resist and denounce any interference. Acquiescence in the light of blatant interference is unacceptable.

A Chief Justice has a special responsibility and should maintain a steely resolve. That resolve should be strong in the knowledge that an independent Judiciary is essential if the rule of law is to be maintained. And if the rule of law

is abandoned then the very fabric of society is torn apart. Kenya became living proof of that.

B: A Policy Agenda

A shortened version of a paper prepared on behalf of the CMJA by His Honour Keith Hollis and Dr Karen Brewer for the recent meeting of Senior Officials of Commonwealth Law Ministries, October 2004.

The importance of an independent and integrity led judiciary (and by this we mean judicial officers at all levels) in strengthening democratic standards and in fulfilling Commonwealth countries' commitment to Commonwealth fundamental values (including those recently agreed in Abuja as "The Commonwealth Principles (Latimer House) on the Three Branches of Government" cannot be understated.

However, in a number of Commonwealth countries there is a widespread perception that the legal system is corrupt. It does not necessarily follow that there is corruption amongst the judges and magistrates ("judicial officers"). The problem may well be in the legal profession or in the court administration. But the perception, rightly or wrongly, will include the judicial officers (i.e. the judges and magistrates).

There are particular problems in approaching allegations of corruption against judicial officers. Firstly the allegation may not in fact relate to the individual, but to a clerk or advocate claiming, perhaps wrongly, to be acting on his behalf; and secondly the allegation itself may be mischievous, designed to undermine the integrity of an honest public servant. The very making of the allegation neutralises the judicial officer and makes it impossible for him or her to preside over any relevant case, possibly bringing about the result sought by the corrupter.

The core of the problem lies on the one hand with the judicial officer's duty and need to be independent and for that independence to be wholeheartedly supported and respected by the other branches of government, and on the other with the need for corruption to be identified and firmly dealt with by due process at the earliest possible stage.

In June 2002 the Commonwealth Secretariat, with the CMJA, ran a Colloquium in Limassol Cyprus on this issue. Attendance at the

Colloquium comprised 33 judicial officers, including nine Chief Justices (or their equivalent) with all other ranks of judicial officer also represented. Twenty-four Commonwealth jurisdictions were represented ranging in size from Kiribati to Canada. The purpose of the Colloquium was “to identify issues relating to corruption of judicial officers and to devise strategies to assist judicial officers and governments in the identification and elimination of corruption having regard to the principle of the independence of the judiciary”.

The Colloquium discussed strategies, the respective roles of the judiciary themselves, of the Chief Justices, of government, and of oversight bodies. It considered issues specific to small jurisdictions and the quasi judicial role in some communities of traditional leaders. The Conclusions of the Colloquium were issued as an agreed document. Those conclusions in turn were debated and endorsed at a CMJA Conference in London in September 2002 and at a regional conference of East African Magistrates and Judges in Jinja, Uganda, in October 2002. They formed a centre point of discussion at a meeting of Commonwealth Chief Justices in Malawi in August 2003, and of the Statement issued from that Meeting. The Conclusions were also discussed during a session on fighting corruption held at the CMJA’s Triennial Conference in Malawi in August 2003.

The Limassol Conclusions identified a number of practical areas where steps could be taken to deal with the problem, and which could form the basis for future work by the Commonwealth Secretariat and the CMJA. They can be divided into areas where judicial officers can themselves help to raise standards; areas where other branches of government can assist; and areas where international agencies (such as the Commonwealth Secretariat and the CMJA) can assist.

Areas where judicial officers can themselves help to raise standards

The Limassol Colloquium revealed a reluctance amongst judicial officers of all ranks to see or discuss corruption as a problem that may affect them or their colleagues. Judicial officers need to be encouraged to create and participate in judicial associations not only in respect of their own rank but also between different ranks. Such associations should take responsibility for developing and promoting

codes of conduct as well as running courses on behalf of their members to ensure best practice. They should be responsible for specific judicial training on corruption issues. In particular systematic training should be available to newly appointed judges and magistrates with a view to giving them a degree of resistance to that first, perhaps minor, unsuspected trap of the corrupt approach. Commonwealth countries have the added advantage of sharing similar legal systems and despite the differences that exist, interaction with judicial officers of all ranks on a national, regional or international level is essential to help break down the tendency for judicial officers to be isolated, and to help guard against the self delusion that can arise in a weak person who is occupying a position of trust in society. In short, every opportunity should be taken to promote a greater degree of collegiality amongst the whole body of a country’s judiciary.

There should be a clear leadership role taken on by members of the senior judiciary, under the guidance of the Chief Justice, to help and support not only one another but also those serving in more junior courts.

Mentoring schemes should also be established to help avoid judicial officers, especially those newly appointed, becoming too isolated and to ensure that they have a colleague to turn to for advice and guidance at times when they are subject to an approach which may be equivocal.

Importantly, both funding and time should be allocated to enable judicial officers to participate fully in such activities, which should be seen as part of their judicial responsibilities, set out as such on their appointment.

Judicial officers should also be aware of their own role in the recruitment and disciplining of other judicial officers and be prepared to play their full part in ensuring that the highest quality of recruits are brought into this area of the public service and, when disciplinary issues arise, be prepared to participate in these.

Steps should be taken to promote transparency between judicial officers and court staff, these should include reviewing internal procedures to minimise the risk of the disappearance of files and the possibility of the unscrupulous court clerk taking advantage of confusion in practice and procedure.

Listing arrangements should be in place which firstly ensure that the selection of the trial judge is done on a completely random basis (and preferably at a late stage where this can be achieved) and also to avoid the need for judgements to be reserved for a lengthy period (an area that was particularly identified in Limassol as one which led to a judge being vulnerable to a corrupt approach).

Finally it is recommended that the senior judiciary provides regular published reports on the work of the courts.

Areas where other branches of government can assist

An independent, impartial, honest and competent judiciary is integral to upholding the law. Each branch of government must exercise responsibility and restraint in the exercise of its power within its own constitutional sphere so as not to encroach on the legitimate discharge of constitutional functions by other institutions.

With regard to the appointment of judicial officers, the involvement of the Executive is clearly defined and procedures should be in place to ensure that the highest quality of recruit is identified and appointed. Detailed arrangements are a matter for each jurisdiction in accordance with the constitution. In those jurisdictions in the Commonwealth where there is an established “career” judiciary perhaps commencing without experience in legal practice, then there should be a transparent and fair system of career development in place to ensure that progressive appointments are made on merit alone and can be seen to be so by their contemporaries, both in the judiciary and in other fields

Judicial independence and security of tenure is usually guaranteed for judges through the Constitution, however, it is also important for there to be security of tenure for magistrates and other junior judicial officers in order for them to fulfil their duties in accordance with the law, and in a responsible manner, without fear of sanction by the Executive.

Although it is acknowledged that a shortfall in anticipated national income might lead to budgetary constraints, it is impossible to overstate the importance of the courts being properly resourced and of the pay and conditions (including pension arrangements) of judicial officers being such as to provide them

with financial security. There should be decent pay promptly paid, which can give judicial officers of all ranks the confidence of being able to go into court knowing that they can feed and house themselves and their families. It has been a matter of the gravest concern that there are reports from some countries of delays in salary payments being made, especially amongst newly appointed and junior judicial officers.

There must be provision of good physical security for judicial officers and their families. This is especially the case where serious criminal cases are decided by a judge or magistrate sitting on his or her own deciding issues of guilt and innocence as well as sentence. In such cases the single judicial officer is especially vulnerable. The Executive have an important role to play in this respect.

Insofar as resources are needed to support the judiciary in the matters which are set out above (e.g. for the release from court duties for attendance on training courses etc, and the provision of full and accurate statistical information for reports) then those resources should be made available. Similarly adequate funding should be provided to ensure that court staff are properly trained and resourced, and the professionalism of court staff is promoted by a transparent and meritorious system of upgrading.

In the investigation and prosecution of corruption, whether within a country’s normal criminal procedures, or through specific anti-corruption programmes, there must be due process, with fair and transparent procedures following basic human rights principles for any accused.

Areas where international agencies (such as the Commonwealth Secretariat and CMJA) can assist

International associations of judicial officers, such as the CMJA, have an important role to play in helping promote the professionalism of judges and magistrates. They can perform this role through their conferences and through training programmes on relevant issues, which ensure that judicial officers from different jurisdictions mix and share experiences. This would help to promote the highest international standards and to demonstrate that the failure of the judiciary in one country can reflect on the judiciary in another. It helps the vulnerable understand that in a globalised world the

corruption of a judicial officer in one country taints judicial officers in other countries, not only by overall reputation, but by attitudes amongst shifting populations, by people who move from countries where corruption is the usual practice, or by companies who, doing business across international borders, stretch their probity according to their location.

It is submitted that the best way in which the CMJA and the Commonwealth Secretariat can continue to assist judiciaries on this issue is by the expansion of the training courses that have already been run, following the Limassol model. Judicial time and administrative resources have to be made available to make them work. Where appropriate they should provide court administrators with similar support.

There is also a role to be played in promoting the CMJA's Commonwealth-wide network of judicial officers, ensuring that judiciaries are aware of the difficulties in different countries and of the highest standards that should be followed. The increasing use of e-mail and international judicial websites also assists.

The importance of "ringfencing" expenditure on judicial resources from cuts in government expenditure which may be required as a condition of aid programmes was also identified as important in Limassol.

C: Building Integrity and Combating Corruption

The response of Senior Officials of Commonwealth Law Ministries was based on the above paper and an additional paper from the Commonwealth Secretariat, parts of which follow.

Judge Christopher Weeramantry, formerly of the International Court of Justice said in his keynote address at Limassol that "the problem of judicial corruption has grown in complexity because several new sources of attack upon judicial integrity have emerged. Former barriers protecting the judiciary have been weakened. The prestige the judiciary commanded at all levels of society is not as high in many jurisdictions as it once was, and the sources of possible corruption are becoming increasingly difficult to detect. This complexity of factors has rendered it more important than ever before that protections should be devised and strengthened both internally within the ranks of the judiciary

themselves and externally, protecting the judiciary from attack from extraneous sources".

The protections of which the learned judge spoke are not protections that shield judicial officers from scrutiny and encourage corruption and the non-observance of judicial ethics. The protections refer to the need for mechanisms at all levels of the administration of justice to be put in place in order to deal with corruption. Countries with the co-operation of the international community must pull together to fight corruption, be it in the judiciary or in other sectors of government.

Commonwealth Action

In 1998, the Commonwealth Secretary-General commissioned a Group of eminent Experts to study the root causes of corruption and make recommendations for Commonwealth action. The report of that Group – *Fighting Corruption, Promoting Good Governance* - was exhaustive and far reaching, touching on all aspects of an anti-corruption strategy with particular emphasis on economic management. It recognised the significant role that must be played by an independent and accountable judiciary if the policy of "zero tolerance" of corruption (which the Group enjoined the Commonwealth to adopt) is to be realised.

The involvement of the Legal and Constitutional Affairs Division in judicial integrity work arises from a direct mandate from Law Ministers in May 1999. Ministers requested the Secretariat to develop programmes aimed at assisting member countries in building judicial integrity without compromising judicial independence. This led to the Legal Division holding a Commonwealth judicial colloquium in Cyprus in 2002. The Limassol Conclusions (as they are called) came up with a set of recommendations for judicial reform, training and executive action, that aims to contribute to the effective strengthening of judicial integrity whilst making judges more accountable.

While the Commonwealth was looking at ways and means of strengthening judicial integrity, the United Nations under the auspices of the UN Centre for International Crime Prevention (UNCICP) (now the UN Office for Drugs and Crime (UNODC)), was also examining similar issues with the Judicial

Group, which consists of a few chief justices initially from common law countries which started work in 2000 under the framework of the Global Programme Against Corruption and in conjunction with the UN Congress on the Prevention of Crime and Treatment of Offenders.

The Judicial Group has, following a series of meetings, developed the Bangalore Principles on Judicial Conduct which is intended to be a universal code of conduct that national judiciaries can adapt and adopt for use as guiding principles on the comportment of judicial officers.

On the recommendations of the Judicial Group, the UNODC's Global Programme Against Corruption developed a programme of reform piloted in 3 judiciaries: Nigeria (3 State judiciaries), Sri Lanka and Uganda. In Nigeria, for example, there have been visible results in the operation of the Lagos State Judiciary.

The Senior Officials' response

Future action will be guided by the decisions of Commonwealth Law Ministers who are due to meet in Ghana in October 2005. As recorded in their published Communiqué Senior Officials "agreed to recommend that Law Ministers should mandate the Commonwealth Secretariat to carry out further work (with the assistance as appropriate of the CMJA) including continuing its programme of assistance to member countries in training and capacity building and reforms in the administration of justice; exploring means whereby it can assist member countries to develop judicial training institutes at the regional or sub-regional level; organising regular pan-Commonwealth judicial colloquia; establishing a judicial code of conduct in member countries which could be based on the values set out in the Bangalore Principles of Judicial Conduct to be placed before Law Ministers with a view to their being commended to judiciaries in the process of establishing such a code; and developing training for and a code of conduct for court administrative staff."

RESTORATIVE JUSTICE IN NEW ZEALAND

by
Judge David Carruthers
New Zealand

This is a shortened version of a paper presented by Judge David Carruthers, Chief Judge of the District Court of New Zealand, at the CMJA Conference, Jersey, 20-23 September 2004.

A few years ago in New Zealand, while driving a car, a young Samoan man was careless, and hit and killed two young Tongan boys aged 5 and 6. After the accident, the young man panicked and drove away from the scene. He eventually abandoned his car five or six kilometres away. The incident attracted considerable media publicity, and because of this publicity, he gave himself up. Shortly afterwards, before the matter had been resolved by the courts, the two families convened a meeting according to Pacific Island custom, at which the nature and consequences of the offence could be addressed. The offender and his family admitted what had happened, made a genuine apology and pleaded for mercy. After considerable discussion, the apology was accepted. The grieving community embraced the young driver and forgave him. "His deep shame, his fear, his sorrow, his alienation from the community was resolved."¹ The offender was given a red scarf representing the blood of the boys, which he subsequently wore at all his court appearances.

When he was sentenced for the offence by the court, the family of the victims were not consulted. They felt completely excluded from the process, and despite the fact that they did not wish the offender to go to prison, he received 15 months imprisonment. The family of the victims were so upset by the outcome that they publicly indicated that if they had the power to appeal they would do so.²

This example, one among many, highlights a "fundamental clash of values and interests" between two alternate processes of criminal justice. Under the conventional model of criminal justice, the focus is on a violation of the state and its laws. Justice focuses on establishing guilt through an adversarial process that pits the offender against the state. Victims and offenders alike are unable to participate

meaningfully in the prosecution processes. "One side wins and the other loses."³

By contrast, under the restorative justice model the focus is on the injuries caused by the offence: injuries to the victims, communities and offenders. The aim of restorative justice process is to repair those injuries. To facilitate this aim, the focus shifts away from the state and the court; to the victims, the offender and their community. A response from the community most relevant to the offender is negotiated rather than imposed. A healing process is sought for both victims and offenders.

In the example I referred to above, the restorative justice process initiated by the families helped restore the family of the victim. It addressed their emotional and material needs. The restorative justice process helped the offender to apologise and to undo some of the harm he had caused. It helped him to reconcile with the family of the victim and reintegrate into his community. For the people involved, the process stimulated and reaffirmed their respect for one another. The conventional justice process did not help anyone.

The reality is often that our conventional system of criminal justice does not work. It fails to engage offenders and the victims of offences. It fails to stimulate their respect for themselves or for each other. On the one hand, Courtroom justice systems give predominance to the state's role.⁴ The system seeks to deal with crime dispassionately without reference to emotion. On the other hand, the adversarial nature of the system also creates "a hostile environment where concern for mutual respect is replaced with the desire for victory in a pure winner-take-all scenario."⁵ Neither of these tendencies is helpful for the victim or offender. Despite the best efforts and intentions of Judges, counsel and court staff, this system does not provide victims or offenders with meaningful justice.

Restorative justice in the Youth Courts

New Zealand was one of the first Western legal systems to adopt a restorative justice model (in

practice, if not by design) through its enactment of the Children, Young Persons and their Families Act 1989 (CYPF Act). Prior to the 1989 Act, New Zealand had followed international trends in the way it dealt with young people within the justice system and at the beginning of the 20th century the 'welfare' approach to justice was encapsulated in the relevant legislation. There was a growing recognition in New Zealand that the welfare approach to youth justice was having little impact on the levels of youth offending and was unable to deal with persistent young offenders. There was also strong criticism of the lack of accountability for young offenders with young people being cushioned from the human, social and economic consequences of their behaviour.

The CYPF Act established a system for dealing with criminal offending by children and young people that has a restorative mechanism of resolution – the Family Group Conference – at its heart. While restorative justice was not a phrase which featured in the New Zealand debates about youth justice in 1989, the family group conference process is clearly consistent with the principles of restorative justice.

The New Zealand Youth Court hears matters relating to the criminal offending of young persons and children who are charged with any offence (except murder or manslaughter or where the child or young person elects trial by jury). The key mechanism available to the Youth Court is the Family Group Conference, a meeting attended by the victim, offender and their supporters, together with representatives of the Police and community and social services agencies. At this meeting, young offenders are given the opportunity to take responsibility for their wrong-doing (those who do not are dealt with by traditional, adversarial hearings, although, if culpability is established, recommendations as to outcome are made by Family Group Conferences) and to make amends. Plans of action are devised by group consensus and carried out under Police or Court supervision (depending on whether the matter is being addressed before or after formal charges have been laid).

Victims are given a voice at the Family Group Conference. They may attend with or without supporters, or may send a representative – although it is agreed by those who work in the

system that the most effective conferences are those at which the victim attends and describes the effects of the offending on them to the young person. The Youth Court has the power to make formal orders, but must always take into account the views of a Family Group Conference. If a young person successfully completes a Family Group Conference plan then, in all but the rarest of cases, he or she will be discharged by the Court, either as if the charges had never been laid or with a note of the Youth Court matter on his or her record for the future.

Is the CYPF Act a success? Clearly in relation to achieving a reduction in offending, the answer is yes. In a 1998 paper on Family Group Conferences, His Honour Judge F McElrea noted:⁶

[O]nly 16 per 1,000 young people appeared in the Youth Court in 1990 [the first full year of operation of the new Act] compared with an average of 63 per 1,000 in the three calendar years immediately preceding the Act". This indicated a 75% immediate reduction in the number of young people appearing in the Youth Court.

[R]eductions in custodial solutions for young offenders have occurred despite both a high overall use of imprisonment in New Zealand (which, in the developed countries of the western world, is second only to the USA) and an increasingly "get tough" line evident in the news media and in public opinion, and are a direct reflection of the legislative policies ... underlying the FGC system and their implementation by the police, courts and other officials.

Other judges have expressed similar opinions. The Act allows us to deal with offending problems in ways that are more imaginative. It is ridiculous to assume that any police force or any court system can replace the day-to-day involvement of family members and community in the life of an offender. That is not how the world works.

As a Judge, I deal with offenders on a snap shot basis. I see them for a brief period of time, deal with a particular moment in their lives, and then move on. By contrast, family members and the close community the people

are there all the time are: parents, brothers and sisters, uncles and aunts, church leaders, sporting contacts, friends, school teachers, workmates and social workers. Sending young offenders to prison usually does not help them or anyone else. Calling on the strengths of their families and community can produce astonishingly helpful results.

Calling on families and communities to address offending results in creative solutions to crime and this is exemplified by cases in which reparation has been paid. Significant amounts of reparation have been achieved in New Zealand, well in excess of what could have been ordered under the adult system. I have seen many cases where large amounts of money have been collected from large family communities to assist a young offender in meeting his obligation to a victim. Typically, this impacts enormously on the young person, who feels very strongly the sacrifices which have been made for him or her. There is a huge sense of continued family responsibility engendered by such generosity.

Remarkably, very often in New Zealand, victims have become advocates for young people and the offenders have ended up doing work for the victims, and being assisted by them to be rehabilitated.⁷ The family group conference allows victims to express their anger, frustration and outrage. This release of emotions can change the victims' outlook so much that they often decide they want to contribute to the solution. This occurs even in situations involving the most serious types of offending.

Restorative justice in the adult courts

In the early 1990s, New Zealand was experiencing a perceived increase in serious crime, and, as a result of legislative change, the Court was required to respond by imprisoning more people for longer periods of time. The public was divided between those who saw the only solution to criminal offending as being retribution: harsher penalties and increased incarceration, and those who advocated a restorative approach in which accountability and reparation would be driving factors.

To an extent, the same dichotomy in public opinion exists in New Zealand today, after legislative changes have incorporated restorative principles into our sentencing and parole

systems, and restorative conferencing pilot programmes have been instituted for adult offenders. It would be rash to ignore the fact that a not insignificant, and certainly vocal – if the New Zealand experience is anything to go by – proportion of the population believes in the power of retributive justice. To successfully install restorative justice for the future is not merely a matter of devising good working models; it also requires the education of society about the benefits of restorative principles and processes and the deficits of punitive ones.

In the 1990s, judges began to refer sentencing cases to community facilitators of restorative conferences. One such case was taken on appeal after the prison sentence imposed by the trial judge was significantly reduced from what would normally be expected (the case was one of wounding by stabbing) to take account of a very productive restorative justice meeting between victim and offender. Although the Court of Appeal overturned the sentence, they made the following supportive comments in relation to the restorative justice approach that had been adopted:⁸

We would not wish this judgement to be seen as expressing any general opposition to the concept of restorative justice (essentially the policies behind ss.11 and 12 of the Criminal Justice Act 1985 [now replaced by the regime under the Sentencing Act 2002]). Those policies must, however, be balanced against other sentencing policies, particularly in this case those inherent in s.5 dealing with serious violence. What aspect should predominate will depend on an assessment of where the balance should lie in the individual case. Even if the balance is found, as in this case, to lie in favour of s.5 policies, the restorative aspects can have, as here, a significant impact on the length of the term of imprisonment which the Court is directed to impose. They find their place in the ultimate outcome in that way.

The groundswell of enthusiasm for restorative measures in New Zealand continued as the 1990s progressed, and further models and programmes were instituted. The included:

Project Turnaround, a pilot restorative justice project for adult offenders being run as a diversionary action from the Timaru District Court. Its success has led to its being adopted by a number of community groups throughout

New Zealand offering restorative conferencing to Courts as a supplement to recent Government sponsored initiatives.

Te Whanau Awhina, piloted in Waitakere and continuing to this day. Compared with offenders referred to Project Turnaround, those referred to *Te Whanau Awhina* are all Maori, they are involved in more serious offending, are more likely to have been given severe penalties had they been formally processed, and have a greater chance of reconviction. In *Te Whanau Awhina*, the key concerns are the relationship between offenders and their whanau and the wider Maori community. There is more emphasis placed on reintegration, with *Te Whanau Awhina* providing programmes and activities relevant to the Maori culture, which play a part in reintegration.

The Second Chance Programme, which began with an approach in 1999 to the Judges in Rotorua by a community based organisation, Mana Social Services Trust. The programme involves a meeting between the victim; family/whanau members; other relevant people where appropriate, the offender; and a facilitator from Mana Social Services. It is aimed at ensuring that an offender is held accountable for their actions to the community and, in particular, the victim, and to look at ways in which the offender can make up for what he or she has done through restitution and reconciliation, and to put in place measures to assist in avoiding re-offending. One example, of a case involving injury with intent will illustrate its working:

The defendant and the victim were Tongan. A meeting was held in the local Tongan church and was attended by a large proportion of both the defendants and the victim's family. The meeting was conducted utilising Tongan protocols and Tongan language, with an interpreter available to assist the facilitator.

The defendant and the victim had known each other 3-4 years, but their uncles had been friends for many years and their families were close. Both parties had been out drinking and certain actions of the victim had led to the defendant getting angry and the assault occurring. The families of both parties met to hear both sides and to consider their combined actions. The defendant opened the

meeting with a prayer of remorse and repentance for his harmful actions to the victim and his family. He acknowledged his great shame and sought God's guidance and blessings on the meeting. The defendant's family members spoke of the defendant and asked for forgiveness. The victim and his family spoke about forgiveness and not wanting the defendant to go to jail. The defendant and his wife spoke and expressed remorse and the meeting concluded, in accordance with Tongan custom, with a feast offered by the defendant to the victim and his family.

A reparative plan was submitted to Court after being prepared by the two families that had the defendant to complete 1200 community work hours, pay reparation of \$1,000 and attend alcohol and anger management counselling. The meeting was held in September and it was not until February, one year and five months later, that the defendant was convicted and ordered to come up for sentence if called upon for a period of 12 months.

In New Zealand today, a variety of restorative justice programmes operate alongside each other, including:

- Four Ministry of Justice (formerly Department for Courts) court-referral pilot schemes in Auckland, Waitakere, Hamilton and Dunedin.
- 19 Ministry of Justice funded programmes, monitored by the Ministry's Crime Prevention Unit.
- Several restorative justice projects funded jointly by the Ministry of Justice and community groups
- A range of 100% community-funded and driven groups operating conferencing, some of which receive support from local councils or trusts. There are around 50 of these groups nation wide. They include Project Turnaround and *Te Whanau Awhina*.

District Court Judge Fred McElrea, Chair of the Pilot Programme's Liaison Committee, describes the operation of the model adopted for the four Ministry of Justice pilot programme as follows:⁹

If a victim has been personally affected by an offence and if the offender pleads guilty, the judge, or Community Magistrate, can adjourn the case for investigation into whether a restorative justice conference

can be held. Although a stamp will have been put on the file indicating whether the case is eligible under the pilot, lawyers may also wish to ask the Court to make an adjournment for restorative justice.

When that happens, the offender will first meet with the Restorative Justice Co-ordinator employed by the Court. The purpose of this first meeting is to see whether the offender is willing to take part, and whether there is likely to be a positive outcome from a conference. Ideally the meeting will take place at the Court immediately after the adjournment.

If the offender is willing to participate in a restorative justice process, the case is referred to restorative justice facilitators contracted and trained by the Department for Courts. The facilitators will approach the victim to discuss the possibility of a restorative justice conference and will also have a further meeting with the offender.

If both parties agree, a conference is arranged to take place before sentencing.

Generally, cases that can be referred under the pilot include:

1. Property offences where the maximum penalty is two years imprisonment or more;
2. All other offences under the Crimes Act [1961] where the maximum penalty is no less than two years imprisonment and no more than seven years.

Domestic violence cases are excluded from the pilot and a number of other specific offences are included such as dangerous and careless driving causing death or injury.

The threshold has subsequently been raised to include all offences carrying a penalty of imprisonment for up to 10 years. It still excludes domestic violence cases.

The Sentencing Act 2002

The Sentencing Act 2002 section 8(j) states:

In sentencing or otherwise dealing with any offender the court-

...

must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular

case (including, without limitation, anything referred to in section 10).

Section 10 lists a variety of possible outcomes that may occur by virtue of a restorative justice meeting (including offers to make amends – financial or otherwise; agreements between victims and offenders as to remedy; and compensatory measures). The obligation to consider these restorative outcomes applies as much to informal apologies or reparative payments made voluntarily by offenders and their families as it does to action taken pursuant to a plan formulated in a formal restorative meeting.

Section 7(1) sets out the purposes for which a Court may sentence or otherwise deal with an offender. While most of these purposes are either re-enactments of what existed under earlier legislation or at common law, there are three new purposes (all restorative in nature):

Purposes of sentencing or otherwise dealing with offenders are-

- a) to hold the offender accountable for harm done to the victim and the community by the offending; or*
- b) to promote in the offender a sense of responsibility for, and an acknowledgement of, that harm; or*
- c) to provide for the interests of the victim of the offence...*

Notably, in all the sections already discussed the phrase ‘sentencing or otherwise dealing with’ is used. Section 11 addresses scenarios in which Courts ‘otherwise deal with’ offenders. That section establishes a mandatory rule that, before imposing any of the formal sanctions available to it, a Court must first consider whether it would be more appropriate to deal with the matter by discharge with or without conviction (e.g. where restorative measures have been taken and the offender has performed well) or with a deferred sentence (e.g. allowing time for restorative measures to be pursued and completed).

Finally, section 25 allows the Court to adjourn proceedings to allow for restorative measures to be undertaken, as follows:

- (1) A court may adjourn the proceedings in respect of any offence after the offender has been found guilty or has pleaded guilty and before the offender has been*

sentenced or otherwise dealt with for any 1 or more of the following purposes:

- a) *to enable inquiries to be made or to determine the most suitable method of dealing with the case:*
- b) *to enable a restorative justice process to occur:*
- c) *to enable a restorative justice agreement to be fulfilled:*
- d) *to enable a rehabilitation programme or course of action to be undertaken:*
- e) *to enable the court to take account of the offender's response to any process, agreement, programme, or course of action referred to in paragraph (b), (c), or (d).*

In addition to the new requirements of the Sentencing Act 2002 that place restorative justice at the centre of any sentencing procedure, the Victim's Rights Act 2002 now requires all Judges, defence and prosecution lawyers, courts staff and probation officers to encourage the holding of restorative meetings between willing victims and offenders¹⁰.

Criticisms

There are a number of fairly common criticisms of restorative justice to which the New Zealand programmes and legislative changes have not been immune.

One is that restorative justice is a *soft option*. Being required to confront your victim and negotiate a solution acceptable to him or her is *not* a soft option. In one New Zealand case, a victim told an offender what it felt like to vacuum from the floor the ashes of her dead parent which had spilled when the offender burgled her house. In another, a victim told of her sadness at the theft of tapes, which included a farewell from a dying sister. No matter how serious the offending, an offender is still a human being with emotions; there are some encounters to which even the most hardened person will be unable to remain immune.

Another fairly common criticism of restorative justice is that it produces *inconsistent sentences*, and sentences that are disproportionate to the severity of the offence. A first response to this criticism is that sentencing is not consistent under the traditional model of criminal justice. A second is that the Court ultimately retains power in any sentencing. While the Court must take account of any restorative outcomes, it

must also consider the need for consistency with other results. In any case, it is arguable that the doctrine of sentencing consistency, in some cases, produces substantively unjust results. In such cases it is, surely, preferable to gain the flexibility that is offered by taking restorative outcomes into account.

Another criticism of restorative processes is that they may lead to *re-victimisation* of the victim. This can and should be avoided by the proper management of the restorative conference procedure. From a logistical level, this requires an adequate pool of properly qualified and skilled facilitators to service a restorative conferencing programme. Seeking victim consent to participate is a key safeguard, but should not be viewed as a 'cure all'. This criticism should be given significant attention. There may be some cases where victims are more likely to be vulnerable in a restorative context. In New Zealand, for example, domestic violence cases are excluded from the Ministry of Justice's pilot programme (not because it was thought that this was a class of case that could not in any circumstance, be assisted through restorative means, but because the scope of the pilot programme was not such that proper safeguards could be installed) – this exclusion is much debated.

A further common criticism of the restorative justice process is that it may *infringe the rights of the offender*. To safeguard against this, it should be possible for an offender to have his or her lawyer attend any meeting. Care should be taken, when they do, to ensure that they know what their role is and how it differs from that in an adversarial procedure. Notably, in New Zealand, after the successful operation of restorative justice processes for a number of years, we are beginning to see an increase in interest by the legal profession in education about the skills needed to offer support to an offender in a conferencing context.

Yet another criticism that is commonly made of restorative justice mechanisms is that they are *inappropriate where an offender has not accepted responsibility* for his or her wrongdoing. I agree. In New Zealand, offender acceptance of liability is a pre-requisite to any restorative procedure. The Ministry pilot programmes are applied only to those offenders who have already entered a guilty plea. In Youth Court, a young person may not participate in a

Family Group Conference if he or she denies culpability. In the informal restorative programmes, such as Project Turnaround and Te Awhina Whanau, the offender must acknowledge responsibility at the commencement of any meeting (if not before) and if this does not occur, the meeting will not proceed.

There is one final criticism of the recent changes to the New Zealand adult criminal justice system that I wish to address substantively because it is one that I hear repeatedly and yet it is, in my view, untenable. The criticism is that applying informal restorative justice processes to serious crime *circumvents judicial intervention* – such intervention being regarded as the more appropriate way of dealing with serious criminal behaviour. In my view, the criticism is internally flawed, in any case, because it posits restorative justice as an alternative to judicial intervention. In the New Zealand system, the two operate together, each benefiting from the other.

Judicial decision making, particularly in the hard cases – which are often the cases of serious offending – benefits from the information made available through the restorative process. And the restorative process benefits from the Court mandate – that is, it is in the back of the minds of all the parties to a conference that the Court is ready and waiting to impose a sentence, that a Judge will consider what is said and done in the conference, and that, if the conference fails, then the offender will not be let off ‘scot free’ and the victim left without resolution. This tacit pressure assists to focus the minds of the parties, as much as a back stop to the informal process itself.

The argument that judicial jurisdiction has been eroded by the invasion of restorative principles is untenable. They are still only one factor to be weighed in the balance. In the appropriate case, they may be determinative either of the type or the severity of sentence. In other cases, there may be factors that shift the balance away from restorative outcomes and towards, for example, the need to send a clear message to society as to what sort of behaviour will and will not be tolerated.

In appropriate cases, a custodial sentence will be the appropriate solution. The Courts are not deprived of the power to impose such a sentence by the incorporation of restorative principles in the adult criminal justice system. The New

Zealand Minister for Courts, Hon Margaret Wilson, emphasised the point that restorative justice is not a replacement for the jurisdiction of the courts in a speech delivered in March 2003. She stated “Restorative justice *adds another option* to the justice system – one that looks offenders squarely in the eye and supports the direct victims of their offending to look them in the eye too.” (emphasis added) Restorative justice should not be regarded as a hindrance to the judicial decision-making process. In practice, in fact, it provides Judges with an additional tool with which to reach a conclusion in any case.

Conclusion

Though the restorative justice movement has recently experienced remarkable growth of awareness and interest, there are hurdles ahead. In New Zealand, although there is growing support for the restorative justice philosophy, the broader trend in public opinion seems to be in the opposite direction. Moving forward with restorative justice will not always be easy, but it is hugely important that we do move towards a restorative approach to criminal justice. Our conventional system of criminal justice does not work. The restorative model does work. It represents the way forward of criminal justice.

- 1 J Consedine, *Restorative Justice – Healing the Effects of Crime* (Ploughshares Publications, Lyttleton, 1995) 162.
- 2 W Young and A Morris *Reforming Criminal Justice: Reflecting on the Present and Imagining the Future* Victoria University of Wellington, 1-2.
- 3 H Zehr *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, PA, 1990) 211.
- 4 Ministry of Justice, *Restorative Justice – A Discussion Paper*, October 1995, 18.
- 5 E Luna *Reason and Emotion in Restorative Justice* (New Zealand Centre for Conflict Resolution, Wellington, 2000), 9.
- 6 Judge F McElrea, *The New Zealand Model Of Family Group Conferences* (The Beyond Prisons International Symposium, Ontario, 1998).
- 7 T Stewart “Working Together – Key Elements” Address to Youth Justice Conference, Wellington (1996).
- 8 *R v Clotworthy* (1998) 15 CRNZ 651, 661 (CA).
- 9 J Eateon & F McElrea *Sentencing the new dimensions* (New Zealand Law Society seminar paper, March 2003) 40.
- 10 Victims’ Rights Act 2002, s.9.

THE TRIALS AND TRIBULATIONS OF SUMMARY JUSTICE

by

Tim Workman, Senior District Judge, UK

An edited version of a paper at the CMJA's Jersey conference

May I take you back to 1361. England was in the midst of the Hundred Years War with France and twelve years earlier had sustained the most appalling heavy loss of life through the visitation of the plague called the Black Death. Against that background crime and disorder grew rapidly. By the Justice of the Peace Act of 1361 Parliament decreed that every county shall be assigned (for the purpose of keeping the peace), one lord and three or four of the most worthy in the county, with some learned in the law, and that they should all have

'the power to restrain offenders, rioters and all other excitors of quarrels and cause them to be imprisoned or duly punished according to the law and customs of the realm'.

It was those county worthies who were to become the Justices of the Peace, who have been the cornerstone of summary criminal justice in England and Wales for almost 750 years.

To start with, it appears, it worked well. However after a while in London things did not go quite so well.

By the end of the 17th Century, Justices of the Peace in London had become known as Trading Justices or Basket Justices. In return for performing favours whilst exercising their various judicial functions, they expected to receive either payment or a basket of goods. By 1735, the degree of corruption was such that Justices of the Peace in London were temporarily suspended. I say temporarily because by the measurement of time in the history of the English legal system it might not be seen as very long. However, it was not until 230 years later, in 1965, that Justices of the Peace returned to carry out their duties in London.

From 1735 to 1965 summary justice was administered by Stipendiary Magistrates. In

1735 Sir Thomas De Veil purchased a house in Bow Street London. He became the first Chief Metropolitan Stipendiary Magistrate. He arrived at a time of considerable disorder. There was virtually no Police Force, there was no question of detection and any defendants who were unfortunate enough to get detained did so usually as a result of the hue and cry as able bodied men joined lame night watchmen in chasing defendants. Sir Thomas set about raising a posse of men to help him go out and make arrests. He did so in the evening, detaining defendants, locking them in the cellar of the neighbouring public house. Next morning he sat in court in the front room of his house and dispensed justice. As a system it had the very considerable advantage of not having to spend too much time on issues of evidence.

Sir Thomas was a remarkable man who had throughout his life four wives and at least 22 children. He was followed as Chief Magistrate by a continuous line of Chief Magistrates to the present day and I have the honour of holding the post as the 33rd Chief Magistrate.

The second and third Chief Magistrates were interesting men. The second was Henry Fielding the author, and the third was his brother Sir John Fielding who was known as Blind Jack. Totally blind, it was said that he was able to identify all the local villains solely by their voices. It was he, together with his brother, who founded the small police force, which became known as the Bow Street Foot Patrol or the Bow Street Runners.

The home of the Stipendiary Magistrates, now the District Judges of the Magistrates Courts, has remained since its inception in 1735 at Bow Street Court. (Although it did cross the road in 1882). It has seen some remarkable cases, including the prosecution of Crippen and Oscar Wilde, and in more recent years General Pinochet and Jeffrey Archer. Some of the early cases were reported by Charles Dickens when he started his career as Court

Reporter. Sadly there is a serious risk that I shall be the last Chief Magistrate to occupy the Bow Street Court as the authorities seem determined to ignore history and heritage and wish to sell the court, probably to some hotel developers.

By the time Justices of the Peace returned to continue their jurisdiction in London there were approximately 47 Stipendiary Magistrates and there were also some 13 Provincial Stipendiary Magistrates in many of the Cities in England and Wales.

The current situation

Although all criminal cases in England and Wales begin in the Magistrates' Courts, the most serious offences move on swiftly to the Crown Court. Cases of moderate seriousness, which the court decides should be dealt with by a jury, or where the defendant asks to be dealt with by a jury, are also transferred to the Crown Court, but a little less swiftly. As in most jurisdictions, the vast number of offences brought before the court are offences that are either minor offences or offences of moderate seriousness. Only about 6% of the total number of offences dealt with by the criminal courts are dealt with at the Crown Court. 94% of all the criminal work is concluded in the Magistrates' Courts.

The judiciary in the Magistrates' Courts now consists of some 28,500 Justices of the Peace and 127 District Judges of the Magistrates' Courts (formerly Stipendiary Magistrates).

Justices of the Peace

Justices of the Peace are a remarkable group of people. They come from all walks of life, giving their time freely, only being paid their expenses and any loss of earnings. They generally sit as a tribunal of three with a legally qualified clerk. They are appointed by the Lord Chancellor on the recommendation of the Lord Chancellor's Advisory Committee for the area in which they are to serve. Their commitment is to sit in court for not less than 26 half-days a year and on average they sit for between 35 and 40 half-days per year. They are enormously dedicated and hard-working, and of course the largest group of the judiciary. In some areas however recruitment is proving a problem and in other areas recruitment to bring the balance of a wide range of backgrounds is proving difficult. The essential

thing about the 28,000 Justices of the Peace is that they represent both the locality and the community. The difficulty in recruiting is, in my view, partly due to the enormous breadth of the jurisdiction and the substantial increase in legislation, which has in turn given rise to the need for a significant amount of training. The commitment in terms of time has become all the greater.

District Judges

In general terms the District Judges sitting alone have the same jurisdiction as a bench of 3 Justices sitting with a legally qualified Clerk. The roles of Justice of the Peace and of District Judge are complementary. It would be impossible for District Judges to take on the workload of 28,000 Justices of the Peace, just as it would now be impossible, and indeed unfair, to expect Justices of the Peace to take on many of the lengthy and complex cases which are now dealt with within the Magistrates' Courts. Together Justices of the Peace and District Judges provide the Magistrates' Courts with a Judiciary, with strong links to a locality, strong links with the community and the support of a professional bench to deal with matters that are unduly long, complex or sensitive.

District Judges in the Magistrates' Courts are all legally qualified full time judges. All have the qualification of either a barrister or solicitor, many have been in private practice as a solicitor or a barrister, usually specialising in Criminal Law, and others have been Justices' Clerks. They usually have somewhere between 15 and 25 years in practice before being appointed to the bench.

The appointment system is now quite rigorous. Any applicant has first to seek appointment as a Deputy District Judge, to sit part time on about 30/40 days a year. The selection of a Deputy District Judge begins with a detailed application and the taking up of six professional references. All applications are then considered by a Board and on the last occasion we had some 490 applications to fill 28 Deputy District Judge places. From the paper applications the Board select what they consider to be the best candidates and take approximately three times the number of posts that they wish to fill. In the last round some 90 applications were successful and those applicants are then invited to an Assessment Centre. They go

through a gruelling all-day session, taking four candidates at a time. The testing involves a written test, an interview and court role-play. I am happy to say that this system was not devised when I was appointed, as I would not be here now.

From that ninety, some twenty-eight have been successful and subject to the approval of the Lord Chancellor, they will spend one week sitting with an experienced District Judge following all the cases that he deals with in that week. He or she is then invited to the Induction Course, which is a five-day intensive residential course dealing with all matters of court craft and magisterial law. At the end of that course, if satisfactorily completed, they will join their colleagues as Deputy District Judges. There are currently 140, and with the 28 still to join us there will be 168. Our compliment is 170. Deputy District Judges are used to fill the places of District Judges as and when those Judges are called away on other duties.

During the course of their sittings over a period of 2 or 3 years, the Deputy District Judges are observed and assessed and as and when a full-time District Judge post becomes available applications are invited from the ranks of Deputy District Judges. All applications are considered, a short list prepared and that short list interviewed in some detail, the reports of their sittings are examined and new references taken up. If successful the usual security checks have to be taken and the Queen is invited to sign the Royal Warrant authorising them to sit as District Judges in the Magistrates' Courts throughout England and Wales.

The full-time District Judges take on all the ordinary work of the Magistrates' Courts, but in addition take on any lengthy, complex or sensitive cases. Where a court does not have a District Judge (and there are many of them), the Justices' Clerk can apply to my office for a District Judge to be assigned, either to deal with a backlog of work or to deal with a long, complex or sensitive case. If I or my Deputy approves the deployment of a Judge to that court, a Deputy District Judge is authorised to sit in that Judge's place. The Deputy District Judge receives a fee and both Judges are entitled to their travel and subsistence and the cost of that is met from a budget which I have

to manage, which amounts to approximately £2?million. Because of the limitations on the budget it is not possible to meet all the requests but last year the office dealt with about 350 requests for assistance, of which we were able to meet about 320, involving about 4,000 judge days. Although within the Magistrates' Courts the District Judges' jurisdiction is almost identical to the jurisdiction of three Magistrates sitting with a legally qualified clerk, there are certain exceptions, which include terrorism, extradition and prison adjudications.

I think it is a great tribute to both benches and to the legal staff of the courts who advise the lay magistracy, that the number of appeals against the enormous number of cases dealt with is infinitesimal. Less than 0.5% appeal and considerably less than that are successful in their appeals. I do not wish to sound complacent because there are many things that could be improved within the Magistrates' Courts, but at a time when every tabloid newspaper is anxious to question or belittle the decisions of the courts, I think the Magistrates' Courts can be proud of their record.

The future

May I turn now briefly to their future. On the 12th June 2003 the Prime Minister purported, overnight, to abolish the role of Lord Chancellor. It had dramatic consequences for the judiciary as a whole, including the lay magistracy: it put at risk the independence of the judiciary in England and Wales. It was unlikely to happen immediately, but there was the clear prospect in years or decades to come of the judiciary falling under the control, and therefore the direction, of the Government of the day. Alarm bells rang. Happily, through the diligence and hard work of the Lord Chief Justice, ably and I know greatly assisted by Lady Justice Arden, agreement was reached to provide protection on a large number of issues. The safeguards have been embodied in a document that has become known as the "concordat" and which effectively preserves independence by providing for our Lord Chief Justice to assume the role of the Head of the Judiciary. The Country and the Judiciary are greatly indebted to him and to Lady Arden.

Administratively, we are undergoing great change. Currently the Magistrates' Courts are run by Committees of Magistrates known as

Magistrates' Courts Committees, of which there are some 42 throughout England and Wales. It is proposed to combine all the courts, both civil and criminal, under one administration to be known as "Her Majesty's Courts Service" and this will take over from the Magistrates' Courts Areas in April of next year.

The sentencing powers of a Magistrates' Court are likely to change greatly over the course of the next two years, and to some extent the maximum sentencing powers will increase. This is likely to result in an increase in work at the moderately serious level of work, as the Government of the day (of whatever party) strives to deal with problems of crime and anti-social behaviour. Various sentencing ideas will be tried and the courts will continue to do their best to play their part in reducing crime. However, at the level at which Magistrates' Courts operate, unless we can abolish the motor car and alcohol, and more particularly provide effective treatment for drug addiction, the work of the Magistrates Courts will continue unabated.

Judicial independence

Those of us working in Magistrates' Courts must always remember that judicial independence applies not just to the High Court or the House of Lords but also, and just as importantly, to the decisions being made in local Magistrates' Courts. For many citizens the only first hand experience they have of the justice system will be in the Magistrates' Court. We must demonstrate that judicial independence is alive and well. It is not, as some would suggest, a "perk of the job"; it is a vital principle so that those who come to our courts should know that they will get an informed, reasoned and impartial decision. Although so much has been achieved, it is important to see that those principles embodied in the Concordat are not eroded.

One of the additional jurisdictions exercised by the District Judges at Bow Street relate to extradition. One afternoon last year I was told that a late application would be made for a provisional warrant in respect of a man wanted by the Russian Government who was thought to be arriving in England by air. By virtue of our Extradition Treaty I had to be satisfied that the fugitive being sought is either within the United Kingdom or on his way to it.

The application therefore could not be made until 7.30 that evening shortly before the aircraft was due to arrive at Heathrow Airport. The Detective Sergeant making the application explained that the man wanted was the former Minister of Culture for Chechnya and that he was wanted for offences of waging war, 303 murders, causing grievous bodily harm and possession of explosives. I was told during the course of the application that the Home Secretary had decided to make an exclusion order, that the Foreign Secretary had decided that this was not possible and the exclusion order was removed, that President Putin had telephoned our Prime Minister and that Buckingham Palace had telephoned because of concern about a forthcoming state visit from President Putin. By the way, said the officer, the aircraft lands in 15 minutes – there is no pressure, sir.

I issued the warrant but as a result of other information that I was provided with, I decided to grant bail on fairly strict conditions. It was the first time that I had ever granted bail to a man charged with 300 murders. That decision produced a furious response from the Kremlin. I mention this anecdote purely because during the months that followed, as I heard this case, there was intense international pressure, but I was never once approached directly or indirectly in any way to influence my decision. I think that is a feature of the judicial independence that we are able to demonstrate and which we are determined to maintain.

Conclusion

The Magistrates Courts are, in my view, ready and able to provide the highest standard of criminal justice - but cannot do it alone. All parts of the criminal justice system and all the criminal justice agencies upon which the courts rely, must be properly resourced. Failure by any one part of the system, be it the Police, Crown Prosecution Service, the defence, Probation or Prison Service is a failure for justice. However, in areas where it is properly resourced and is working well, the administration of justice in Magistrates' Courts is something of which we can be rightly proud.

ADJUDICATION OF CUSTOMARY LAW IN THE PACIFIC

by
The Hon. Vincent Lunabek
Chief Justice of Vanuatu

Most Pacific island states are to some degree engaged in the process of developing a modern legal system that includes elements of its indigenous custom or customary law. In all except Tonga, the Constitutions or statutes make express provisions for custom or customary law to be used as the basis for determining rights to customary land. In Kiribati, Nauru, Samoa, Solomon Islands, Tuvalu and Vanuatu there are written and express provisions for customs or customary laws to be applied as part of the law of the country by all courts to matters other than customary land. In Kiribati, Nauru and Tuvalu, the legislature has provided that customary law is to prevail over the principles of common law and equity. The term “custom” can have two meanings. First, it can mean a practice or usage. Second, it can mean a practice or usage that it is required to be done. The practice or usage becomes a rule or a law, and the people will be punished for failing to observe that custom. It is within the second definition that, once a custom has been discovered, declared and applied by the courts, tribunals or customary leaders, a custom or practice becomes customary law.

Although the generic terms “customs” and “customary laws” are used in relation to the legal systems of Pacific countries, the reality is that in Melanesian countries there is great diversity and variety in customs and customary laws. In the Solomon Islands and Vanuatu there are great variations between the customs of different communities, even on the same island. In Polynesia and Micronesia these differences are not so marked. For example, many customs are uniform throughout Samoa and Tonga.

In Vanuatu the combination of a remarkable colonial history, a multiplicity of local cultures, and a determined effort at de-colonisation and constitutional development has resulted in a unique experience in legal pluralism. Since

time immemorial people of each Vanuatuan Island group or community have lived in accordance with their own practices, traditions and customs. Regulation of social order was unwritten and communicated by word of mouth and action. These customs or customary laws have survived the passage of time to the colonial and now post-colonial era.

Vanuatuan constitutional reform in the early 1980s “fused” the indigenous, French and British aspects of the legal system. The Constitution mandated custom as a principal source in the development of dispute resolution (Chapter 8, Article 47) and recognised that laws in Vanuatu must develop consistently with customary laws (Chapter 15, Article 95(3)) and not vice versa, as is the position in other independent Pacific island states. Even the law relating to land transactions reverted back to the customary position (Chapter 12 of the Constitution), “emphatically affirming” the values of the customary system¹. In the resulting Constitution, Vanuatu retained the basic principles of French and English legal administration as well as its own indigenous customary law.

Vanuatu is now confronted with the application of customs or customary laws as part and parcel of its legal development process. This paper investigates two aspects of this process: first, the recognition and promotion of customary law through the Independence Constitution of Vanuatu and secondly, the place, role and difficulties of the application of custom by the Courts, Chiefs and the new Customary Land Tribunal.

Background

Vanuatu is an island nation, comprised of a ‘Y’ shaped dual archipelago of 83 islands, with about 30 major, inhabited, mostly volcanic islands in the south-west Pacific. The nation’s total land area is only about 12,000 square kilometres but archipelago claims give

Vanuatu a maritime territory of about 450,000 square kilometres. Vanuatu has a population of approximately 190,000. Eighty-two per cent of the population still lives in small villages and hamlets in rural areas, as has always been traditional throughout Melanesia.

Vanuatu has a rich history. Settlers are believed to have arrived some 4,000 years ago, but the islands were not “discovered” by European explorers until Pedro Fernández de Quirós spied the island on his travels. French and English traders and settlers started to arrive in the islands during the mid 1800s and in the early 1900s petitions were received by both countries to annex the territory.

Constitutional reform

In 1906, in response to petitions for annexation, France and Britain agreed to an Anglo-French Condominium over New Hebrides (as Vanuatu was then called).

The “Condominium” form of colonial governance, by which the French and British jointly ruled the New Hebrides, was organised on the basis of equality of government and co-existence of the respective jurisdictions. The Vanuatu people were neither consulted in its establishment nor involved in its operation. More fundamentally, the separate education systems, police forces and medical services as well as two national anthems, two currencies and three official languages, produced a rule described as “[s]o inefficient and cumbersome that it was popularly known as the Pandemonium.”²

In the Condominium, each of the two powers retained sovereignty over their nationals and over corporations legally constituted according to their law. Accordingly, the British and French established separate systems of judicial administration, each with jurisdiction over its own nationals. Persons present in the condominium who were neither British, French nor indigenous were required to opt for either the British or the French legal system within one month of arrival, and were known as either British or French optants. Once made, the choice was final. Determination of whether a matter went to the French or the British courts were rather less clear. In criminal matters, the governing factor was the nationality (or ascribed nationality) of the defendant, which was normally straightforward – except in the

case of multiple offenders. Civil matters were more problematic, given the fact that English and French conflict of laws regimes do not mesh.

The Condominium did not directly regulate native affairs. Article VIII of the London Protocol of 1914, which differs materially in the English and French versions of the text, was the source of legislative power over the indigenous population. The English text reads:

The High Commissioners and Resident Commissioners shall have authority over the native chiefs. They shall have power to make administrative and police regulations binding on the tribes, and to provide for their enforcement.

Indeed, some Condominium initiatives seemed to be aimed at undermining, rather than regulating, tribal organisations and chiefly powers. For example, no provision existed with respect to civil actions between indigenous peoples or indigenous peoples’ rights to form companies or even, until 1967, to register births, deaths and marriages.

Article VII(4) of the Protocol directed Condominium officials to make a collection of native laws and customs. Customary law, where not contrary to the dictates of humanity and the maintenance of order, “should be utilised for the preparation of a code of native law, both civil and criminal”. However, such a project was never undertaken and the Native Criminal Codes, for example, were based entirely on French and British jurisprudence.

Article X of the Protocol also established a joint Court for Condominium matters. The three-person joint court was composed of the British and French judges who headed their respective national jurisdictions, as well as a neutral President appointed by the King of Spain. Although the joint court had jurisdiction over all condominium matters, its main raison d’être was to minimise conflict among the European settlers over the grab for land. The Court was used to legalise fraudulent land dealings by unscrupulous Europeans who took advantage of indigenous “vendors” unaware of the nature of the transaction and unable to understand the written contracts. Not surprisingly, land grabs, fraud and speculation during the colonial period were the main causes of unrest and the stimuli of nationalist political

movements leading to Vanuatu's independence in 1980, whereby the British and the French finally terminated the Condominium arrangement.

With the termination of the Anglo-French Condominium the Republic of Vanuatu and the new Vanuatu Constitution was created.

The place of customary law in the Constitution

The Vanuatu Constitution is a fairly concise and straightforward document, particularly in comparison with the constitutions of other countries in the Pacific region. Apart from establishing the framework of government, the largely programmatic Constitution also contains provisions of particular importance to legal development and pluralism.

Under the Constitution, legislative power in Vanuatu was vested in a popularly elected unicameral Parliament with an element of proportional representation to ensure fair representation of different political groups and opinions. Proportional representation and decentralisation of power were two requirements imposed by the French as a condition of independence.

The Constitution included several provisions to re-establish the dominance of customary law, including a role for the National Council of Chiefs (also known as *Malvatumauri*), the use of customary law in dispute resolution and a role for custom in land transactions. Under Article 30, the National Council of Chiefs has general competence to discuss and recommend methods to preserve matters relating to custom and tradition. The Council can also be consulted on such matters, particularly if they are in connection with any Bill before Parliament.

The Constitution mandates custom as the principal course in the development of the law and also as an appropriate dispute resolution methodology for Vanuatu. Article 47 provides that, in the absence of existing applicable law, the judiciary may resolve a controversy according to substantial justice and, whenever possible, in conformity with custom. Article 96(3) in Chapter 15 of the Constitution affirms that "[c]ustomary law shall continue to have effect as part of the law of the Republic". Further, the reception of pre-independence British and French laws is expressly subject to

compatibility with the independent status of Vanuatu and wherever possible taking due account of custom.

Parliament may enact legislation covering "the ascertainment of relevant rules of custom" and appoint assessors knowledgeable in custom to sit with the judges (Article 51 of the Constitution). Although no legislation on this subject has emerged yet, Article 52 requires Parliament to establish a system of village or island courts "with jurisdiction over customary and other matters and shall provide for the role of chiefs in such courts". A system of island courts has been established.

Whilst other Pacific states have simply facilitated the future introduction of reforming laws, Vanuatu's approach has been to overhaul the land tenure system and reinstate the pre-colonial land tenure system. The Constitution provides that "[a]ll land in the Republic belongs to the indigenous custom owners and their descendants" (Article 73) and that "[t]he rules of custom shall form the basis of ownership and use of land in the Republic" (Article 74). Only indigenous citizens who have acquired land in accordance with the recognised system of land tenure have perpetual ownership of their lands (Article 75). Rules regulating land ownership and setting out the land tenure system were to be created by Parliament in consultation with the National Council of Chiefs (Article 76). According to Article 78(2), disputes over ownership of customary land are to be resolved by "appropriate customary institutions or procedures" as arranged by the Government.

Land transactions between *ni-Vanautu* and non-indigenous citizens or non-citizens require Government consent under Article 79(1). Such consent must be given unless the transaction is deemed to be prejudicial to the interests of the customary owners of the land, indigenous citizens who are non-owners, the community in which the land is located or the republic generally. Many land disputes are now pending before the courts and the land tribunal for adjudication.

The application of customary law

The application of custom or customary law by courts in the Pacific has revealed a number of controversies. The Courts have had to consider such questions as:

- Which is the applicable custom or customary law?³
- Does the custom or customary law require proof and if so, how?⁴
- Is a customary law to be applied to all matters or limited to specific matters involving indigenous peoples only?

Further controversy arises over whether custom or customary law is to be applied to particular indigenous communities and how such application is to be undertaken in the light of basic moral or legal rights enshrined in the Constitution and statutory provisions.

Application by the formal Courts

During the first few years following approval of the Constitution, Parliament failed to promulgate rules for the ascertainment, recognition and application of customary law. The experience elsewhere in the Pacific suggested that in the absence of strong guidelines and incentives to utilise custom it is very difficult for customary law to develop in a coherent and comprehensive manner. Despite a lack of direction, the Courts have attempted to provide guidance for their own decisions when dealing with matters involving custom.

Interpretation of Article 96(3) of the Constitution.

Article 96(3) in Chapter 15 of the Constitution affirms that “[c]ustomary law shall continue to have effect as part of the law of the Republic”.

The case of *Waiwo v Waiwo and Banga* raised important issues about the role of custom in the Vanuatuan legal system. The case involved a petition for divorce on the grounds of adultery and a petition for VT100,000 damages from the co-respondent, with whom the husband (the respondent) had committed adultery. The Council of Chiefs had decided under custom that the co-respondent should pay the plaintiff VT5,000 and the respondent should pay the co-respondent’s husband VT20,000. The plaintiff challenged the Chiefs’ decisions and instituted a civil action against the respondent before the Magistrates Court claiming punitive damages under s.17(1) of the Matrimonial Causes Act 1986, which provides that “A petitioner may on a petition of divorce claim damages from any person on the ground of adultery with the respondent.” It was silent on the nature of the damage and whether damages were compensatory or punitive.

The plaintiff argued that s17(1) was to be interpreted in light of local circumstances and Vanuatu custom and should not be interpreted on the basis of the Matrimonial Causes Act (UK). The respondent argued that an award of Vatu 100,000 would amount to punitive damages. The second respondent further argued that the Matrimonial Causes Act 1986 was based on the Matrimonial Causes Act (UK) and that the United Kingdom Act allowed compensatory damages only.

At first instance (Magistrates Court Civil Case No. 324 of 1995), the Magistrate Court found that after Independence, the pre-independence British and French laws continued to apply to British and French nationals respectively. However, these laws did not apply to Ni Vanuatu and the law that did govern Ni Vanuatu was customary law.

In custom, adultery was seen as a serious offence and adulterers were customarily penalised for their wrongdoing. This was not only true for Tanna people, as in *Waiwo*, but throughout Vanuatu. Thus damages claimed in respect of adultery in Tanna, and throughout Vanuatu as a whole, were considered as punitive damages on the basis of custom.

The Magistrate Court stated a general rule as to when custom is part of Vanuatuan law:

The most important point to establish is that for a custom to be recognised and enforced throughout the whole country, it must have a common basis or common foundation throughout the country.

In order to prove the existence of a customary law it was not necessary to “observe strict legal procedure or apply technical rules of evidence.” In particular, rules as to hearsay and opinion evidence could be relaxed.⁵

On appeal (Supreme Court Case No. 1 of 1995, unreported), the Supreme Court rejected the argument that after independence French and British laws continued to apply only to French nationals and British nationals respectively and that there was no law other than custom applicable to Ni Vanuatu. The Court held that prior to independence there were three marriage laws that applied to Vanuatu:

The French marriage laws, the English marriage laws...and finally the New Hebridian Marriages Act under the Joint

Regulation 16 of 1970 which governed marriages between indigenous New Hebridians...It was the latter namely, Joint Regulation 16 of 1970 that in fact became the Marriage Act Cap 60 that is now the only Marriage Act that applies to everyone in Vanuatu...In the same manner, the passing on the 15 September 1986, by the Parliament of Vanuatu to the Matrimonial Causes Act 1986...had the same effect on the French and English divorce laws that also applied until then to everyone in Vanuatu.

It is true to say that until then, the English chose to be divorced under English law and the French under French law, but there was no obligation to them to do so. As I have said above, it is clear that under Article 93 of the Constitution, the French and English Laws that applied on the day before the day of independence applied to everyone in Vanuatu, irrespective of nationality and irrespective as to whether one is indigenous Ni-Vanuatu or not. ...There cannot be a law for the English and another for the French and yet another for the Ni Vanuatu in the Republic. Article 93 of the Constitution created laws for Vanuatu as a gap filling process. That gap has taken many years to fill and will continue to take many years to fill entirely, but is gradually narrowing.

The Judge stated that although Parliament had introduced legislation that superseded the English and French laws it had not and “is unlikely to do...away with the element of British common law and equity that apply in Vanuatu”.

The Vanuatu Supreme Court in *Molu v Molu* (Supreme Court Civil Case No.2 (unreported); Civil Case No. 30 of 1996; Matrimonial Case No. 13 of 1998, 15 May 1998) reaffirmed the role and place of custom. The Court applies custom and common law in a free and flexible way.⁶

When customary law is applicable

In *Felora Association and Vatu v Council of Chiefs of Santo and Santo Regional Council* (1989 – 1994) 2 VLR 545), the Supreme Court was required to decide which party had the right to control the customary rite of Nagol jumping.⁷ This custom involved jumping from

a specially constructed tower to which the jumper is attached by vines. It is only performed at certain times of the year, in specific villages on the island of Pentecost.

The jump attracts considerable attention from tourists. In an attempt to capitalise on its popularity a group from one of the villages attempted to set up the ceremony in Santo without obtaining the requisite authority to do so from the village chiefs. As a result, the group was summoned to a meeting of the chiefs of Santo who ordered that the group return to Pentecost and obtain permission from the chiefs there before the ceremony could be performed. They also imposed a fine for attempting to move the ceremony to Santo without following the correct customary procedure.

The group appealed to the Supreme Court on the basis that their rights under article 5(1) of the Constitution (freedom of expression; freedom of assembly and association; freedom of movement; equal treatment under law or administrative action) had been violated.

The Judge held that the chiefs were empowered by the Constitution to deal with such situations and that there had been no breach of the Constitutional rights of the appellants. He then discussed the issue of the Nagol jump itself. Article 45(1) of the Constitution states:

If there is no rule of law applicable to a matter before it, a court shall determine the matter according to the substantial justice and whenever possible in conformity with custom.

Here, there was no applicable rule of law and so the decision was made in conformity with custom: that the Nagol jump be returned to Pentecost and only exported with the majority consent of the customary owners and in particular of the chiefs representing them.

Other cases discussing the role of custom

In *Robert Boe and John Ronnie Taga v Ben Thomas* (1980-1988) 1 VLR 284, a personal injury case, it was submitted that the Judge should look to custom when determining the extent of damages to be awarded. The Judge declined to do so, and indicated his reluctance to create “guidelines” for determining damages:

‘Custom varies so much in each village throughout Vanuatu that it would be quite impossible to lay down guidelines for those dealing with the matter. Over the years, the chiefs seem to have reasonably dealt with the compensation in their villages hence I should be loath to interfere in a matter which in my opinion is better dealt with by them.’

In contrast is the *G v L* ((1980 – 1988) 1 VLR 293), a case concerning child custody issues, where custom was not applied. At first instance the Council of Chiefs ordered that the child stay with his father in accordance with custom. On appeal, the Island Court Judge held that Vanuatu law requires that the welfare of the child is the first and paramount consideration and on this basis he ordered that the child should stay at home with his mother. This decision may be incorrect. There is no Vanuatuan statute that deals with custody of children and so, according to Article 45, custom was the applicable law. No English statute which addresses this issue was extended to Vanuatu (unless as a law of general application) and the common law of England required that custody be given to the father. Whether French law would favour the father or the “best interests” principle depends on which amendments to the Civil Code were extended to the New Hebrides.

The Constitution, rights and custom

In some instances, custom has conflicted with the Constitution and human rights.

The case of *Public Prosecutor v Kota* (1989 – 1994) 2 VLR 661 involved a kidnapping to which the penal code applied, but in the light of the facts the judge also commented on the potential for conflict between custom and the Constitution.⁸ A woman was forced to attend a meeting of the Chiefs for the purpose of attempting to reconcile her with her husband, from whom she was separated. She said she wanted to divorce her husband and at that point the chiefs announced that she must leave Port Vila (where she was living and working) and return to Tanna, the home island of both her and her husband. The Chiefs decided that Tanna was the appropriate place to resolve the couple’s problems. She was very upset and protested that she did not want to go but was put on a boat for Tanna. She stayed there for a

week but then returned to Port Vila where she reported the matter to the Police.

The Judge noted that there was a conflict between the law of Vanuatu (including the Constitution) and custom. He reminded the Chiefs that any decision they made was subject to both the Constitution and statutory law. In particular, he noted the fundamental right of freedom of movement set out in Article 5 of the Constitution and the provisions for equality of all people in Vanuatu.

In the case of *Noel v Toto* (Supreme Court Civil Case No. 18 of 1994, unreported), the Supreme Court justice took a very different approach to the conflict between customary law and protection from discrimination. The case involved an application for declaratory judgement regarding ownership of and profits from a piece of land in Santo. In an earlier case it was held that the respondent was the customary owner of the land. The applicant (being the respondent’s sister’s son) sought to establish that the land was held in a representative capacity. On this basis, it was argued that the benefits arising from the land had to be accounted for and shared with the applicant. Evidence of customary ownership conflicted, but included a custom that if a woman married she would be deprived of rights to property, whereas a man would not.

Justice Kent stated that the right to equal treatment before the law provided by Article 5 of the Constitution was a fundamental right, clearly intended to guarantee equal rights for women. His Lordship then considered whether this right could be overridden by Article 74, which provides that custom should form the basis of ownership and use of land in Vanuatu. Kent J reached the conclusion that it could not, as the Constitution is clearly aimed to give equal rights to women, and even permitted laws that discriminated in their favour. He proceeded to state that it had to be presumed that when the Constitution was adopted the framers knew that customary law discriminated against women with respect to land ownership. By not specifically permitting discrimination with respect to land rights, His Lordship considered that the Constitution must have been outlawing discrimination. It would, His Lordship stated, “be entirely inconsistent with the Constitution and the attitude

of Parliament to rule that women have less rights with respect to land than men”.

His Lordship commented that his ruling would not mean that ownership of land would be decided otherwise than in accordance with custom or those general principles of land ownership would change. Customary law would still provide the basis of determining ownership, subject to the limitation that any customary rule discriminating against women should not be applied.

Application of custom in criminal sentencing mitigation

Section 118 of the Criminal Procedure Code (CPC) concerns promotion of reconciliation. It reads:

Notwithstanding the provisions of the Code or of any other law, the Supreme Court and the Magistrates Court may in criminal causes promote reconciliation and encourage facilitate the settlement in an amicable way, according to custom or otherwise, of any proceedings for an offence of a personal and private nature punishable by imprisonment for less than 7 years or by a fine only, on terms of payment of compensation or other terms approved by such Court, and may thereupon order the proceedings to be stayed or terminated.

Section 119 of the Criminal Procedure Code is concerned specifically with sentencing issues:

Upon the conviction of any person for a criminal offence, the court shall in assessing the quantum of penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom and if such has not yet been determined, may if he (sic) is satisfied that undue delay is unlikely to be thereby occasioned, postponed for such purpose.

The Courts are reluctant to accept customary settlement as a mitigating factor in cases of serious offences involving violence, especially where death results. In the case of *Public Prosecutor v Kevin Gideon* (Court of Appeal Case No. of 2002, unreported) the Vanuatu Court of Appeal held:

The requirements of the section are plain in that a Court is required in passing

sentence in any criminal case, to take account of any customary settlement that has occurred in the case and, in the absence of the same, to postpone sentence in order to facilitate the effecting of customary settlement.

Customary settlement may occur at any one of three stages: (1) before the charge is laid; (2) after charge is laid and before conviction; or (3) after conviction. In the case under appeal we were informed that customary settlement occurred at stage (2) and the trial Judge took this into account in imposing sentence on the respondent.

Customary settlement was initiated by a letter from the village Chief to the respondent demanding the payment of a fine of VT30,000 a pig and mats by a specified date, failing which criminal charges would be laid against him. The demands of the letter were duly met but that did not prevent the criminal charge being laid against the respondent who might well entertain some sense of grievance.

We were not informed whether the complainant supported the settlement demands or received anything as a result of it. We are concerned, however, at the suggestion in the letter that performance of customary settlement could somehow influence the laying of criminal charges in this case. We desire to dispel any notion that customary settlement can have such an effect in an offence as serious as occurred in this case and where the public interest dictates that criminal charges must be laid.

It is not the function of this Court to comment on the wisdom or desirability of requiring a sentencing court to take account of customary settlement in every conviction of a criminal offence, however heinous or trivial it may be. However, that is the law.

We observed that section 119 has no application at the charging stage and cannot be the basis for reducing an otherwise appropriate charge to a lesser charge. It must not be used as a “bargaining chip” in determining what is or is not an appropriate charge.

Section 119 is relevant to an assessment of the “quantum of the sentence” and not the nature of the sentence. It can influence the length of a sentence of imprisonment or the amount of a fine, but not its fundamental nature.

This approach was also followed in *Public Prosecutor v Peter Thomas* (Court of Appeal Criminal Case No. 2002, unreported) where Marum J held that “compensation in compensating the life of a dead person is totally useless to the dead person, because it cannot compensate him by putting him back to life, and that is why I say that compensation is useless, when death occurs. However, the Court does taken into consideration compensation, but of less significant [sic].”

Application by the Island Courts

The Island Courts Act 1983 established a system of grassroots custom-based courts, modelled on the village courts of Papua New Guinea and the local courts of the Solomon Islands. The Island Courts are presided over by three justices who are “Knowledgeable in custom... at least one of who shall be a custom chief residing within the territorial jurisdiction of the court” (Island Courts Act 1983, s.3(1)).

Appointments are made by the President (the Head of State) acting on the advice of the Judicial Service Commission, which includes a representative of the National Council of Chiefs. The Chief Justice, who also holds the power to establish, suspend, cancel or vary the warrant of a particular Island Court, nominates Supervising Magistrates.

According to the Act, the Island Courts have broad jurisdiction over civil and criminal matters within their territorial boundaries. The Court may punish a litigant (where a matter is deemed to be “criminal”) by a fine of up to VT24,000 (approximately US\$250), imprisonment of up to six months, or by ordering a period of community service. In civil matters, the Island Courts have the important power to make orders regarding the use or occupation of land.

Under section 10 of the Island Courts Act, Island Courts are bound to:

Administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict

with any written law and is not contrary to justice, morality and good order.

Lawyers are not permitted to take part in any proceedings, and the Courts are instructed not to apply technical rules of evidence but rather to “admit and consider such information as available”.

Appeals may be made from the Island Court to the Magistrates Court in all matters except land ownership (as opposed to its use or occupation), which goes directly to the Supreme Court and “shall have two or more assessors knowledgeable in custom sitting with them in an advisory capacity”.

By late 1986 seven Island Courts had been established. Each court covered a whole island, which may contain diverse customary groups. The most important feature – and failing – of the Island Courts as currently operating is the absence of any general customary law and dispute settlement jurisdiction.

The primary function of the Island Court is to ensure peace and harmony, and to endeavour to obtain amicable settlement of disputes and apply custom within the spirit of the Constitution and section 10 of the Island Courts Act 1983. As a result these Courts operate somewhat less formally as magistrates rather than as officially sanctioned customary courts. The Island Courts are intended to provide an accessible forum for dealing with minor disputes and infractions, and one that is responsive to the needs and expectations of local communities. Although they have been most successful in dispensing “quick grassroots justice” in the exercise of their criminal jurisdiction, some aspects of Island Court jurisdiction deserve attention.

First, appointed Senior Magistrates are responsible for supervising the Island Court but in practice rarely have the capacity to do so. Half the Magistrates are still pursuing law degree courses in order to qualify as lawyers. At the same time, supervision of Island Courts is clearly required. There have been instances where Island Courts have exceeded their powers under the Island Court Act or have acted improperly, contrary to the requirements of fairness and natural justice. Island Courts have also become increasingly responsive to local power structures dominated by elderly male chiefs. As a result, the grievances of

women and children are not properly dealt with.

A second significant problem is that of training and support. The courts system was the subject of review in 2001-2002. Recommendations were made and the training of clerks and Island Court justices was seen as the key. Another suggestion was the appointment of a Chief Clerk of the Island Courts to liaise with the supervising Magistrate to improve the effectiveness of the system. A training program for clerks and Island Courts justices is now in place and carried out.

With appropriate support and supervision, the Island Courts can provide effect service of justice to the local communities. Their strength lies in the provision of an accessible legal forum that is appropriately defined and highly responsive to the local communities' expectations. If the system is effective, it is capable of integrating different regulatory regimes at local levels.

The Customary Land Tribunal

In 2001, Parliament enacted the Customary Land Tribunal Act, giving the Tribunal the sole responsibility to deal with any dispute involving land. The main objective of the Customary Land Tribunal Act is to provide a custom-based system to resolve disputes concerning customary land. The Act covers the following topics:

The establishment of Land Tribunals to resolve disputes about customary land;

The procedures to be followed by those Land Tribunals in resolving such disputes; and

The appeal process for parties who are dissatisfied with decisions of Land Tribunals.

The decision of a Land Tribunal is final and binding on the parties and those claiming through them, and the decision is not to be challenged, appealed against, reviewed, quashed, set aside or called into question in any court or any ground.

The Supreme Court has a supervisory role over the land tribunals – but only on questions of process. The Customary Land Tribunal does not provide enforcement mechanisms for its decisions. This has been taken care of by the Civil Procedure Rules of 2002.

The Customary Land Tribunal has yet to prove its standing and credibility as a competent and accepted land court producing a customary system of justice. At this point in time it is too soon to make an assessment.

Application of customs by the chiefs and customary leaders

As discussed above, Chapter 5 of the Vanuatu Constitution gives the National Council of Chiefs (“the Council”) a governance role and invests in the Council “a general competence” to discuss and make recommendations upon matters concerning local custom, culture, tradition and languages. It provides that the Council may be consulted by Parliament regarding prospective legislation, particularly on matters relating to tradition and custom. Further, Parliament is required to consult with the Council on the development of a national land law and representatives of the Council are involved in certain appointments to public office. Such appointments include the Judiciary, the Office of Public Prosecutor and Public Solicitor and the position of Ombudsmen.

Although the constitutional scheme was designed to give the Chiefs a leading role in national affairs, in reality they have considerably less influence than, for example, their counterparts in Tonga, Samoa and the Marshall Islands. Since independence the Government has rarely seen fit to consult the Council on pending legislation or policy matters, sometimes pointedly noting that the Council has no special expertise and need have no role in determining such “modern” matters as policing, finance, social services, commerce and the media.

The lack of consultation clearly demonstrates Government unease over the political role of the Council. For their part, the Chiefs are angry and disillusioned that their former prominence has not been restored following the end of colonialism and that their views are not sought by the Government, or disregarded when proffered. The ability of the Council to offer a clear, alternative voice or to exert political influence is hampered by several factors. These include a lack of resources and organisation, diverse local customary regimes and disunity owing to conflicting views over qualifications for “customary chiefs”. As in other parts of Melanesia, there are some communi-

ties with hereditary leadership (usually those with some Polynesian influences) but most “chiefs” or “bigmen” reach status through personal accomplishment.

This situation compromises the legitimacy of the Council’s role as a repository of custom and tradition. There is a significant potential for rivalry and conflict between the local councils and the National Council of Chiefs. However, the local councils have tried to avoid a direct conflict of roles, promoting the dispute settlement functions of the Council (including regarding important land matters) and encouraging the Council to produce codes of customary law.

The Council is undoubtedly a valuable institution for the provision of local and administrative services to bring peace, order and harmony when state government and its apparatus prove ineffectual. For example, in August 2002 senior members of the Vanuatu Police Force, dissatisfied about the process of appointment of the then Police Commissioner, arrested and detained senior Government officials including the then Attorney General. This led to civil unrest for some weeks. The police were divided on the issue and therefore ineffective.

To resolve the dispute, the government called on the National Council of Chiefs to mediate to bring peace, order and harmony to the police force, the Government and the people. The President of the National Council of Chiefs organised a customary reconciliation ceremony between the dissatisfied senior members of the police force, sections of the police force loyal to the Government and the Government. All parties involved accepted the customary ceremony. Peace and order were restored, paving the way for criminal investigations and prosecution charges to be laid against the dissatisfied senior members of the police force who were tried, convicted and sentenced to imprisonment in May 2003.

The above situation illustrates the legitimacy of the Council’s role as a repository of custom and tradition, yet the road ahead for the Council is by no means clear.

Conclusion

Courts in Pacific island countries are confronted with the application of customs or customary laws as part and parcel of the

formal legal development processes. During the process of developing a legal system that applies customary laws tension may arise between custom law and rights or freedoms guaranteed by introduced or adopted laws. Some of the tensions have been identified in this paper. A fundamental question that must be meaningfully addressed is whether it is appropriate to merge customary law and principles with the introduced legal system that underpins the formal court system.

The position of Pacific island countries seems to be that the question is not whether to incorporate custom or customary law but how to apply it. In most Pacific island jurisdictions, customary land tenure is one of the last refuges of custom in the official legal system. The attachment of Pacific Island indigenous people to the land goes well beyond the developed world’s view of land as a commodity and factor for production and includes essential elements of social relations, political and economic organisation and metaphysical concerns. As Joel Bonnemaïson has written:⁹

In Vanuatu custom land is not only the site of production but it is the mainstay of a vision of the world. It represents life, materially and spiritually. A man is tied to his territory by affinity and consanguinity. The clan is its land, just as the clan is its ancestors... The clan’s land its ancestors and its men are a single indissoluble reality – a fact which must be borne in mind when it is said that Melanesian land is not alienable.

The preoccupation with land matters has meant that, to a large extent, issues of “custom” and “land” are thought to be synonymous. The consequences are that significant customary law issues, such as the recognition of marriage, divorce, adoption, child custody and succession regimes, have not often been the subject of formal consideration or official action. This is especially so in Vanuatu.

What can be commonly observed in Pacific island countries (including Vanuatu), is that most people conform their behaviour and uniformly resolve their disputes according to commonly understood customs, usage and traditions. It is likely that custom is more important outside of the formal courts than inside them, although the Courts may yet

provide the medium for considering customary law in its procedural and substantive aspects with official sanction.

- 1 For further commentary on this issue, see Y. Ghai, “Land Provisions of the Independence Constitution” in P. Larmour (ed) *Land Tenure in Vanuatu* (1984) at 72-74. See also B. Narokobi “Land in the Vanuatu Constitution” in P. Lamour, R.Crocombe *Land, People and Government: Public Land Policy in the South Pacific* (1981) 149-156
- 2 G Molisa, N Vurobarabu and H Van Trease “Vanuatu – Overcoming Pandemonium” in *Politics in Melanesia* (1982) 85.
- 3 See Jennifer Corin C Care, *Bedrock and Steel Blues: Finding the Law Applicable in Vanuatu*.
- 4 See *Malas Family v Songoriki Family* (1980-1988) 1 VLR 235 and the Privy Council case *Twimahene Ajeibi Kojo II v Bonsie* (1957) WLR 1223 at 1226-1227.
- 5 This view is in accord with the decision in *Malas Family v Songoriki Family* (1980-1988) 1 VLR 235 and the Privy Council case of *Twimahene Ajeibi Kojo II v Bonsie* (1957) WLR 1223 at 1226-1227.

- 6 Jean G Zorn, “Custom then and Now: the Changing Melanesian Family” in *Passage of Change, law, Society and Governance in the Pacific* (Pandalous Books (ed) 2003) p108-111
- 7 See also Anthony H Angelo, *Nagol jumping should return to Pentecost: A Conspectus of the French, English and custom law of Vanuatu* (Institute of Comparative Law in Japan).
- 8 See Jennifer Corrin Care, “Conflict between Customary Law and Human Rights in the South Pacific” presented at the 12th Commonwealth Law Conference at Kuala Lumpur September 1999; Susan Farran “Custom and Constitutionally Protected Fundamental Rights in the South Pacific Region – the Approach of the Courts to Potential Conflicts” (1997) 21 *Journal of Pacific Legal Studies* 103 – 122.
- 9 J Bonnemaision “Social and Cultural Aspects of Land Tenure” in P Larmour (ed) *Land Tenure in Vanuatu* (1984) 1 – 2. See also Barak Sope *Vanuatu’s First National Development Plan 1982 – 1986*

LAW REPORT – PARADISE LOST?

Christian and Others v R

Court of Appeal

Henry P, Barker and Neazor JJA

26, 27, 28 July, 5 August 2004

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(1) *Constitutional law – Acquisition of territory – Act of state – Justiciability – Criminal trial pending in Pitcairn Island – Defendants challenging validity of laws and courts established for Pitcairn Island – Whether Pitcairn Island a colony – Whether an independent state – Orders in Council – Validity – Whether court having jurisdiction to determine validity – Ministerial instruction – Validity – Effect – British Settlements Acts 1887 and 1945 – Pacific Order in Council 1893 – Pitcairn Order in Council 1952 – Pitcairn Order 1970.*

(2) *Constitutional law – Sovereignty – Colony – Acquisition – Categorisation – Settlement – Cession – Pitcairn Island – Acquisition as a British possession – Whether acquired as a British settlement – Relevant considerations – Appropriate test.*

(3) *Court – Inherent jurisdiction – Composition of bench – Criminal trial – Pre-trial application – Right of appeal – Criminal trial pending before single judge – Pre-trial application by defendants to stay proceedings for lack of jurisdiction – Supreme Court deciding to sit as Full Court of three judges to hear application – Court invoking inherent jurisdiction to reject defendants' application for hearing by single judge – Application for stay dismissed by Full Court – Defendants seeking leave to appeal to Court of Appeal from decision to sit as Full Court – Whether right of appeal from such decision available – Whether Full Court hearing lawful – Whether irregular – Whether a nullity – Whether a miscarriage of justice – Judicature (Courts) Ordinance, ss 6, 9, 16 – Judicature (Appeals in Criminal Cases) Ordinance, s 35DD(1) – Supreme Court Act 1981 (UK), ss 19(3) and 73(1).*

(4) *Constitutional law – Fundamental rights – Right to fair trial – Right to independent and*

impartial tribunal – Judges and magistrate holding office during pleasure – Criminal proceedings – Magistrate committing applicants for trial in Supreme Court – Application to Supreme Court for stay of proceedings and for declarations that appointments of judges and magistrate, relevant laws and committal proceedings invalid – Judges giving directions for hearing of application – Statutory amendment then conferring security of tenure upon judges – Supreme Court dismissing application – Whether infringing fundamental right – Whether fundamental rights provisions in force – Whether magistrate constituting impartial and independent tribunal – Judicature (Courts) Ordinance, s 11 – Ordinance No 11 of 2003 – Judicature (Appeals in Criminal Cases) Ordinance, s 35DD(1) – Human Rights Act 1998 – Convention on Human Rights and Fundamental Freedoms 1950, art 6(1).

The applicants, inhabitants of Pitcairn Island, were committed by a Magistrate for trial in the Supreme Court on various criminal charges brought under United Kingdom statutes, as applied to Pitcairn Island by ordinances made by the Governor under powers delegated to him by Orders in Council. In pre-trial proceedings they applied to the Supreme Court for a stay of the trial and declarations that the Orders in Council, legislation based on them, the appointments of Justices of the Supreme Court and the Magistrate and the committal proceedings were all invalid and without force or legal effect. The Supreme Court, sitting (against the objection of the applicants) as a Full Court of three judges, dismissed the application on 19 April 2004. The applicants applied to the Court of Appeal for leave to appeal against that judgment and also for a declaration that the Supreme Court judgment was invalid because the judges had sat as a Full Court. The Court of Appeal heard substantive argument on the issues raised by the applications for leave to appeal.

HELD: Leave to appeal granted; appeal dismissed.

(1) An assertion by the Crown of sovereignty over a territory was an act of state which was not susceptible to challenge. The clear weight of authority was to the effect that the court could not go behind the Orders in Council of 1952 and 1970 which declared Pitcairn to have been a British settlement and which then gave powers to the Governor to legislate for the good government of the island. The 1970 Order in Council superseded the 1952 Order in Council, which had revoked and replaced the Pacific Order in Council 1893, based in part on the British Settlements Act 1887, in so far as it applied to Pitcairn Island. The 1893 Order had provided, inter alia, for the constitution of courts and the application of general law. Although Pitcairn Island did not come within the areas initially defined by the 1893 Order in Council for its application, it was a British settlement in the Pacific Ocean. Therefore the Instruction given by the Secretary of State for the Colonies in 1898, under arts 4 and 6 of the Order in Council, to include Pitcairn Island within the jurisdiction exercisable thereunder, was authorised by the proviso to art 6 and was *intra vires* the Order in Council. As a valid administrative assertion of sovereignty by the appropriate minister of the Crown, the Instruction also could not be challenged (see paras [12]-[33], below). *Mighell v Sultan of Johore* [1894] 1 QB 149, *R v Earl of Crewe, ex parte Sekgome* [1910] 2 KB 576, dicta of Viscount Haldane in *Sobhuza II v Miller* [1926] AC 518 at 525, *In re Southern Rhodesia* [1919] AC 211, dicta of Denning LJ, Morris LJ and Parker LJ in *Nyali Ltd v Attorney General* [1956] 1 QB 1 at 15, 22 and 33 and of Diplock LJ in *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 at 753 applied.

Per curiam. For the applicants, it had been submitted that the validity of the Orders in Council and the 1898 Instruction could only be challenged in the English courts, the Pitcairn Supreme Court having no extra-territorial jurisdiction to strike down United Kingdom legislation. The correctness of this submission is doubtful. Under s 16 of the Judicature (Courts) Ordinance, the British Settlements Acts, as statutes of general application in force in England, are also in force in Pitcairn and form part of its laws, together with the Orders

in Council made thereunder. Moreover, under s 6 of the Ordinance, the Supreme Court exercises all the jurisdiction vested in the High Court of England and Wales. In any event, the question of forum appears to be inconsequential: even if a challenge to an Order in Council was made in a British court, the authorities make it clear that the result would be the same (see paras [29]-[33], below). *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] 3 LRC 249 distinguished.

(2) (i) Pitcairn Island was a British settlement within the meaning of the 1887 Act when the Orders in Council of 1952 and 1970 were made. Sovereignty was acquired by settlement or occupation, at a time when there was no organised society to which international personality could have been attributed, and still pertained. Categorisation of a colony once made by practice could not be disturbed, and there was ample evidence of the practice of categorising Pitcairn as a settled colony, going back at least to the 1898 Instruction (see paras [52]-[55], below). *Halsbury's Laws of England* (4th ed, 2003 Reissue), Vol 6 para 800 applied.

(ii) It was palpably unreal to contend that Pitcairn Island was not a British possession but independent. The mutineers from HMAV *Bounty*, who first settled the Island in 1790, remained British subjects, their duty of allegiance never having been broken, either by their own acts or by any act of the King. Over subsequent years the United Kingdom had exercised sovereignty and jurisdiction over the Island: British warships visited, providing practical assistance and reporting to the Admiralty. In 1838 Captain Elliott drew up a form of constitution and a series of laws, which were adopted by the Islanders; a revised constitution was adopted in 1852. In 1893 Captain Rookes drew up a comprehensive set of laws and regulations which the Islanders adopted. In 1898 Pitcairn Island was brought under the Pacific Order in Council 1893; revised laws were laid down in 1904 and new regulations in 1940. There was also comprehensive evidence demonstrating ongoing recognition of the United Kingdom sovereignty over the Island by foreign states, the European Union and the United Nations. Furthermore, there was an unbroken pattern of evidence in many forms of continuing recognition of United Kingdom sovereignty by the Islanders

themselves and no example had been cited of any denial by the Islanders of their status as British subjects under the dominion of the Crown (see paras [35]-[45], below). *Joyce v Director of Public Prosecutions* [1946] AC 347 applied.

(iii) It was unnecessary to define precisely the time at which Pitcairn Island became a British possession: there could be a gradual extension of jurisdiction over a territory. No formal act of acquisition was required: as in the resolution of international disputes as to sovereignty, it was the intention of the Crown, gathered from its own acts and the surrounding circumstances, which determined whether a territory had been acquired under English law. The available material established acquisition as a British possession, probably as far back as 1838, when the provision and acceptance of a Union Jack and the establishment of a Chief Magistrate required to take an oath of loyalty and to be accountable to the Queen, were significant factors; that was the date traditionally regarded as the date when Pitcairn Island had its definitive origin as a British possession. The submission that there might have been acquisition by cession in 1898 was unacceptable: the acquisition was by neither cession nor conquest and occurred before the 1898 Instruction, which, whether in the eyes of the government or the Islanders, was not an assumption of jurisdiction not previously exercised. Moreover, before 1898 Pitcairn did not have an independent legislature, which would have taken it beyond the application of the 1887 Act. Furthermore, no significance could be attached to the move of the inhabitants from Pitcairn Island in 1856 to Norfolk Island, which was made possible and effected by the British Government, and the return of some of them in 1859 and others in 1864. No other state had claimed sovereignty and there had been no suggestion from the Islanders themselves that Pitcairn was not under British dominion (see paras [46]-[50], below). *Attorney General for British Honduras v Bristowe* (1880) 6 App Cas 143 applied.

(iv) The submission that the Islanders were self-governing, formulating their own laws and rules, did not assist the argument that Pitcairn was independent: British settlers had common law rights and could adopt rules and regulations governing their community and that was in no way inconsistent with the concept of

dependency. This was demonstrably the case in Pitcairn, where the inhabitants acted upon the advice of visiting Royal Navy officers in formulating laws. Where no legislature had been established by the United Kingdom, the adoption of local laws by British settlers did not prevent a settlement from becoming, or remaining, a British possession. The 1904 revision and 1940 regulations were formally adopted by the Islanders but clearly under the direction of British authority (see para [51], below).

(3) (i) There was no right to seek leave to appeal from the Supreme Court ruling that it would sit as a Full Court of three judges. The right to seek leave to appeal pre-trial rulings under s 35DD (1) of the Judicature (Appeals in Criminal Cases) Ordinance was restricted to Supreme Court decisions to make or refuse an order staying proceedings on any ground, including abuse of process, and to give or refuse any other interlocutory judgment having the effect of bringing the proceedings to an end. Other rights to seek leave to appeal certain pre-trial rulings given by s 35E were irrelevant. The decision of the Supreme Court to sit as a Full Court did not come within s 35DD(1); reversal of that decision would not have brought the proceedings to an end (see para [59], below).

(ii) Nevertheless, it was appropriate to consider the submissions made because, should there ever be appeals against conviction, the legitimacy of the Full Court sitting might become a ground of appeal. The Supreme Court decision to sit as a Full Court, on the ground that the issues raised by the applications were novel and complex and merited the fullest possible consideration, was a sensible one, which gave the applicants the benefit of having their arguments heard by three judges instead of one. By s 16 the Ordinance applied the laws of England for the time being in force, including statutes of general application, in Pitcairn and s 6 gave the Supreme Court all the jurisdiction and powers of the English High Court and Crown Court. Section 9, providing for civil and criminal trials in the Supreme Court before a single judge, did not assist as the issue was not a trial but an application, in effect, for a declaratory judgment. Moreover, there was some difficulty in applying the English statutory provisions, which expressly provided for a divisional court, for which there

was no provision in Pitcairn, but made no direct provision for the matter raised in the instant case. Therefore there was merit in the Supreme Court's decision to invoke its inherent jurisdiction. Furthermore, even if the applicants' argument could be sustained, it would have been quite inappropriate to have declared the Supreme Court hearing a nullity: under s 16(3) of the Ordinance that would have required a finding that there had been a substantial miscarriage of justice whereas, applying a commonsense judgment approach, there was no miscarriage, let alone a substantial one: the defect or irregularity, if any, of convening a Full Court had been to the benefit of the applicants (see paras [62], [65]-[66], [69]-[73], below). *Rural Timber Ltd v Hughes* [1989] 3 NZLR 178, *Hall v Ministry of Transport* [1991] 2 NZLR 53 and *Best v Watson* [1979] 2 NZLR 492 applied.

(4) (i) Although neither the Human Rights Act 1998 (UK) nor the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 had been directly applied to Pitcairn Island, the Crown had accepted that these provisions were relevant to the Island and that the concept of a fair trial was known to the common law. The Act and the Convention could be related to the Island by s 16 of the Judicature (Courts) Ordinance, providing that English law for the time being in force was in force in the Island, so far as local circumstances and the limits of local jurisdiction permitted (see paras [84]-[85], below).

(ii) When the applications were initially made to the Supreme Court the judges held office during pleasure, but when they conducted the substantive hearing of the application, they enjoyed the security of tenure given them by the amending Ordinance. The argument that the substantive hearing was somehow tainted by their former lack of tenure was quite untenable: in giving procedural directions at the earlier stage they were only exercising administrative functions. Article 6 of the Convention did not necessarily apply to preliminary hearings concerning trial arrangements and matters of procedure. In any event, the situation came within s 16(3) of the Ordinance, requiring a substantial miscarriage of justice before a decision could be quashed for irregularity (see paras [74]-[78], below). *X v UK* 5 EHRR 273 applied.

Per curiam. Counsel for the applicants expressly made no challenge to the members of the Court of Appeal on similar grounds (see para [79], below).

(iii) There appeared to be no right of appeal under s 35DD(1) of the Ordinance, the only provision relied upon, in respect of the committal for trial. If the applicants succeeded on the merits on this ground, the decision would not have the effect of bringing the proceedings to an end: the appropriate remedy would have been to send the matter back for the committal process to be recommenced (see paras [81]-[82], below).

(iv) In any event, the committal for trial could not reasonably be seen to have infringed the applicants' rights; there was no basis for the conclusion to be reasonably drawn that the magistrate was other than an independent and impartial tribunal. Although when making the committal the magistrate held office during pleasure, under s 11(5) of the Ordinance, before changes in the terms of service were introduced by Ordinance No 11 of 2003, the authorities showed that the fact that judicial office was held at pleasure, while a very significant factor in relation to the issue, was not of itself definitive: regard was to be given also to the interpretation and practical operation of such legal provisions and to the realities of the situation. In the instant case there was no history to examine to form an objective view of the magistrate's impartiality and independence but there had been no suggestion of any action or inaction on his part which could amount to or show a lack of impartiality or independence. He did not have to resolve any dispute about the content of evidence or the committal for trial. However, contrary to the view of the Supreme Court, the committal was a judicial decision which was part of the trial process. The conditions in which the magistrate acted were relevant: he held a part-time appointment in a small, remote island, difficult of access, with a population of 47 people, where no major crime had been alleged from 1898 until now. Because of the requirement of legal qualification and practice, the magistrate would inevitably be non-resident and so not subject to any local pressure. The magistrate was not in any respect able to be influenced by prospects of re-appointment or promotion and was not subordinated to the Governor, being subject only to the authority of the Supreme

Court. He had no significant relationship with the prosecuting authority and it was not suggested that his private practice elsewhere could be enhanced in any way by his Pitcairn Island judicial decisions. There was nothing to suggest that there was any incentive for the magistrate to be influenced in his decisions by the policy-driven wishes of the Governor (see paras [87]-[91], [102]-[107], below). *Campbell and Fell v UK* (1984) 7 EHRR 165, *Eccles, McPhillip and McShane v Ireland* (1988) 59 DR 212, *Findlay v UK* (1997) 24 EHRR 221, *Starrs v Ruxton (Procurator Fiscal, Linlithgow)* [2001] 1 LRC 718 and *Millar v Dickson* [2002] 1 LRC 457 applied.

On the 28 October the Privy Council granted leave to appeal but declined to stay the criminal proceedings. Six of the defendants were found guilty of committing sexual crimes against children in October 2004.

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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.

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