

**Commonwealth**

**Judicial  
Journal**



Journal of the  
Commonwealth Magistrates'  
and  
Judges' Association

Vol 16 no. 3 June 2006

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This journal is generously funded by The Commonwealth Foundation

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## EDITORIAL

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This issue of the *Journal* appears a few months before the CMJA's triennial conference in Toronto. It is appropriate that we include a number of items with a Canadian context.

All judges and magistrates have a proper interest in judicial ethics. James Spence is co-chair of the Canadian Judicial Council's Advisory Committee on Judicial Ethics and his paper examines its work. One of the cases on which the Council had to rule was cited in a case summarised in our Law Reports section, *SOS-Save Our St Clair Inc v City of Toronto*. Readers may find the procedure adopted in that case unedifying: one judge in a three-judge court was alone given the responsibility of ruling, in a case the outcome of which was already known, whether he should recuse himself on grounds of apparent bias; the issue was raised by the unsuccessful party on the merits. He defended his continued participation, in robust and even strident terms, only to find himself in effect overruled by his two colleagues. The substance of the case points to the difficulties attending any exercise by judges of their right as citizens and taxpayers to engage in public controversy.

Another case we summarise, *Provincial Court Judges' Association v R*, is all about judicial salaries. The Canadian Provinces have what seems at first sight an attractive system, of independent Commissions which make recommendations to Government. As the case, a decision of the Supreme Court of Canada, shows, the outcome may be rejection of the recommendations and litigation. The Supreme Court examined the extent to which the courts could properly adjudicate on issues which are necessarily of personal concern to the judges involved.

The final case, from Malaysia, touches on an aspect of judicial independence in terms of

immunity from suit, raising a nice question about the extent of immunity in respect of administrative decisions by judges, including those taken from outside the territorial jurisdiction. CMJA members need no persuading of the importance of judicial independence, nor of its correlative, proper judicial accountability. Both aspects are examined in this issue with an African focus. Chief Justice Brobbey of Gambia examines judicial corruption, Justice Warioba of the East African Court of Justice the proper interaction of Executive and Judiciary, and there is a CMJA briefing note on the threat to judicial independence contained in legislative proposals in South Africa. The Malaysian case illustrates the fact that many judicial decisions are essentially about the administration of their courts: one issue in South Africa is as to the respective roles of Executive and Judiciary in those administrative aspects.

The Toronto Conference has restorative justice as one of its themes, and Michael King's article, which also cites writing by Muhammed Amir Munir of Pakistan, provides a valuable survey of Commonwealth practice.

One of the enjoyable features of any gathering of Commonwealth lawyers is the exchange of practical information about court processes. What works? What might be learned from the success, or the failure, of a particular initiative? Michael de la Bastide's paper about the working of a unified family court in Trinidad and Tobago will be of interest to judges and magistrates in many jurisdictions.

One aim of the CMJA is to disseminate information and literature on all matters of interest concerning the legal process within the various countries comprising the Commonwealth. We hope this issue of the *Journal* advances that aim in a stimulating and useful way.

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

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

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## OBITUARY: ERIC CROWTHER

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We have learned with great sadness of the death on 6 February 2006 of Eric Crowther, the first Editor of the *Journal* from 1973-1977. He continued to serve on the Editorial Board until his death.

Eric was born 1924. He served in the Royal Navy from 1943-47. On his return to England, he studied Law. He was awarded the Tancred Studentship in Common Law in 1948 and won the Inns of Court Advocacy Contest in 1951. He was called to the Bar by Lincoln's Inn in 1951. He joined Inner Temple Inn *ad eundem* in 1960 and joined the Queen Elizabeth Chambers where Colin Nicholls QC (former President of the CLA) was in practice, and had a strong junior practice in crime and licensing. He resisted invitations to take silk. He was appointed Metropolitan Stipendiary Magistrate in 1968, a post he held until 1989. Colin Nicholls recalls: 'He had an independent mind and obviously loved the job which was his true vocation'. Eric was also a Recorder from 1983 to 1996, and Senior Resident Magistrate for Montserrat in 1996.

He was lecturer and student counsellor for the British Council for 30 years from 1951 and served on the Council of the British Council from 1985 until his death. He was in demand as a lecturer worldwide and lectured on Elocution and Advocacy for the Council for Legal Education from 1955-1991. He was much involved in education and training, as Chairman of the Inner London Magistrates' Association Training Sub-Committee from 1981-1989, and in the work of Cumberland Lodge, the Cromwell School of English, the Oxford Study Centre, and International Students House. He served as a Trustee of the Professional and Academic Regional Visits Organisation, and of Fair Trials Abroad, and as Chairman of the Prisoners Wives Service. He wrote a number of articles and books about the law and his experiences as a magistrate. He was awarded the OBE in 1977 and made a Freeman of the City of London in 2004.

The Chief Justice of Queensland, Justice Paul de Jersey, used one of Eric's experiences to

illustrate the importance for advocates being ready for every contingency: Eric once appeared in the Court of Appeal opposite a distinguished junior and his unfortunate pupil. On arrival to start the hearing, it was clear the preceding case would run substantially overtime, and the distinguished junior took a 'calculated risk', commencing another matter elsewhere, leaving the unfortunate pupil to wait. Two days later, the earlier appeal case concluded abruptly. The next case was called. While Eric obligingly kept the Court of Appeal 'at bay', the unfortunate pupil scurried off to find his distinguished junior, vigorously cross-examining elsewhere. He returned to a restless Lord Denning, who requested he open the case. The horrified pupil revealed he had not even read it. Said Lord Denning: 'Oh dear, oh dear. What have you been doing these last two days? Some young men would give their ears for a chance like this. You're not going to throw it away, are you?' 'Yes please, my Lord', came the reply. 'Well, it's all a great pity, but we can't lose time', sighed the ever courteous, yet time-conscious Denning. 'You'd better open the case, Mr Crowther. You're a very fair-minded man, I'm sure'.

When Eric took up his appointment as first Editor of the *Journal* in 1973, the late Sir Thomas Skyrme described him as having 'an independent spirit and a progressive and sometimes novel approach to current problems'. Eric himself wrote in his first Editorial: 'The real tie of the Commonwealth seems to be one of sentiment, of emotion, of friendship – a friendship which almost every Commonwealth citizen feels when visiting almost every other Commonwealth territory; a warmth and kinship not equalled when visiting any land outside the Commonwealth however hospitable its people. There is another common sentiment, no less worthy, in the Commonwealth that of pride: pride in being a free association of free people, and pride, in the judges and magistrates, in their common design to do right to all manner of people without fear or favour, affection or ill-will'. His valuable contributions to the work of the Editorial Board will be sorely missed.

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## LETTER TO THE EDITOR

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My dear Editor,

Perhaps I might add a post-script to the Chief Magistrate of Tonga's fascinating piece on *Tonga: The Strike and the Judiciary* in the December 2005 issue of the Journal?

In March this year, I had the pleasure of visiting the 'Friendly Islands' in response to a request from the government for advice on constitutional reform. Reverberations from last year's strike were still to be felt and indeed a small demonstration on a piece of open ground known as Pangai Si'i in the capital Nuku'alofa continued on a daily basis. (At the height of the crisis last year, Chief Justice Robin Webster, MBE, an expatriate Scot, had helped to calm the situation by granting an interlocutory injunction restraining the government from removing the strikers from Pangai Si'i.) A Public Service Association has now been formed, and the Assistant Registrar of the Supreme Court is a member of the executive committee. This body sees itself as in the vanguard of demands for political and constitutional reform which are being put forward by a number of leading legal practitioners. As Mr Palu told us, Tonga has a proud tradition of constitutional government. The 1875 Constitution contains a 'Declaration of Rights' which anticipated by many years the instruments which were to be adopted by other Commonwealth countries. The efficacy of the protection afforded by the declaration of rights was shown in October, 2004. Webster CJ, in a lengthy and complex judgment which illuminates the whole constitutional history of Tonga, struck down legislation limiting press

freedom as violative of the law of liberty entrenched in the 1875 declaration<sup>1</sup>. However, the Constitution reflects a tradition which needs examination in the light of the fundamental values of democracy to which Commonwealth governments now subscribe. Half the elected members of the Legislative Assembly are chosen by some 300 members of the nobility. The appointment of the Prime Minister and other ministers remains a royal prerogative. The recent confirmation of an elected commoner as Prime Minister was seen as a signal development. However, the difficult task which confronts His Majesty's ministers is to chart a path which satisfies popular wishes with regard to reform without sacrificing the unique tradition which is a source of pride to all Tongans. They cannot have been encouraged by recent events in the neighbouring Solomon Islands where a democratic election led to riots which laid waste to the capital.

My Tongan experience brought home to me the delicate and crucial role still played in some jurisdictions by the diminishing band of expatriate Chief Justices in the Commonwealth. In all my conversations, the one institution which was immune from criticism was the judiciary. However, lest any reader might suppose that such a post offers a sinecure in a tropical paradise, I have to say that the workload is extremely heavy and, as the cases which I have cited illustrate, decisions taken may be of monumental importance to the community in which the judge serves.

Yours sincerely

**Peter Slinn**

<sup>1</sup> Taioni v. Kingdom of Tonga [2005] 4LRC 661

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# SOUTH AFRICA: JUDICIAL INDEPENDENCE UNDER THREAT

*A briefing note by the CMJA*

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Many readers of this *Journal* will remember the dark days in which South Africa was a pariah State because of its apartheid policy and its disregard of the rule of law. South Africa is now happily restored to the Commonwealth family with a new democratic Constitution. Sadly, currently proposed legislation awakens old fears about the rule of law in that country. We offer a briefing note on the situation. Five Bills relating to the judiciary were published in 2005, but only two, the Constitutional Amendment Bill and the Superior Courts Bill are before the Parliament.

Judicial independence is guaranteed in the clear language of s.165 of the Constitution of South Africa, which provides in part:

- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of state may interfere with the functioning of the courts.
- (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

## **Executive powers over courts administration**

The Constitutional Amendment Bill would add new sub-sections which give the Chief Justice responsibility for the ‘judicial functions of all courts’, other than actual adjudication of cases, but provide that ‘the Cabinet member responsible for the administration of justice exercises authority over the administration and budget of all courts’.

In the United Kingdom, which does not have a rigorous separation of powers, HM Courts Service is an executive agency of the Department of Constitutional Affairs, established to discharge the Secretary of State’s duty to provide appropriate services to support the

business of the courts. Other Commonwealth countries have arrangements which involve the judiciary to greater and lesser extents, and in some, notably Canada, there has been a deliberate move to distance the courts administration from the Executive.

In South Africa, the amendment would seem to infringe the principle of judicial independence, which the Constitutional Court has declared (*De Lange v Smuts*, 1998 (3) SA 785) to include independence ‘with respect to matters of administration bearing directly on the exercise of [the] judicial function.’ It also seems unnecessary, given the existing responsibility of the organs of state to address the ‘effectiveness’ of the courts (s.165(4), above).

## **Suspension of challenged legislation**

Another provision in the Constitutional Amendment Bill would provide as a new s.172(3) that ‘Despite any other provision of this Constitution, no court may hear a matter dealing with the suspension of, or make an order suspending, the commencement of an Act of Parliament or a provincial Act’.

At present, the Constitution (ss 80 and 122) allows members of the National Assembly or a provincial legislature to apply to the Constitutional Court to declare an Act unconstitutional, and the Court may suspend the legislation if, and only if, it is in the interests of justice and the application has a reasonable chance of success. It is difficult to see what mischief flows from that power of the Constitutional Court, and it is not difficult to imagine circumstances in which its absence might lead to injustice. Serious and lasting damage might be suffered by individuals or groups by the swift implementation of legislation which was *prima facie*, and which was later confirmed as being, unconstitutional.

## **Final appeals**

A puzzling feature of the proposals concerns the relationship between the Constitutional

Court and the Supreme Court of Appeal. According to s.167(3) of the Constitution, the Constitutional Court is the highest court in all constitutional matters, and may decide only constitutional matters. The Supreme Court of Appeal may, under s.168(3), decide appeals in any matter, and is the highest court of appeal 'except in constitutional matters'. This division of functions is reflected in the composition of the two courts. In the Constitutional Court, only four members of the Court must be persons who were judges at the time they were appointed to the Constitutional Court (s.174(5)), a provision which allows persons with other types of experience to be appointed. It is proposed that the jurisdiction of the Constitutional Court be extended to allow it to hear *any* appeal, whether or not on a constitutional matter, if the Court considers that such action would be in the interests of justice. No explanation seems to have been given for this surprising proposal.

### Judicial appointments

The concern felt by jurists in South Africa and beyond is fed by the range of different proposals, all of which seem to adjust the balance between Executive and Judiciary. So, another item in the list of proposals would change the procedure for appointing the Judges President and Deputy Judges President of the High Court. At present, they are appointed by the President of the Republic on the advice of the Judicial Services Commission. It is proposed that future appointees be selected by the President 'as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly' from three names submitted by the Commission, a procedure applying at present to the judges of the Constitutional Court. Again there seems to have been no consultation about this change.

It is particularly awkward when discussion about these issues has to be in the public arena, given the absence of consultation. The judges themselves are properly inhibited from engaging in political debate; and public debate

can polarize rather than clarify issues. There are aspects of the whole set of proposals, those addressing the territorial allocation of jurisdiction between the provincial divisions of the High Court and introducing a judicial code of conduct and a register of financial interests, which are to be supported. The latter seems timely given allegations (not yet resolved) about a Judge President of one of the provincial divisions of the High Court concerning payments from a company engaged in litigation.

### Responses

If judges are forced to be silent on the controversial issues, others are not. There have been trenchant comments from former South African judges, notable Jan Steyn, now President of the Lesotho Court of Appeal; from human rights lawyers such as George Bizos SC; and from international NGOs. The International Bar Association has given its opinion that the proposed constitutional amendments operate individually and collectively to encroach upon the fundamental principle of the separation of powers and the independence of the judiciary, both principles being central to the success of democracy in South Africa.

In May, the CMJA made a submission to the parliamentary Portfolio Committee on Justice and Constitutional Development drawing attention to the Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government endorsed by Commonwealth Heads of Government. The Secretary-General's letter observes that successive generations of government and parliamentary officers, political leaders, and indeed judicial officers, have a duty to ensure that the principles of judicial independence are not lost. It was to be expected that the South African government and parliament would ensure that at all times the spirit as well as the letter of judicial independence was fully protected.



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## JUDICIAL CONDUCT: A CANADIAN PERSPECTIVE

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*The Honourable Mr. Justice James M. Spence*

Judge of the Superior Court of Justice, Ontario, Canada; co-chair of the Advisory Committee on Judicial Ethics. Part of a paper given at the Commonwealth Law Conference in September 2005.

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The Canadian Judicial Council was established by an Act of Parliament in 1971. Its statutory mandate, as set out in s.60(1) of the Judges Act is: ‘...to promote efficiency and uniformity, and to improve the quality of judicial service in superior courts and in the Tax Court of Canada’. Two of the Council’s general areas of activity are the continuing education of judges; and the handling of complaints against federally appointed judges.

The Council is principally comprised of the chief justices and the associate chief justices of the courts whose members are appointed by the federal government of Canada.

Canada’s Constitution Act 1867 provides that judges shall hold office during good behaviour, that their salaries and benefits shall be fixed by Parliament and that they shall be removable only by the Governor General on Address of the Senate and the House of Commons. Canada’s Parliament has never made a decision for removal of a judge, although over the years a number of judges whose conduct has been under examination have chosen to retire or resign rather than face such a decision or the process leading to it.

The Council has stated as follows about the relationship of judicial independence and judicial integrity:

Given the independence accorded judges, they share a collective responsibility to promote high standards of conduct. The rule of law and the independence of the judiciary depend primarily upon public confidence. Lapses and questionable conduct by judges tend to erode that confidence. ...

Public acceptance of and support for court decisions depends upon public confidence in the integrity and independence of the bench. This, in turn, depends upon the judiciary upholding high standards of conduct.

Under the Judges Act, the process established by statute to assess alleged breaches of conduct by federally appointed judges has been the responsibility of the Council since 1971. The Council’s role normally comes into play when a complaint or allegation is made that a judge in some way has breached the requirement of good behaviour. It must then decide whether, by his or her conduct, the judge has become ‘incapacitated or disabled from the due execution of the office of judge’.

The Council makes an independent assessment of the judicial conduct in question – not whether a judge has made an erroneous decision. This distinction between judicial *decisions* and judicial *conduct* is fundamental. Judges’ *decisions* can be appealed to progressively higher courts. They can be reversed or varied by the appeal courts without reflecting in any way on the judges’ capacity to perform their duties, and without jeopardizing in any way their tenure on the bench, so long as they have acted ‘within the law and their conscience’.

Where conduct is involved, the Council’s assessment of a complaint can lead at most to a recommendation to the Minister of Justice that a judge be removed from office. The Minister, in turn, can make a further recommendation to Parliament.

The kind of conduct that has been the subject matter of complaints to the Council has, from its annual reports, typically concerned conduct by a judge in the courtroom, or in connection with a particular court case. Complaints have been made about alleged bias, alleged conflict of interest and alleged delay in rendering judgment, and alleged abusive conduct in the courtroom. Most complaints have been found to be unsubstantiated. Some have resulted in a reprimand or admonition to the judge concerned.

### The Ethical Principles for Judges

The *Ethical Principles* were published by the Canadian Judicial Council in 1998, after four

years of preparation which included widespread consultation both within and outside the judiciary.

The initial Statement and Principles set out the nature of the document:

STATEMENT: *The purpose of this document is to provide ethical guidance for federally appointed judges.*

PRINCIPLES:

1. The Statements, Principles and Commentaries describe the very high standards toward which all judges strive. They are principles of reason to be applied in light of all of the relevant circumstances and consistently with the requirements of judicial independence and the law. Setting out the very best in these Statements, Principles and Commentaries does not preclude reasonable disagreements about their application or imply that departures from them warrant disapproval.
2. The Statements, Principles and Commentaries are advisory in nature. Their goals are to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role. They are not and shall not be used as a code or a list of prohibited behaviours. They do not set out standards defining judicial misconduct.

A wide variety of sources were consulted in the process of preparing the document. These include not only Canadian sources but also the Code of Judicial Conduct applying to the United States federal judiciary, the American Bar Association's *Model Code of Judicial Conduct* (1990) as well as scholarly writing and rulings concerning judicial conduct in Canada, the United Kingdom, Australia and the United States. Of particular note are J.B. Thomas, *Judicial Ethics in Australia* (2nd edn, 1997), J. Shaman et al., *Judicial Conduct and Ethics* (2nd edn, 1995) and S. Shetreet, *Judges on Trial* (1976).

The document sets out five basic principles of judicial ethics. Each is first presented in the form of a statement. The statement is then followed by an expression of certain principles that are relevant to the statement. These are

followed by a commentary, including examples.

The document addresses conduct of varying degrees of seriousness. Dishonest conduct by judges relating to a case before that judge, for example, would presumably constitute judicial misconduct warranting a recommendation for removal from office. Other forms of conduct, for example, engaging in charitable fundraising, might, in a particular case, fall short of the best practices recommended in the document but that, by itself, would not necessarily suggest that judicial misconduct has occurred that would warrant disciplinary action.

The five basic principles are stated under the respective headings: 'Judicial Independence', 'Integrity', 'Diligence', 'Equality' and 'Impartiality'.

The five basic principles are set out as follows:

### 1 **Judicial Independence**

An independent judiciary is indispensable to impartial justice under law. Judges should, therefore, uphold and exemplify judicial independence in both its individual and institutional aspects.

### 2 **Integrity**

Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary.

### 3 **Diligence**

Judges should be diligent in the performance of their judicial duties.

### 4 **Equality**

Judges should conduct themselves and proceedings before them so as to assure equality according to law.

### 5 **Impartiality**

Judges must be and should appear to be impartial with respect to their decisions and decision making.

With respect to the basic principle of impartiality, the following general principles are set out:

1. Judges should strive to ensure that their conduct, both in and out of court, maintains and enhances confidence in their impartiality and that of the judiciary.
2. Judges should as much as reasonably possible conduct their personal and

business affairs so as to minimize the occasions on which it will be necessary to be disqualified from hearing cases.

3. The appearance of impartiality is to be assessed from the perspective of a reasonable, fair minded and informed person.

These general principles about impartiality then go on to address judicial demeanour, civic and charitable activity, political activity and conflicts of interest.

### **Advisory Committee on Judicial Ethics**

The publication of the *Ethical Principles* coincided with the establishment of the Advisory Committee on Judicial Ethics which receives specific questions from judges and responds with advisory opinions. The Committee is chosen by a nominating committee comprised equally of members of the Council and members of the Canadian Association of Superior Court Judges.

The Committee is a group of fellow judges whose job is to give their best advice to colleagues. They do so on a confidential anonymous basis. Only the member of the Committee who receives the enquiry knows its source. The copy of the letter in the Committee's file is anonymous. The recipient is given the opportunity to say whether it is satisfactory to include the anonymous version of the letter in reports by the Committee.

When an enquiry is received, a communication goes out to the Committee members giving the details and possibly including an initial proposed response for discussion. Views are exchanged by fax and e-mail and, if anyone requests, by conference call. Usually a consensus is reached but sometimes it is necessary to express a minority view.

The enquiries typically concern out-of-court conduct and they almost always concern prospective conduct. Many of the enquiries concern things judges might well have a reason or a desire to undertake as private individuals, for example taking part in fundraising for charitable activities, but the fact of being a judge may potentially make the activity problematic.

The out-of-court matters about which the Committee is typically consulted do not seem to be the kind of activities which usually occasion complaints against judges that reach

the stage of public notice. But caution is always advisable. Certainly, proposals to engage in public comment are troubling, and for good reason, in view of the possibility for public controversy. A case a few years ago before the Council concerned a judge who gave an interview to the press concerning his wife's participation in a real property transaction with a number of fellow property owners which involved a dispute about municipal government. Such cases provide a reminder that what might seem a private matter to a judge may not look that way once the judge comments on it publicly.

In this regard, it is wise to recall a talk on this subject given about a decade ago in Cambridge by Lord Ackner. He spoke approvingly of guidelines then in effect for English judges that discouraged judicial communication with this media. Lord Ackner said that he and his fellow judges were well advised to keep in mind what the mother whale said to the baby whale: 'Remember, they can only shoot at you when you're spouting.'

Some of the questions the Committee receives relate to situations that arise for the judge without any volition on the judge's part – questions that arise because of the judge's past law practice for example. Other questions arise from things that judges want to do: help in charitable fundraising, undertake exploitation of their artistic avocations, and make a contribution to public concerns, for example.

It is understandable that judges would wish to be able to express the things that are important to them and thereby to develop what might be called their moral personality, like other citizens, to the greatest extent legitimately possible. However, the vast expansion of the role of the law in contemporary society suggests that judges should be extremely careful not to seem to take advantage of their office in any way, even marginally.

The problem might be illustrated this way. When a judge offers his or her endorsement for a charitable activity he or she may suppose, reasonably enough, that this is just a personal act. After all, the judge would presumably have been disposed to do the same even if the judge were not on the bench. But to the non-judicial observer, what appears to the judge to be merely personal may carry some imprint of reliance on judicial office. That impression

may or may not be reasonable. The Ethical Principles address these concerns in principle and with helpful examples, but they cannot cover all the circumstances. So there can be difficult judgment calls in forming a view as to whether a proposed course of conduct might, just because it is the conduct of a judge and not because of anything otherwise questionable about it, be regarded as taking undue advantage of the judicial office. For example, a judge might wish to write to a circle of friends to encourage them to commit themselves to take part in giving support to a charity marathon. These people are my friends, the judge would no doubt say to himself or herself; they will understand that this is just personal. But can we rely on the matter being that simple? The Ethical Principles include cautionary comments which the Committee has properly had to take into account in forming and giving its advice.

The attention that these concerns require may be part of a larger but less readily discernable change in public expectations about the role of the judge. In a traditional unicultural society, custom and law are perhaps closely allied and aligned in a continuum and it is accepted and perhaps desired that the judge should be a guardian of the values of the culture. In a multicultural society such as contemporary Canada, in which law acquires overwhelming paramourcy in matters of general public order and custom perhaps recedes to a more local and optional status, it arguably ceases to be appropriate for the judge to be the representative of broad cultural value. The judge's role may then be expected to focus exclusively on the administration of law. In such a cultural climate, it would not be surprising if the public expectation was that judges would refrain from public involvement in aspects of public activity and opinion, especially if they engage particular and contested social values.

In a social context of this kind it arguably makes good sense to be cautious about matters of extra-judicial conduct that might otherwise seem unexceptional. On the one hand, a judge likely feels that the judge knows when the judge is acting personally and privately and without any intent to derive benefit from his or her judicial office. On the other hand, we have no available device to use to say to the public: with respect to this activity, you are to ignore the fact that I am a judge. And perhaps there cannot be any conclusive device of that kind; the question must ultimately depend on whether the conduct in question could compromise confidence in the independence of the judge.

These matters are in many respects matters on which reasonable people, reasonable judges, may disagree. The Committee is at a relatively early stage in this undertaking and the social context in which judges work is changing.

### **A View of the Canadian Experience to Date**

My fellow co-chair of the Committee (the Hon. Madam Justice Georgina R. Jackson) has recently provided the following assessment of the operation of the Principles and the Advisory Committee:

I would like to offer my opinion that the drafters of the Ethical Principles have struck an important balance between the rigors of a code and a system that has no written guidelines. The newly created Advisory Committee and the concurrent educational programming appear to be fulfilling an important need in fostering a strong, independent, impartial and informed judiciary.

I concur.

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# CASEFLOW MANAGEMENT IN A UNIFIED FAMILY COURT: A CARIBBEAN EXPERIMENT

*The Rt. Hon. Mr. Justice Michael de la Bastide TC*

President of the Caribbean Court of Justice. A paper presented at the Commonwealth Law Conference, September 2005.

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A new Family Court has been set up in Trinidad and Tobago which is unique in the Commonwealth Caribbean. The Court is experimental. It is a pilot project which is to be conducted for two years, the intention being that the results of the experiment will help to shape a full Family Court system for Trinidad and Tobago. The Court opened for business on the 17<sup>th</sup> May, 2004, so the pilot still has some eight months to run. But the indications are that it has been hugely successful. There is no doubt that one of the reasons for the success of the Court has been its adoption of caseload and case management techniques in combination with other strategies, all tailored to the peculiar requirements of a Family Court. Before examining these techniques and strategies, however, it is necessary first to give some basic information about the Court.

One unusual feature of the Family Court is that it was set up without the need for any legislation. The Court is a unified Court in which both High Court judges and magistrates adjudicate. Both classes of judicial officer continue to exercise the jurisdiction given to them respectively by the existing law, though to the user of the Court the joinder of the two jurisdictions appears quite seamless. Initially the Court was staffed by four magistrates and one High Court judge. In November 2004 a second High Court judge was added, and in July 2005, a third. The Court was intended to serve the capital city of Port-of-Spain and its environs. The magistrates who sit in the Family Court can only deal with cases brought by persons resident within the magisterial district of St. George West in which Port of Spain is located. There is no similar restriction on the jurisdiction of the High Court judges comprising the Court. The Family Court, however, has an identity of its own. It is a single integrated institution, housed in a building which is dedicated exclusively to it.

The Court is served by a single registry and a common staff.

Another important and novel feature of the Court is that it provides in-house the services of social workers, mediators and probation officers. A judge or magistrate may refer the parties to the proceedings to any of these services but additionally, the services of the social workers who provide counseling, and the mediation service, may be accessed directly by any member of the public without the necessity either of starting court proceedings or hiring a lawyer. So this is truly a multi-door court where customers may enter not only through the litigation door but also through the social services door or the mediation door. This does provide some justification for giving an extended meaning to caseload management as it applies to the Court.

## Caseflow management

Perhaps it would be as well to start off by defining terms. The terms caseload management and case management are often used interchangeably but I prefer to recognize a difference between them. I understand caseload management to refer to the co-ordination of the court's entire system towards the goal of timely disposition of the matters entrusted to the court. In short it deals with the timely flow of matters through the court. Case management is an element of case flow management and refers to the management of an individual case. Trial management, a term also often used, refers to the management of a trial by the setting and observation of certain ground rules.

An important aspect of the experiment constituted by the establishment and operation of the Family Court, is that new Rules of Court have uniquely been implemented to govern proceedings in the High Court section of the Court. These rules are not really new, as their title, the

Family Proceeding Rules 1998, would indicate. In fact these rules together with the Civil Proceedings Rules 1998, were made by the Rules Committee of Trinidad and Tobago in 1998, subject only to the fixing of a date for their coming into force. Both sets of rules followed largely the model of the new style of case management rules adopted in England following Lord Woolf's report *Access to Justice*. Both sets of rules were for the most part drafted by Judge Richard Greenslade who had participated in the drafting of the new English rules. There were of course modifications to suit local conditions suggested by the Rules Committee itself and by attorneys and court administrators.

Since I happened to be the Chief Justice and Chairman of the Rules Committee at that time, I may be forgiven for saying that it was with great reluctance and deep regret that the Rules Committee was forced to yield to fierce opposition to the new rules from the Law Association and the Attorney General of the day, and to postpone their implementation indefinitely. Happily, the tide of opinion among the legal profession appears to have turned and the Civil Proceedings Rules are to be brought into effect with the blessing of the Law Association and the present Attorney General, at the beginning of the new Law Term on 19th September, 2005. But, for the time being the High Court judges sitting in the Family Court alone have and will continue to have the advantage of operating under the Family Proceedings Rules. It is worth noting that since 1998 both the Eastern Caribbean Supreme Court and more recently the Supreme Court of Jamaica have adopted new style civil procedure rules drafted by or with the assistance of Judge Greenslade along similar lines to those he followed in Trinidad and Tobago. Another version of the same model has also been adopted in Belize. No other Caribbean country has yet adopted new Family Procedure Rules.

The Family Proceedings Rules do not apply to the magistrates who sit in the Family Court but those magistrates subscribe to the philosophy which underlies the rules and have to the fullest extent possible adopted the same approach and procedures as those prescribed by them.

## Jurisdiction

The jurisdiction of the High Court judges in the Family Court does not require much elaboration. It includes the grant of divorces, decrees of nullity and judicial separation, and the award of ancillary relief which may relate to custody and maintenance of children, maintenance of a former spouse and property settlement. The jurisdiction of the magistrates includes such matters as paternity suits, applications for financial support or custody of children, adoption and committal to an institution of children who are out of control. Domestic violence cases are only accepted if there is some other proceeding pending in the Family Court involving the same parties. The Family Court may also be called upon to adjudicate claims as between 'cohabitants', that is persons who live or have lived together in a domestic relationship, for the enforcement of rights granted by the Cohabitation Relationships Act 1998. It may be observed in passing that 'cohabitant' is so defined in this Act as to exclude someone living with a partner of the same sex.

## Management techniques

I turn now to consider how the techniques of caseload management and case management have been applied in the operation of the Family Court. Case-flow Management has been defined as the coordination of all the court's processes and resources to move cases in a timely manner from filing to disposition, regardless of the case type or the type of disposition. I would suggest however that in shaping procedures for the Family Court it is important to take account of certain special features of the type of case which comes before the Court. Probably the most important of these features is the frequent involvement of children. When children are involved, their welfare is better served if their parents can be persuaded to communicate and cooperate with each other in determining and implementing the best arrangements that can be made for them. Another feature of family proceedings is that the parties have usually shared a failed relationship and frequently come to the court with a good deal of baggage from that relationship, in which hurt and hostility often predominate. The architects of the Family Court have demonstrated that they were very conscious of the need to meet the challenges which these features create.

In order to identify the goal which its procedures are intended to achieve, it would be as well to begin by quoting the ‘overriding objective’ which is set out in the very first rule in the Family Proceeding Rules. That rule reads in part as follows:

- 1.1. (1) The overriding objectives of these Rules is to enable the court to deal with family matters –
  - (a) justly; and
  - (b) in a way which, in proceedings affecting any child of the family, gives first and paramount consideration to the welfare of that child.
- (2) Dealing justly with the case includes –
  - (a) ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position; and
  - (b) encouraging settlement of any disputes by negotiation or mediation or other means; and
  - (c) saving expense; and
  - (d) dealing with cases in ways which are proportionate
    - (i) to the complexity of the issues; and
    - (ii) to the financial position of each party; and
  - (e) ensuring that it is dealt with expeditiously; and
  - (f) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases. ...

I would like to draw attention particularly to the emphasis which this rule places on :-

- the welfare of any child affected by the proceedings;
- the need to ensure that no party has an advantage over the other;
- settlement of disputes by negotiations or mediation;
- the need for expedition;
- fostering communication and cooperation between parents and others with regard to the parenting of the child; and
- the need to take account of the wishes and feelings of any child concerned.

## Directions hearings

Continuous court supervision of the progress of the case is triggered as soon as a matter is filed in the High Court section of the Family Court. A key feature of this is the use of directions hearings which are in effect case management conferences. Evidence may be taken at these hearings for the purpose of enabling the judge to determine specific issues. As a result of this early court intervention, almost invariably matters are finally disposed of by the judges of the Family Court without the need for a full-scale trial separate and distinct from the directions hearings. As soon as a petition or application is filed, the court office is required to fix a time, date and place for the holding of a directions hearing. If a directions hearing is adjourned, the Court is required to fix a new date, time and place for the adjourned hearing.

The Court is expressly permitted to give directions on all matters that are or may be in issue between the parties, regardless of whether an application has been made for a particular issue to be decided by the Court. This facility may be used by the Court, if it considers it necessary, to decide issues that have not been specifically raised by the parties. An important general rule is that each lay party shall attend a directions hearing. If a party is represented, his attorney is also required to attend.

## Mediation

A recurrent theme in the Rules is the importance of resolving disputes by agreement whenever possible, and of using mediation for this purpose. The Rules provide that ‘the Court shall take all practicable steps to encourage the parties to reach agreement on any disputed matters and, in particular, may refer the parties to mediation’. Rule 14.1 provides that the Court shall further the overriding objective by ‘actively managing cases’ and goes on to list a number of things which this includes. Among them are the following:

- (c) encouraging the parties to use the most appropriate form of dispute resolution including, in particular, mediation, if the court considers that appropriate and by facilitating the use of such procedures,
- (d) encouraging the parties to cooperate with each other
  - (i) as to the parenting of any children;
  - (ii) in the conduct of proceedings

Power is expressly given by the Mediation Act 2004 to a judge or magistrate to refer parties to mediation by a certified mediator in any matter other than a criminal matter. Under the Family Proceedings Act 2004 a court (which includes a magistrates' court) may refer a matter or any aspect of it to mediation or to the unit responsible for social services in the court or to some other professional.

### Other strategies

To look merely at the rules which govern proceedings before the judges of the Family Court would give a very imperfect and incomplete picture of how cases are actually dealt with. A number of measures have been taken and strategies adopted in pursuit of the overriding objective, which are reflective of the philosophy and policy of the Family Proceedings Rules but are not expressly written into them. The process of conditioning parties to help the Court further the overriding objective begins from the time they first enter the building. I shall say more about this later but will confine myself for the time being to describing the rooms in which cases are heard. These rooms are located on the first floor of the building and are more like small or medium-sized conference rooms than court-rooms. The main item of furniture is a T-shaped conference table. The judge or magistrate sits with his clerk or support officer, at the top of the T and the parties and their attorneys, if any, sit around the lower end of the table. There is much less formality than in other courts, though a certain decorum is maintained. The judge does not wear a gown and attorneys are not required to do so. Parties quite often appear without an attorney, even before the High Court judges. Even when a party is represented by an attorney who is present, the judge or magistrate will quite often address his client directly and get the client to respond to questions posed by the judge. Generally speaking, the attorney does not provide the same shield between the judge and the lay client as he does in other courts. The attorney's role is much less dominant.

Time-tables are set for the taking of action between one directions hearing and the next. The Rules require the judge to fix a time-table prescribing dates for the hearing of every disputed issue and the taking of every step leading up to such hearing. The lay client does

not fail to appreciate that the judge's insistence on counsel's adherence to the time-table is for the client's benefit. Parties are happy to discover that they have a voice in the disposition of their matters. The judges and magistrates, using the skills and techniques which they have been taught as part of the specialised training which they received prior to joining the Family Court, take every opportunity at these directions hearings to encourage the parties to talk with each other with or without the assistance of counsel. When children are involved, an appeal is made to the parents to use the special knowledge which they alone have of the relevant facts, to determine between themselves the best arrangements that can be made for the children and to subordinate their own agendas to the achievement of this goal. The parties may be referred to any or all of the ancillary services provided in-house, that is, counseling, probation and mediation. If there is an outside agency or professional e.g. a psychologist, who is better equipped to provide assistance, then the referral may be made to them. To whomever the referral is made, the judge or magistrate making it keeps the case in his docket and will adjourn the matter to another fixed time and date. In fact once a case is assigned to a judge or magistrate, it will be retained by him or her until final disposition.

Scheduling of cases is facilitated by a networked case management information system which is integrated with a system that permits the calendaring of judges and magistrates, parties, attorneys, hearing-rooms and other resources. The result is that an electronic diary is generated for each judge and magistrate, the contents of which can be accessed by the judge or magistrate or his support officer who sits next to him in court with his laptop in front of him. It takes very little time therefore to find an empty slot in the judge's calendar to which a matter can be adjourned without fear of a conflict of fixtures. The same information can be accessed on their computers by the officers in the Registry who are responsible for fixing new matters for first hearing. Each matter is assigned its own time slot, usually of 20 minutes duration, although more time may be allocated to an adjourned hearing in the discretion of the judge or magistrate.

This system has a number of beneficial effects, It provides for hearing date and time certainty.



It tends to minimize cost and inconvenience to litigants and attorneys by ensuring that their time (as well as that of the judge or magistrate) is used as efficiently and productively as possible. The point may be made that this system is in stark contrast to what obtains in many of the 'ordinary' magistrates' courts in Trinidad and Tobago in which upwards of 100 cases may be listed each day and the magistrate may spend a significant part of the morning adjourning most of them.

### Magistrates' cases

Though unsupported by rules of court, the magistrates use many of the same case management techniques as their colleagues on the High Court side of the Family Court. They have the power to refer parties to the social services or to mediation or for report by a probation officer and they utilize this power fully. The hearing-rooms in which they sit are identical to those in which the judges sit. They place the same emphasis on getting parties to search for solutions and to focus on the welfare of their children. Except for the non-applicability of the Rules, all that has been said with regard to the approach and strategies used by the judges in the Family Court, is equally true of the magistrates who sit there. It is important to note that the judges and magistrates of the Family Court were for the most part trained together. It would be appropriate at this stage to say something about that training.

### Training

The training for judges and magistrates of the Family court focused on subjects which were especially relevant to the types of cases they would be dealing with. The topics covered included family economics, the nature of domestic violence and the role of the judge in domestic violence cases, hearing the voice of the child and handling children's evidence. Instruction was also given in broader topics such as mediation skills and techniques for the non-mediator, communication, trial management, settlement conferences, caseload management and information technology, but in every case with special reference to the application of the topic to proceedings in a Family Court. The training was both theoretical and practical, with a certain amount of simulation and role-playing being used for the development of skills. Training was not

confined to the judges and magistrates but extended to the other staff of the Family Court who were, whenever appropriate, trained together with the judicial officers. There was also training offered to attorneys with a Family Court practice. This served to introduce attorneys to the new role which they would be expected to play in the pilot Court and to the objectives that were being set for, and the techniques that would be used by, the new Court. This initiative has probably helped to secure the acceptance by attorneys practising in the Family Court of the transition from the combative approach to which they were accustomed under the old Matrimonial Proceedings Rules to the cooperative approach adopted by the Court in accordance with the Family Proceedings Rules. It is probably true to say, however, that their enthusiasm for the new approach is in large part attributable to the improved results which they have seen that new approach produce.

### Other facilities

Those responsible for setting up this experimental court utilized other strategies which though not falling strictly within the scope of case management or caseload management, are geared to achieving a similar result, that is, a just and beneficial solution in the shortest possible time of the problems which the users of the Court bring to it. Those who designed the pilot attached a lot of importance to smoothing the way for persons wishing to access the services provided by the Court and to putting them in a proper frame of mind to assist in the search for a solution to their family problems. In the first place, the interior design, décor and furniture of the building have been selected with a view to producing a soothing and relaxing effect. Three pastel colours are used throughout the building, The waiting area outside the hearing-rooms on the first floor has the ambiance of a garden. There is a profusion of tropical plants in planters and seating accommodation is provided by garden benches. The third floor on which the social workers, mediators and probation officers are located, is particularly light and airy with lots of sunlight entering through large windows and French doors, Indeed there is very little in the building to suggest to the lay users of the Court any resemblance to the court-houses with which they would be familiar.

The Court also provides a facility which is a very useful adjunct to caseload management, in the shape of two daycare centres for children. One is for children between the ages of 3 months and 10 years and the other for youngsters between 11 and 17 years of age. Both centres are staffed by persons professionally trained in child care. The centres are well equipped not only with cribs and cots for the infants and toys for the toddlers but also with books, puzzles, television and computers for the older children. The centres are available to anyone who has business in the building whether it be in connection with the hearing of a case or for accessing the services on the third floor. Every precaution is taken to ensure not only that each child left in the centres is well cared for and entertained, but also is returned only to the person who brought him or her to the centre unless an order is made by the Court while the child is in the centre ordering him or her to be handed over to someone else. These centres not only serve to make the experience less traumatic for a child required to attend court, but also enable the child's parent or guardian to keep his court appointments and to do so in a more relaxed frame of mind.

Another strategy adopted for smoothing the way for users of the Court, has to do with the way in which they are dealt with, particularly on a first visit, by the staff. A lot of emphasis has been placed on provision by the Court of high quality customer service. The staff have been well trained, highly motivated and, with the attention to detail identified as one of the fundamentals of caseload management, attractively uniformed. When a lay person enters the Registry on the ground floor of the building, he or she is greeted by a Customer Service Representative. These representatives, who are easily identified by the bright red jackets which they wear, are in fact stationed on each floor to which users of the Court have access, for the purpose of directing them to the appropriate area or office where their presence is required. Assuming that the person whom the Customer Service representative has greeted is a 'pro se' client, that is, someone who is seeking the assistance of the Court but does not have the services of an attorney, he is ushered by the Customer Service representative to an Intake Officer. That officer is housed in a cubicle in which he can talk with the client with some degree of confidentiality.

The Intake Officer who is a trained social worker interviews the client, takes and records information from the person and explains to him or her the options which are available, that is, either an application to the Court or access to the services of a social worker or mediator. If the choice is to access the social services, then the Intake Officer will have a Customer Service representative escort the client straightaway to the social services department on the third floor. If the client wishes access to the services of a mediator, the Intake Officer explains the mediation process, asks the client to inform the other party and obtains a telephone contact which she passes on to the Coordinator of Mediation Services. If there is to be an application to the Court, the client will be escorted by a Customer Service Representative to a Family Case Management Officer who sits behind the counter in the Registry. If what is sought is a divorce or some other relief which only the High Court can grant, the client may be referred to the representative of the Legal Aid Authority who has a desk in the Registry, or if the client wishes to start and conduct proceedings in person (as he or she is entitled to do under the Family Proceedings Rules) the client is referred to the Registrar for assistance. If the application is to be made to a magistrate, the Family Case Management Officer will prepare the appropriate application for the client and have him or her sign it. On the basis of information provided by the Listing Unit, the date, the time and the number of the hearing-room on, at and in which the application will be heard, are fixed and stated in the application, a copy of which is given to the client.

### **Monitoring the pilot**

From its inception the Family Court has been monitored by a Monitoring Committee appointed by the Chief Justice of Trinidad and Tobago. This committee is chaired by a judge of the High Court (not one of those assigned to the Family Court) and includes two attorneys nominated by the Law Association, the director of a Government agency charged with the delivery of social services, court administrators, an attorney from the Attorney General's office and the senior judge and senior magistrate from the Family Court. The Monitoring Committee is assisted by the Evaluation Team comprising the Family Court Manager, the Court Statistician and Robert

Hann, a court evaluation specialist from Canada. The Evaluation Team is mainly responsible for designing evaluation and monitoring instruments, coordinating data collection, collation of data, developing statistical tables and preparing reports for the Monitoring Committee. In fact the Monitoring Committee has received from the Evaluation Team, and is considering, a draft first year Report on the Court which covers the period from May 2004 to May 2005.

Assessment of the Court's performance is done within the framework of certain Court Performance Standards which have been adopted by the Court. The core standards adopted by the Court have their genesis in a project undertaken between 1987 and 1990 by the National Centre for State Courts whose headquarters are in Virginia, U.S.A. and the United States Bureau of Justice Assistance. These Court Performance Standards are grouped in five performance areas that embrace the fundamental purpose and mission of courts. They are access to justice; expedition and timeliness; equality, fairness and integrity; independence and accountability; and public trust and confidence. The Family Court has chosen to add a sixth performance area, namely environment for conducting the work of the court.

The monitoring exercise has been an on-going one throughout the first year of the Court's existence. It has served to pinpoint some weaknesses in the Court's systems. When remedial action by the Court's management was possible, it was taken, and when the intervention of the Executive or the legislature was required, that was solicited. Remedies of the first type of case include such simple things as the tinting of the Intake Officers' booths and the relocation of the Listing Unit in order to provide a greater degree of privacy for customers.

There is a good deal of statistical data in the draft first year Report submitted by the Evaluation Team to the Monitoring Committee. A major flaw in the summary court system in Trinidad and Tobago is the number of times on which matters are adjourned by magistrates before they are heard. It is interesting therefore to note from the draft Report that of the cases determined by magistrates in the Family Court during the

period under review, 63% were determined at either the first or second hearing and 77% had been determined by the third hearing. It has already been mentioned that many of these matters are adjourned at the first hearing because of non-service of the summons on the defendant. This is reflected in the comparable figures for matters determined by the High Court judges of the Family Court. Of the matters determined by them, 68% were determined at the first or second hearing and 86% had been determined by the third hearing. Looked at from another perspective, of the matters pending before magistrates in the Family Court on the 31 May 2005, 40% had been the subject of only one or two adjournments, and 69% had not been adjourned more than four times. In the High Court section of the Family Court, 51% of the pending matters had been adjourned only once or twice, and 75% had been adjourned no more than four times. In the High Court section these adjournments would have been of the directions hearings, for as already stated, cases there are almost always resolved without a formal trial.

Another significant statistic is the time elapsed between the filing of proceedings and the first hearing. In the Family High Court the target of a first hearing of the directions summons within eight weeks was achieved in 90% of the cases, and in more than 50% of all cases filed the first hearing took place within five weeks of filing. Before the Family Court came on the scene, persons filing petitions for divorce in the High Court Registries in Port of Spain and San Fernando were being given hearing dates for their decrees nisi eleven months after filing. This time lag has now been reduced to eight or nine months because of the reduction in the number of petitions being filed in those registries as a result of parties and their attorneys preferring to file their petitions in the Family Court.

From its inception the Family Court has continuously sought to get feedback from the attorneys who practice before it and their lay clients as to how they assess various aspects of the Court's performance. This they have done by questionnaires, some of which have been directed to the attorneys and others to the lay clients.

The questions posed to the attorneys focused on such matters as their perception of the

fairness and efficiency of the Court, a comparison between the new Family Proceedings Rules and the old Matrimonial Causes Rules, the usefulness of having mediation and counselling available within the court-house and whether their cases were concluded within a reasonable time. The questionnaires given to the lay clients enquired about such matters as whether they had any difficulty in finding their way to and around the building, how quickly they got from the Court personnel the information and assistance they needed, whether the staff treated them with courtesy and whether they were satisfied with some of the court's facilities, including the day-care centres. The responses were extremely positive, both from the attorneys and the lay clients.

Perhaps the most convincing evidence of the Family Court's success is provided by its popularity with the attorneys who practise in the field of family law as well as the lay persons with family problems to whom word has spread of the Court's existence and growing reputation. The Court was intended to serve Port-of-Spain and its environs but in fact applications are being filed in the Family High

Court by and on behalf of persons who reside in every part of Trinidad and in some cases, of Tobago.

In light of all this support for the new Family Court, it is probably safe to predict that the Court is here to stay. It remains to be seen what steps will be taken by the Government and Judiciary of Trinidad and Tobago to extend the jurisdiction and services of the Family Court to the whole of the twin-island Republic.

In closing, I venture to put forward two thoughts. The first is that the Family Court in Port of Spain is a pioneer court as well as a pilot court, in that it has departed in many ways from the traditional concept of what a court is about. Perhaps because of its success, it can light the way not only for other family courts but also for other courts with a civil jurisdiction. The other thought is that the success of this new family court is particularly welcome at a time when in the country it serves there is a disturbing increase of violent crime committed by young persons, a phenomenon which many in the society claim to be the result of the break-down in family life and a lack of proper parenting.



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# THERAPEUTIC JURISPRUDENCE IN THE COMMONWEALTH

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Therapeutic jurisprudence is gaining momentum in legal systems of a growing number of Commonwealth nations. Its most visible manifestation is in problem solving courts such as drug courts, domestic violence courts and mental health courts that are gaining popularity in Australia, Canada, New Zealand and the United Kingdom. However therapeutic jurisprudence has implications for the theory and practice of all areas of the law and for legal education. This article examines how therapeutic jurisprudence is informing the theory and practice of legal institutions and the practice of judges, magistrates and lawyers in the Commonwealth and suggests areas for further development.

US law professors David Wexler and Bruce Winick developed the concept of therapeutic jurisprudence in the context of mental health law but it is now applied far more broadly. As at 3 January 2006, the website of the International Network on Therapeutic Jurisprudence disclosed 764 articles published on therapeutic jurisprudence and its application to diverse areas of the law.

Therapeutic jurisprudence suggests a perspective from which the law and its processes can be examined. That perspective is the potential impact of law and its processes on the wellbeing of those affected by it. Any area of the law can be examined from this perspective, including criminal, civil, family, coronial, commercial and international law. The analysis may focus on the impact of law, legal institutions and their processes or the actions of individuals such as judges and magistrates. Any aspect of wellbeing can be the focus of the study such as the trauma suffered by a victim of crime in recounting his or her story to a court, offender rehabilitation as the ability to lead a happy, constructive and law-abiding life, the negative effect on an expert witness in being subjected to gruelling cross-examination, job satisfaction of judicial officers and lawyers or the promotion of self-actualisation as a goal

of a legal system. The range of those affected by legal processes is also broad, including parties to proceedings, judicial officers, court staff, lawyers, witnesses, jurors, families of victims and the wider community.

Therapeutic jurisprudence is not confined to a theoretical analysis. Indeed, a therapeutic analysis is often used to suggest ways in which the law and its processes can be improved. Therapeutic jurisprudence uses findings from the behavioural sciences to inform this process. Such an exchange between disciplines is understandable given that the law and the behavioural sciences are both concerned with the nature and modification of human behaviour and with communication. The law does not have a monopoly on 'what works' in relation to these fields. It should be open to dialogue with the behavioural sciences in an endeavour to improve its functioning.

Therapeutic jurisprudence does not assert that therapeutic concerns should be paramount in every case, only that they should be considered and given appropriate weight in the circumstances.

Allan and Allan used a therapeutic analysis in relation to South Africa's Truth and Reconciliation Commission. They refer to two principal mechanisms used in response to human rights abuses since World War I: the retributive court process and a more restorative process involving the telling of stories by victims and perpetrators in an endeavour to air the truth and promote the process of community healing. South Africa chose to use the second option. Allan and Allan concluded that while the overall effect of the Truth and Reconciliation Commission was therapeutic, there were individual processes that could have been anti-therapeutic to those involved. In the course of their analysis, they suggested preferable methods than some of those used by the Commission in order to promote a more therapeutic effect for survivors and perpetrators.

## Therapeutic Jurisprudence and the Courts

A therapeutic analysis also provides justification for problem solving court programs in criminal proceedings. Often offenders come to court with significant problems – such as substance abuse, psychological dysfunction, loss of employment and family breakdown – that have contributed to the offending behaviour. In need of healing, they enter an environment that uses the imagery of combat in the context of an adversarial approach that is typical of Commonwealth systems of justice. From a therapeutic perspective, an adversarial approach can bring into focus an offender's failures and weaknesses and the differences between parties instead of what is needed to resolve their problems.

From this perspective, legal processes that are collaborative, multi-disciplinary, and empowering of the individual are more likely to promote healing than an adversarial approach. Hence a problem solving court such as a drug court involves a multi-disciplinary team involving the judicial officer, prosecutor, defence lawyer and community corrections officer with treatment professionals working with the participant to promote the common goal of rehabilitation. There is evidence that drug courts are a cost-effective means of dealing with drug problems and offender recidivism.

While specialist problem solving court programs are generally resource intensive and are usually established in urban areas and with significant budgets, they do not have to be established in this way. For example, the Magistrates' Court at Geraldton in regional Western Australia established a problem solving court program called the Geraldton Alternative Sentencing Regime with the cooperation with the police, legal profession, Community Justice Services and local treatment agencies without significant additional resources. The program takes a therapeutic, team-based and holistic approach to promoting offender rehabilitation. The program has a high proportion of Indigenous participants and a good success rate in promoting reduced offending and substance abuse and improved physical and psychological wellbeing. It also used the stress reduction and self-development technique Transcendental Meditation<sup>®</sup> on a pilot basis. Other regional courts in Western

Australia have introduced Aboriginal courts without extensive resources.

Therapeutic jurisprudence can also be used to examine the impact of legal processes on special groups such as Indigenous people, women, victims and homosexuals. For example, the principles of therapeutic jurisprudence have been used to design court processes that promote better outcomes for the community and for Indigenous people coming before courts in Australia.

Therapeutic jurisprudence can also inform individual judicial officers as to ways of interacting with people in court so as to promote justice system goals. Judicial officers sitting in a problem solving court program are an obvious example. But many of the principles are also relevant to judicial officers sitting in a general list. For example, research in procedural justice emphasises the value litigants place on the fairness of the process – they are more likely to respect the outcome, even if adverse to them, if they feel they have been given a fair hearing. A therapeutic approach emphasises the values of voice, validation and respect. Voice is providing a supportive environment for a litigant to present his or her case to an attentive judicial officer while validation is the judicial officer showing that he or she is listening and taking the litigant's case into account. Respect requires a proper manner of address and demeanour to a person in court. By applying these principles in judging, a judicial officer can help to promote greater levels of compliance with court orders.

Further, therapeutic jurisprudence emphasises the importance of self-determination to health and the possible anti-therapeutic effects of a coercive or paternalistic approach. Indeed, the latter may have an effect in promoting resistance to change. Clearly, resistance to change is not something that is desirable in a justice system intent on promoting the rehabilitation of offenders and the resolution of civil and family law disputes.

At first glance, it may seem impossible to promote self-determination in the overtly coercive justice system but according to therapeutic jurisprudence even in such an environment self-determination may be facilitated. Giving a defendant a voice as to what rehabilitation programs he or she should enter into as part of a probation or community

based order, giving the defendant a choice whether to enter a drug court and encouraging civil litigants into dialogue in an endeavour to settle the proceedings are examples of techniques a judicial officer can use to promote self-determination. In a problem solving court, self-determination is also promoted through, for example, the use of behavioural contracts and giving the participant direct input into determining rehabilitation program agendas.

Judicial officers in different parts of the world can apply these principles in culturally meaningful ways. For example, in a juvenile case Pakistani judge Muhammad Amir Munir engaged in dialogue with a young offender with a view to ascertaining his willingness to enter into rehabilitation as part of a probation order on his own conditions. The young man agreed and he and his father were happy with the outcome. The defendant was ordered to appear before the judge every three months for a year to give an account of his progress. With good progress being made, the judge would consider shortening the term of the order.

Judicial officers in the Commonwealth are increasingly recognising the potential for therapeutic jurisprudence to assist them in their work. In November 2004, the Western Australian country magistrates unanimously resolved to apply therapeutic jurisprudence in their work. There is evidence that by taking such an approach judicial officers can promote greater self-esteem and wellbeing in defendants and thereby contribute to their rehabilitation.

### **Therapeutic Jurisprudence and Legal Practice**

Problem solving courts require lawyers to adapt to a different style of practice to that before other courts. Instead of taking an adversarial approach, lawyers need to adapt to working collaboratively as part of a team. Rather than seeing the best interests of the client only in terms of an acquittal or securing the most lenient sentence possible, in a problem solving court the lawyer works with the client and the court team to secure common goals such as the client's rehabilitation. While admission of further offending or drug use may not be considered to be in a client's best interests in most criminal proceedings, in the context of a problem solving court, such an admission may be important for promoting the client's rehabilitation.

Therapeutic jurisprudence is not only for lawyers practising in a problem solving court. It offers an approach that equips lawyers generally to promote a more comprehensive resolution of a legal problem and operate in way that is more satisfying for client and lawyer.

Therapeutic jurisprudence suggests that client wellbeing should be considered in relation to any area of practice, though its significance may vary from case to case. Hence there may be significant issues of family and individual dysfunction in relation to a family law client; a criminal client may have underlying issues such as substance abuse that contribute to a cycle of offending; a client may have family conflict underlying instructions not to make provision for certain children in a will; and a breakdown in communication may underlie a dispute between neighbours. In such cases a recurrence of legal problems may occur if the underlying issue is not addressed.

It has been suggested that a lawyer could take an approach that applies therapeutic jurisprudence in conjunction with a preventive law approach. That is, the lawyer would identify any actual or potential legal problems and associated problems in client wellbeing and then assist the client to develop a strategy to address all of the problems. Consistent with the principles outlined above, the lawyer would not coerce the client nor act in a paternalistic way by dictating strategy to the client. Instead, in accordance with the principles that self-determination through involvement in decision-making helps to promote wellbeing and compliance with the justice system, the lawyer would seek to motivate the client to consider the need for positive change and facilitate the client developing the strategy.

A lawyer should be aware of the factors personal to the client that may inhibit such an approach and of other factors that could impact on the interaction between the lawyer and client such as the power differential between the two. The lawyer would ascertain what is the client's attitude towards change and may use techniques of motivational interviewing to motivate the client to consider change.

## Therapeutic Jurisprudence and Legal Education

Therapeutic jurisprudence suggests new ways for judges, magistrates and lawyers to interact with litigants/clients. It draws from the experience of counselling and from elsewhere in the behavioural sciences to suggest techniques that judicial officers and lawyers can use in their work. It does not mean that judicial officers and lawyers become counsellors, only that they can learn from professionals in fields such as psychology as to 'what works' in human communication and motivation.

However such techniques do not form part of a conventional legal education or conventional education programs for judicial officers and lawyers. If therapeutic jurisprudence is to be more widely applied in the justice system, then it is important that the theory and practice of therapeutic jurisprudence be incorporated into law school curricula and into education programs and conferences for the judiciary and the legal profession. This process has already begun both in relation to legal education in the United States and also in Commonwealth countries such as Canada, New Zealand and Australia.

As Wexler has pointed out, increasingly the development of therapeutic jurisprudence is an international endeavour. Commonwealth nations are contributing to this development. The First International Conference on Therapeutic Jurisprudence was held in Winchester, England and the Third International Conference on Therapeutic Jurisprudence is scheduled to be held in Perth, Australia in June 2006. The experience of applying therapeutic jurisprudence in the Magistrates Court of Western Australia in regional areas in part informed the development of a manual on the application of therapeutic jurisprudence in judging by the National Judicial Institute of Canada. That manual is a useful resource for judicial officers throughout the Commonwealth. Indeed, the manual is being translated for use in Pakistan.

## Issues in the Application of Therapeutic Jurisprudence

As to the development of therapeutic jurisprudence in the Commonwealth, regard must be given to the unique culture of the nation in which it is sought to be used. What is culturally appropriate in one country may not be so

in another. For example, Allan and Allan note that traditionally African people do not talk about emotional issues with strangers yet this is the basis of therapy in the West. Further, in communicating with Australian Aboriginal people, Australian judicial officers and lawyers need to have regard to Aboriginal norms of communication such as avoiding eye contact as a sign of respect, which can be interpreted as quite the opposite from a Western viewpoint.

A lack of resources is an issue in relation to the application of therapeutic jurisprudence in developing nations but can also be an issue in more economically prosperous nations particularly in remote areas. Scepticism amongst judicial officers and lawyers as to whether they should take a therapeutic approach is also an issue.

There are also other issues. For example, Judge Muhammad Amir Munir states:

The problems in Pakistan are complex regarding the application of the TJ [therapeutic jurisprudence] approach in courtroom environment. They are, inter alia, illiteracy, lack of research and writing and empirical analysis of implications of judicial decisions, overworked, underpaid, and under-trained police, a language barrier between the legal system and the litigants (official court language is English, but the people speak local languages), poverty, incapacity to engage a lawyer, heavy backlog of cases in courts giving no time to judge for a TJ dialogue with the accused, non-training of police officers, lawyers, probation officers and judges regarding these sensitive matters, resulting in a lack of interest on part of judges to change their behaviour toward the TJ approach specifically provided in juvenile law.

Many of these problems are also shared by other developing nations. But even with these obstacles a judge such as Muhammad Amir Munir is able to apply therapeutic jurisprudence in his work.

## Conclusion

Therapeutic jurisprudence provides a useful way of analysing law, legal processes and the actions of justice system personnel in terms of their impact on the wellbeing of those affected by it. Such an analysis can provide suggestions for reform. It can also assist judicial officers



and lawyers in their duties and help them to facilitate a more comprehensive resolution of legal problems and greater satisfaction with the justice system. While some justice system professionals have taken a therapeutic approach in individual cases, it should be more consistently applied. Therapeutic jurisprudence is worthy of consideration by government, judicial officers, lawyers, justice system personnel and academics in the justice systems of Commonwealth nations.

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## DOROTHY WINTON TRAVEL BURSARIES FUND CONTRIBUTIONS WELCOME

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

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

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

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

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

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

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# FIGHTING CORRUPTION IN THE JUDICIARY

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*The Hon Justice S A Brobbey*

Chief Justice of the Republic of Gambia. An edited version of a paper given at the Pan-African Forum on the Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government, Nairobi, April 2005.

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Corruption in the judiciary is universal and pandemic in that it is one cancer that afflicts the fabric of many judiciaries all over the world. The reason for this is not far to seek: Corruption is a typically human creation. So long as any institution is manned by man, there will be room for corruption.

Corruption did not start in our time. The Bible is replete with references to corruption of mankind. Some of the earliest examples are the following; When Samuel grew old and made his sons judges, it was said that they were not like their father. 'They had their vested interests, taking bribes and perverting justice' (Samuel, ch. 8, v. 3). When Moses was advised to choose judges and leaders of his people, he was admonished to 'choose among the people, capable, God-fearing men, men of truth who hate a bribe' (Exodus ch. 8, v. 21). When Judas Iscariot who had promised to give up Jesus went to the chief priests, he specifically asked 'how much will you give me if I hand him over to you?' They promised to give him thirty pieces of silver. With that price, he betrayed Jesus (Matt. Ch. 26, v. 14-16).

References in the Holy Koran may also be mentioned from the following: 'And eat up not one another's property unjustly, nor give bribery to the rulers (judges) before presenting your cases that you may knowingly eat up a part of the property of others sinfully' (Al-Baqarah: verse 188); then there is the frequent reference to orphans and the manifestation of corruption in the form of the misuse of property belonging to orphans: 'Verily, those who unjustly eat up the property of orphans, they eat up only fire into their bellies, and they will be burnt in the blazing Fire:' (An - Nisa: verse 10).

Notwithstanding its universal nature, pervading characteristics or ancient background, corruption has always been a virulent cause for concern in every judiciary. Even in the developed world which may pride

itself of quality and advancement in judicial development, corruption will still be found, but to some degree.

I proceed on the premises that corruption in the judiciary always involves one or more or combinations of the following; judges, magistrates, lawyers, court officials, litigants and associates or relations of these. Unless otherwise stated in this paper, judicial officer refers to the first four, reference to judges includes magistrates and reference to male or men should be considered as including females or women.

## **Detecting corruption in the judiciary**

The best way to consider the topic is to approach it from three angles. The first relates to the individual judicial officer as a person. The second may be considered as systematic indices. The third is what may conveniently be described as cultural norms.

## ***The individual judicial officer***

The most common mechanism for deciding when a judicial officer is corrupt is the perception of the public of that individual officer. This implies what reasonable and fair minded people in society will say about him. Sometimes a qualification is added: that the reasonable and fair minded people should be knowledgeable of the facts and circumstances leading to the conclusion as to whether or not a person is corrupt. This is what makes the issue of corruption more invidious. Those of us on the Bench do not have the means to gauge and judge ourselves. When it comes to corruption and what the public believe us to be, we have no control over our destiny. Those outside us are the people who decide who is what. Even where we take it upon ourselves to determine who is corrupt and therefore requires attention, invariably the determinant comes from some statement, complaint or indictment from those outside our lot.

What may next be considered is the person's approachability. This may have two connotations. Sometimes this is taken to be synonymous with affability. That is a personal attribute that no-one can do anything about. It may be taken in most cases to be a positive trait. But the same word may convey negative connotation. This will be seen in the situation where the judicial officer has organized his life in such a way that people can approach him with ease with the view to influencing him in the conduct of his work. The approach may be made via diverse forms, directly or indirectly; it may come through close or distant relations or relatives, friends, associates or through colleague judicial officers.

It is said that some judges have agents who act as conduit pipes for the transmission of bribes to them. Some of these agents are self appointed in that they may not have any contact at all with the judge. He may be totally ignorant of the role that the agent has arrogated to himself. They may create impressions of extreme familiarity or frequent contact with the judge. The tragedy about these so-called agents is that the judicial officer may not even be aware that such an agent exists or that any person has put himself in the position of agent for the purpose of facilitating access to the judicial officer in order to influence or bribe him.

The other side of the coin is that some agents are created by us, the judges, consciously or unconsciously. Excessive fraternisation or familiarity with a particular lawyer, registrar or court clerk to the full knowledge of the public will lead to the inescapable conclusion that the official is truly the judge's agent capable of getting the judge to do anything that the agent will put across. With that knowledge, if litigants approach the official with demands of favour from the judge and the agent cashes in to enrich himself, the judge is largely to blame for he would have brought about the situation. This becomes more prevalent where for instance a particular lawyer files almost all his cases only before one particular judge or always wins his cases before that judge, irrespective of the merits of the case.

Quite often the agent receives some official or semi official coloration where he turns out to be a lawyer or some officer of the court like the court registrar. The modus operandi of these

official and quasi official agents is that they make the litigant understand that the bribe or consideration is being carried for the benefit of the judge sitting on the case. This type of agency often succeeds because the official position of the lawyer or registrar easily makes the victim more gullible.

How do these agents operate? In the morning before the court sits, he may be hovering around the judge's chambers. He will be seen conspicuously entering the chambers. The litigant will be watching from a vantage position all the time. When he enters the chambers, all that he may discuss with the judge may be the football match that took place between the football team he knows the judge supports and the lousy opposing team on the other side. He will walk out. That is enough for him to convince the litigants seeking favours that he has indeed contacted the judge and sealed the deal. That is enough for him to collect 'donations' on behalf of the judge or in the name of the judge. Whether or not the donation will reach the judge – in whole or in part – is another matter.

For these agents, all that they need to convince the unsuspecting public is one case where he promises the litigants that his contact with the judge would result in his winning the case and if indeed he wins the case, the precedent set will be his trump card for more business along the same lines.

Lifestyle speaks volumes when it comes to determining whether or not a judge is corrupt. The reason is not far to seek. The public is fully aware of the earnings of judges. Additionally, judges have no special privileges when it comes to buying what the ordinary citizen needs in order to make a decent living. Comparisons between what judges do and what the ordinary citizen on corresponding salary and allowances can do is in fact inevitable. If a judge is capable of buying for cash a brand new Mercedes Benz saloon car for himself, a Honda Accord for his wife and a VW Golf for his daughter, Shakespeare will tell the world that we need no ghost to come from Heaven to tell the world that the judge is living beyond his means. The public will want to know how he came by the money to acquire those personal assets.

Unless the public have reason to know how the extra income was obtained, the obvious conclusion will be that the judge has come by

the extra income by corrupt means. This scenario will be seen applied to many aspects of the life of the judge, including the expensive schools his children attend where fees are payable in convertible currency that is glaringly beyond the means of the ordinary income earner, the number of social parties he is capable of throwing within relatively short periods, the number of houses he is reputed to possess within the time that he took up appointment on the Bench.

### **Systemic corruption**

This is corruption brought about, encouraged or promoted by the judicial system itself. The causes for these are largely attributable to inefficiency, inadequacy or undue laxity in the justice delivery system.

Delay in the system is one of the major root causes that encourages litigants in particular to abuse the system to cut corners. If a litigant has to wait for three years or more before his case will be called to be listed, let alone being tried, he will cling to any opportunity to have the time abridged. Litigants are known to have approached judges in their houses or chambers out of desperation to have their cases heard in time. Lawyers are known to have asked litigants to make their own arrangements to 'see' the judge, registrar or court clerk in order to have their cases heard out of turn or, in some cases, to have judgments given in their favour. These are hard facts that cannot be denied. They have happened and are still happening in some jurisdictions.

This aspect of corruption thrives where the judge himself has the propensity to be corrupt. Some judges have the reputation, or more properly the notoriety, for getting litigants to learn that the only way cases can be heard expeditiously is to see his court clerk or registrar or himself.

Misuse or abuse of the system is particularly prevalent in jurisdictions where rules of court are couched in abstruse, esoteric or ambiguous terms or are susceptible to several equally plausible interpretations. The judge with the propensity to be corrupt will take advantage of the system to give such interpretation as may promote his corrupt moves at twisting justice for his selfish ends. The more sickening part of this issue is the situation where the judge has the reputation for knowing the law but on some rare occasions he gives such deliberately erroneous interpretation

that anyone reading it cannot help but conclude that there must have been special reason why he gave that outrageous interpretation. To the losing party and his lawyers, the reason will be that the judge was corrupted.

In one extreme case, the judge took bribes from both the plaintiff and the defendant. He gave judgment for the plaintiff. The plaintiff was satisfied and kept mute. The defendant approached him to demand a refund of his money for failure of consideration. The judge assured him not to worry but to proceed to appeal for he had written the judgment in such a way that the appeal would automatically succeed. He personally supervised fast preparation of the appeal record. The appeal was eventually allowed. What do we do with judges of this calibre?

Two instances of how far the court clerk contributes to judicial corruption will be found in *Building the Rule of Law* by Jennifer A. Widner. She reports the following actual conversation that took place between two judges of the Tanzanian High Court and Duane Delaney, clerk for the Superior Court of the District of Columbia.

'You know we have a terrible problem here. Sometimes our clerks tell the people they can get the judge to change a ruling or that they can lose a file in return for money. The people pay what they are asked and the clerks alter the record. We take the blame. Without a pause, Delaney replied, 'oh, we have that problem too! One time some one even tried to alter a guilty verdict. I fired the clerk. That is the only way to deal with these problems. You have to get rid of the people who do these things to send a clear signal to others.'

The same book has an account of a Ugandan magistrate whose court clerk sold his judgment for a goat. The goat was sent to the court when the clerk was absent. The giver told the magistrate that the goat was in return for the decision. He tethered the goat by a tree near the court house to await the arrival of the clerk. The Chief Magistrate was furious.

### **Cultural dimension of corruption**

There are some societies which have cultures that promote corruption in significant ways. In the developing world for instance, it is a taboo to expect settlement of a dispute without having to pay something for the services of

those who settle the dispute. The accepted rule is that the elders (who normally settle disputes) should not be made to act on empty stomachs. In most cases, the payment is a condition precedent to lodging the case. Another payment is made by the defendant before hearing starts. Yet another payment has to be made after the settlement of the dispute. (Practice at the palace of Otublohum, Accra). There are societies in which it is the rule that after the settlement, the losing party has the obligation to refund the payment of the winning party to him. In the not too distant past, the culture was so settled that it seemed to have formed the basis of one High Court decision in Ghana (*Boateng v. Republic* [1968] G.L.R. 1027). Where that culture is the order of the day, citizens going to court have the inclination to believe that the same payment for services has to be made. When an approach is made for consideration to be paid to the judge or on his behalf, it is easy for such believers to accept the tendency to accept the approach as part of the ordinary run of the mill practice.

Communal living and extended family system among some societies have the tendency to provide causes for corruption. In the communal living, especially life in a compound house, the upbringing of the child is the common responsibility of those living in that society. Every adult stakes something by way of contribution to his upbringing – be it cash, material contribution or mere advice as the child grows up. That creates a sense of oneness which is often used for the common good. At the same time, it tends to create the sense that the contribution has put in place a debt of gratitude that is owed by the child to his family when he grows up, especially where he acquires a prestigious status in the society. Therefore, a contribution is expected from him when there is funeral or social event entailing expenditure. That sense of indebtedness becomes the source of potential danger when child becomes a judge and a member of the family has a case, however distant a relation he is. The expectation is that he is required to help the member. If the judge gets to know of the relationship, he may recuse himself from sitting on the case. The illiterate and semi-literate relations do not understand why he, their own ‘son’, does not want to lend a helping hand in spite of all their contribution to making him what he is. The belief is that the Judge’s family have a stake in the position he holds and

that stake should be reciprocated by the help the family should get as of right from him.

The third situation arises from our culture of respect for elders. It is normal for a person desiring a chief or elder of the society to settle a dispute with another to approach the chief accompanied by the head of family or an elder of the family to the chief’s palace in lodging the complaint. That accompaniment signifies the seriousness of the dispute and at the same time the respect the disputant, if he is a younger person, has for the chief invited to settle the case. That culture sometimes drives people to insist on approaching the judge sitting on a case in the company of an elder in the hope that respect for the elder will pave the way for the disputant to put his case across to the judge out of the court room. Culturally, that kind of approach will be normal. Taken in the court situation, that approach may lead to all manner of interpretations if seen or known by a third party, particularly the opposing disputant to the case.

### **Investigative structures**

Investigation of corruption should commence from within the Judiciary itself. This is because steps taken from within tend to emphasize the independence of the judiciary. It is always safer to put in place an internal mechanism for examining complaints concerning judges and magistrates. Apart from the fact of self policing emphasising judicial independence, it will largely prevent the system of washing the dirty linen of the judges and magistrates in the public. Internal investigation will effectively assist in protecting the image of the judiciary. In the normal run of affairs, when complaints are made against judges, they tend to be given wide publicity. If the complaint turns out later to be false, the harm done by that false publicity becomes irreparable because those who read the first damning publication do not often get the chance to read corrections or rejoinders. In *Dibotelo v. Sechele* (2000) 3 C.H.R.L.D. 265, where a High court judge in Botswana had been accused of corruption, one of the ratio decidendi for the decision was that the local and international publicity (on the internet) given to the defamatory statement meant that the judge would never be able to vindicate his good name and reputation notwithstanding that the newspaper later admitted that accusation was false.

Initial discreet investigation from within the system will have the added advantage of saving the names of judges from being sullied by baseless and unjustifiable complaints. The modern trend now is set up an internal investigative mechanism within the judiciary that investigates complaints before they are taken up at higher levels. Tanzania, Uganda and the Gambia have such internal structures whose main function is to conduct initial investigation into complaints involving judges and magistrates: It is only when they are unable to settle the complaints or recommend that the issue be referred to the Judicial Service Commission or some other body that the complaints will leave the internal system. The committees are manned by judges and magistrates. They are duty bound to investigate every complaint coming to their notice with speed, make recommendations and report to the Chief Justice. He will then take action as recommended. If the officer involved ignores the recommendation or fails to comply with the recommended action, the issue will then get to the JSC. If the complaint affects the CJ, the Deputy CJ or the most senior Judge next to the CJ will perform the function of the CJ. Where the complaint turns out to be false or baseless, steps are taken to give the outcome of the investigation maximum publicity. That has the advantage of salvaging the image of the judge concerned as well as that of the entire judiciary.

### Codes of ethics

Closely associated with the last point is the existence of Code of Ethics for the Bench. It is easy to detect and pronounce upon the conduct of judicial officers where there is in place a code of conduct spelling out appropriate and inappropriate conduct among judges and magistrates. There are judicial officers with connections to the Executive or the Legislature by reason of tribal or party affinity. Such people overtly or covertly threaten officials above them charged with the responsibility to discipline them when they err. For fear of avoiding confrontation between the Judiciary and other arms of government, they remain untouched for wrongdoing. Where there is code of ethics in place, it is easier to bring such people to book by roping their actions or omissions within the provisions of the code what might have been breached. In effect, the existence of the code will make it easy for judicial authorities to objectively approach breaches of discipline.

### Role of Chief Justices and Tribunals

Whether the fight against corruption will succeed or fail will depend to large extent on the Chief Justice. It is pointless ignoring corruption and pretending that it does not exist in your jurisdiction. On the other hand, the fact that we have the duty to track down corruption is no excuse whatsoever for washing our dirty linen in the public or digging the ground under our feet. It does not help to mount platforms to placard to the whole world the fact that the judiciary is corrupt.

There are some statutory provisions on the judiciary that need to be in place in order to ensure that disciplinary matters are brought under full control of judicial authorities. One of them is the existence of code of ethics that has already been referred to. The second are statutory provisions on disciplinary procedures and sanctions. Some are contained in ordinary criminal codes and therefore pose no special problems. Others are in special corrupt practices statutes such as those found in Nigeria, Sierra Leone, Ghana, Zambia, etc. The duty on the CJ is to identify these laws, single them out and make sure that they are sufficiently brought to the attention of judges and magistrates for necessary compliance. These are more important in respect of constitutional provisions in respect of which no one has the right to opt out.

Another documentary provision that should be on the ground is one relating to conditions of service for judges. Judges have to be given special terms and conditions of service. This is because we have no means of earning additional income beside that paid by the Government. Additionally, those whose cases we decide expect us to lead decent and respectable lives. The dress that a civil servant can wear in public will cause eyebrows to be raised if worn by judges in the same place. Further, there is no doubt that a poorly paid judge will be exposed to temptation in his struggle to eke out a decent living for himself and his family. Improvement in the conditions of service, salaries and allowances may possibly help to reduce the temptation to be corrupt by insulating judges from the need to seek additional income to make ends meet.

One of the effective means of fighting systemic corruption is by judicial education. Sometimes judges give decisions which appear to be

induced have been motivated by bribe or corrupt influence, but are actually the result of pure ignorance. The best way out of the ignorance is continuing judicial education. That to a large extent depends on the Chief Justice. The CJ must be committed to judicial education and must allocate sufficient resource to make it possible for effective training of judges to take place.

The statement that there is strength in unity cannot be more appropriate than this occasion. There are times when judiciaries have been subjected to all manner of pressures and attacks by people of all types, especially from the Executive or the Legislature when the government or some individuals fail to obtain decisions they want from the courts. Such attacks are made in the name of corruption in the judiciary and the need to clean the judiciary. There are times too when we concede that we are at fault and need to be

helped some how or the other. It is not easy to defend a judge who accepts a bribe by crossed cheque paid into his account or whose receipt of bribe was video taped. Politicians are getting together. Whole nations are now in the process of moving closer because they believe strongly that there is strength in unity. The Chief Justices of the Commonwealth will do ourselves a great deal of good if we can come together to forge some form of unity in our own interest. It is said that the strength of the broom lies in its numbers.

The primary objective of the fight against corruption should be to identify the bad nuts, expose them and prune them from the system. Equally stringent measures should be taken against those outside the system, including prosecutions. They are the surest ways to demonstrate to those within and without that the fight against corruption is being pursued with the seriousness it deserves.

## COMMONWEALTH MAGISTRATES AND JUDGES ASSOCIATION (Registered Charity 800367)

### AIMS

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

### MEMBERSHIP

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

### ACTIVITIES

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

### PUBLICATIONS

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

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# THE JUDICIARY AND THE EXECUTIVE: APPROPRIATE INTERACTION

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*The Hon Joseph Sinda Warioba*

The East African Court of Justice. An edited version of a paper given at the Pan-African Forum on the Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government, Nairobi, April 2005.

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This paper provides some highlight and teases out issues for critical thought on the quest for suitable interaction between the Judiciary and the Executive arms of the Government in the light of the Commonwealth (Latimer House) Principles on the accountability of and the relationship between the three branches of the government. The main point of reference during the presentation will focus on experience drawn from Tanzania, which experience is to some extent similar to what pertains in most jurisdiction of the developing countries of the Commonwealth but examples will also be drawn from other common law jurisdictions.

It is gratifying to note that the Commonwealth has endorsed the necessity and importance of a tranquil and conducive working relationship between the three organs of the State, namely the Judiciary, the Executive and the Legislature. This was done by its adoption of the Commonwealth Principles (Latimer House on the Three Branches of the Government) by the Commonwealth Heads of Government in Abuja, Nigeria in 2003. Each member country is required to guarantee the independence of its Judiciary in its constitution or the laws in its jurisdiction. Although judicial independence seems on its face to be an obviously essential ingredient to any just and fair system, a precise definition of the scope of the principle may be difficult in a world of diverse cultures and legal systems.

The basis of the concept of democracy is the doctrine of separation of powers. The early proponents of the doctrine were of the view that if executive, judicial and legislative powers were enshrined in one hand, the bearer may turn out to abuse his authority and cause untold hardship to the citizens. Thus, the Legislature makes laws; the Executive enforces them and the Judiciary adjudicates on the conflicts that might arise when the law is transgressed. The realisation that a strict application of the doctrine of separation of

powers was practically not feasible led to the formulation of yet another doctrine – the doctrine of checks and balance in order to guide the interaction between the three arms of the State.

The system of checks and balances has two basic components. These are the right to *check* and the means to actively *balance* out imbalances. Effective checking requires access to information and the right to question. Balancing requires a mechanism of control to prevent the branches from overstepping their constitutional limits of power. Difficulties arise in countries where the branches can block each other to the extent of bringing the whole government to a standstill.

One of the fundamental questions that needs to be addressed is: what is the appropriate level of interaction between the Executive and the Judiciary? The question poses a number of challenges, especially to those who believe in a strict application of the doctrine of separation of powers.

The Constitutions of most Commonwealth countries provide for separation of powers. They spell out that executive powers are vested in the Government; the legislative power is vested in the Parliament and the judicial power is vested in the Judiciary. Thus, constitutionally, the appropriate interaction should be guided by the Constitution and legal traditions in a particular jurisdiction. Justice F. B. William observed that if the judiciary is to exercise a truly impartial and independent adjudicative function, it must have special powers to allow it to 'keep its distance' from other governmental institutions, political organisations, and other non-governmental influences, and to be free of repercussions from such outside influences.

In Tanzania, the Parliament has just amended the Constitution. Under the 14th Constitutional Amendments 2005, the Chief Justice and the Speaker of Parliament have been relieved of the responsibility to act as President when the



President and the Vice President are away from the country. It is the Prime Minister who has now been mandated to act as President when the President and the Vice President are way from the Republic. This change has been brought to ensure that executive functions remain within the Executive branch.

Prior to the amendment, for about a decade, the Chief Justice and the Speaker were constitutionally empowered to act as President when the need arose. This was a contradiction on the part of adjudicative powers of the Judiciary. The judiciary acts as a power check on the other organs of government to protect the rights of individuals. It has a central role in the consolidation of constitutional and democratic governance. On the other hand, the Executive's role of initiating and enforcing legislation brings it into conflict with the individuals. The irony of this sort of set up came to light when the Chief Justice made an executive decision when he was the acting President. One wonders what the situation would have been if such matters had come up for judicial review; would the Chief Justice have presided over a matter concerning his own acts and would he have been impartial? Fortunately, such occasion did not arise in Tanzania; the amendment was timely.

### **Appropriate interaction**

It is, of course, inevitable that there be some dealings between the courts and the executive branch with regard to issues related to finance and administration, among many others. In the course of such interaction, it would be inappropriate for the Executive to dangle the carrot with a view to pressing for an advantage. In most developing countries of Africa, such as Tanzania, the Executive usually presents the budget for the Judiciary to Parliament, for approval.

In Tanzania, the Judiciary usually is provided with inadequate resources, allocated at the discretion of the Executive. In a bid to give the judiciary control of its budgetary allocation, there is a move to detach the Judiciary from Ministry of Justice and Constitutional Affairs so that the judiciary would not be directly at the mercy of the Executive. This is a commendable move and if implemented, it would provide room for amore appropriate interaction between the organs of government and a proper reflection of the separation of powers.

It would not be appropriate for Parliament to frustrate budgetary allocations to the judiciary simply because the bench has on a number of occasions declared unconstitutional legislation passed by Parliament. By the same token the Executive must present to Parliament the correct budgetary projections of the judiciary without anticipating any favors or compromise from the judiciary. A respectable bench must never succumb to acts of intimidation by the executive or Parliament in the course of interaction on issues of finance and administration.

It should be pointed out here that the executive branch of government has, however, a legitimate interest in properly coordinating the justice system as a whole. Therefore there should be appropriate co-ordination between the administration of the courts and the other parts of the justice system, such as the police, the prosecution service and the corrections service. The purpose of this co-ordination is to ensure the efficient operation of the justice system, but it is an administrative co-operation that is required and not a judicial one; for example, the Executive and its agencies do not instruct the courts on what their decisions should be and the courts do not tell the police how to investigate crimes.

The Latimer House principles require the entire Commonwealth to have in place mechanisms where judicial appointments are made in a clearly-defined and publicly declared process. Most governments have made efforts to implement this requirement. In most countries the consultation for staffing is made within the echelons of the Executive and the Judicial Service Commission and declared in the Constitution.

Staffing of the judicial officers has also to be supported by arrangements for appropriate security of tenure and the protection of the levels of remuneration. In many countries, the security of tenure of judges is guaranteed by the Constitutions. Once a Judge is appointed; he or she holds office until retirement age. Removal from the office of the Judge is not on the whim of the Presidents but is subjected to a clear procedure under which a Judge can be removed on the grounds of misbehaviour or incompetence but only after a thorough investigation. The investigation is carried out by a judicial body constituted of a judge from any Commonwealth country as chair and having at

least half of its members constituted from Commonwealth countries judges.

With regard to accommodation senior members of the Judiciary are normally accorded housing by the state as government officials are entitled to housing in their terms of service. This has been done in the context of policies that allowed government to own houses. In some countries, however, this policy is changing. In Tanzania, for example, government is disengaging itself from ownership of houses. Instead the government is selling its houses to government staff, including staff in the judiciary. It is important to adopt a policy which will ensure that judiciary staff, particularly judges and other senior staff, secure housing that is appropriate. It would be an embarrassment if, for example, a judge handles a case in which a landlord is evicted.

### Inappropriate interaction

Under the separation of powers doctrine, the principal function of the judiciary is to uphold the rule of law. It is a corollary of that doctrine that the judiciary cannot be deterred from exercising that function by criticisms of the Executive branch even if the Executive's criticisms have the support of the general public. The Judiciary has to apply the law, not public opinion. The separation of powers requires the Judiciary to enforce and protect the rule of law. It follows therefore, that where necessary the Judiciary must speak out publicly against any attempt by the Legislature or the Executive to undermine the rule of law. The Executive may initiate and execute changes in the law, through the Legislature. It is another question whether, consistently with the separation of powers, the Executive can, or ought to prevent the courts from examining the legality of the conduct of those who are bound by those rules of law. Examples that best illustrate the tension that sometimes manifests itself in the interaction between the Executive and the Judiciary can be located in cases on judicial review of administrative actions.

The judiciary has played a critical role in providing complainants with access to remedies and some measure of justice and protection within the Commonwealth in the wake of a series of acts of impunity for human rights violations committed by state officials.

A classic illustration of what can cause a strained relationship between the judiciary and executive in the struggle to exemplify superiority emerged in Swaziland between 2002 and 2003. The tug of war between the two branches of the state in this country triggered mass protest demonstrations. In brief, the steps along the path towards the abrogation of the rule of law by the government of Prime Minister Sibusiso Dlamini included the repeated ignoring of court rulings, interference in court proceedings, intimidating judicial officers, manipulating terms and conditions of employment to undermine the independence of the judiciary, replacement of an effective Judicial Services Commission with an unaccountable and secretive body officially known as the Special Committee on Justice.

Ben Zwane battled for more than five years to retain his position as Clerk to the Swaziland Parliament after the then Prime Minister Sibusiso Dlamini in 1999 accused him of insubordination and 'interdicted' him from continuing his work. In 2000 the High Court ruled that the 'interdict' was illegal. The police however prevented him from entering the Parliament. The Court of Appeal upheld the High Court ruling. Meanwhile the Prime Minister had interdicted Ben Zwane again. In 2001 counsel for the Prime Minister conceded in the High Court they had no case to oppose a second order sought by Ben Zwane. The Prime Minister then 'transferred' him to another post. On 6 February 2002 the Industrial Court granted an interim order allowing Ben Zwane to remain in his parliamentary position. On the same day the Prime Minister publicly stated that he would defy the court order. On 7 February the police dragged Ben Zwane out of the Parliament building. On 19 March 2002 the Industrial Court President Nderi Ndumo with two other members of the Court ruled that the Prime Minister had acted *ultra vires* (beyond his powers) in transferring Ben Zwane without the advice of the Civil Service Board. The police continued to block his access to the Parliament. The Industrial Court again ruled against the Prime Minister, finding him in contempt of court. The Prime Minister 'transferred' Ben Zwane to another post later in the year, this time with the apparent agreement of the Civil Service Board. However the Labour Commissioner ruled that the transfer was in effect a demotion and set it

aside. The Prime Minister still refused to allow him to return to his work in Parliament. Ben Zwane applied to the Industrial Court again.

On 13 August 2003 Ben Zwane was injured when police fired rubber bullets and teargas at demonstrators near where he was driving. He lodged a complaint at Mbabane police station. As of May 2004 no action appeared to have been taken on his complaint. On 4 May 2004 the Industrial Court ruled that Ben Zwane's purported transfer to the Ministry of Agriculture was null and void and directed that he be reinstated into his position as Clerk to Parliament. Prime Minister Themba Dlamini stated publicly that he would comply with the court order. On 24 May the Industrial Court dismissed an application brought by Promise Msibi who claimed that he had been appointed to Ben Zwane's position by the former Prime Minister. The Court also dismissed Msibi's application to stay the implementation of the 4 May ruling, Ben Zwane was able to resume his parliamentary duties in June 2004.

After the 4 May ruling the former Prime Minister Sibusiso Dlamini, currently a member of the Swazi National Council, publicly defended the decisions he took, claimed that Ben Zwane had posed a 'security risk to the head of state' and denied that he had defied any court rulings in this matter.

In Tanzania, the Executive has also had disregard of or simply ignored court orders they are supposed to enforce. Other actions that manifest the friction in the interaction between the Judiciary and the Executive has been the tendency of the Executive rushing to Parliament to re-enact laws (or similarly worded ones) that have been declared unconstitutional by the courts. The enactment of some electoral laws in Tanzania provides a very good case in point.

There are a number of judicial precedents illustrating the defiance in the interaction between the two in Tanzania. In *Sheikh Mohamed Nassor Abdullah v. Regional Police Commander Dar es Salaam* (unreported, 1983) the dispute ensued from the decision of the President to arrest and deport a religious leader from Dar es Salaam to Zanzibar. The deportation was challenged in court on the ground that the President had no legal powers to deport a person from one part of the Union to another. The application was granted and a

writ of *habeas corpus* issued. However, the order was simply ignored by the Executive and the court could not do anything.

Side stepping the Judiciary has been another strategy that has been often employed by the Executive in belittling the Judiciary in Tanzania. In 1983, when the Executive was cracking down on persons suspected of committing acts of sabotaging the economy, the Executive showed his dismay at the Judiciary publicly. The government set up its own special courts to adjudicate such cases. The courts were presided over by a Judge and assessors, both having the same powers. This was one of the worst blows in the history of the independence of the Judiciary in Tanzania.

On the other hand, the Executive always attempts to avoid smooth interaction with the Judiciary by employing the use of ouster and derogatory clauses.

### Appointment of judges to commissions of enquiry

There remains a dangerous area in maintaining the credibility of the Judiciary within the ambit of the proper interaction between the Judiciary and the Executive, which requires scrutiny and attention. Judges enjoy high esteem in their societies as the fountains of justice. In many countries the judiciary finds itself chastened by government efforts to either cajole or intimidate it into falling in line with state dictates. In other times, the executive can use the Judiciary to test the views of the public in paving the way for fundamental changes.

In the case of Tanzania, the government plays a vital, if not a decisive, role in determining who will occupy various positions in the Judiciary. This in a way has a bearing on the work of this important institution. Although the Constitution also provides safeguards to the judges to maintain their independence, experience has shown that these safeguards are formal enactments and are not all that watertight. Judges have been transferred from the judiciary and given other responsibilities in the government service. The very fact that the Executive makes appointments has at times tended to make members of the Judiciary subservient to the Executive.

On the other hand, the Executive commissions members of the Judiciary to undertake purely political functions at times of massive call for

major constitutional changes. Two such instances would suffice to illustrate the dimension of this assertion.

In February 1991 a Presidential Commission was established and given the job of getting views from Tanzanians on whether to maintain a single party system or establish a multiparty system in Tanzania. The 1992 Presidential Commission's report on the democratic system found that more than 80 per cent of Tanzanians wanted to retain the single party system. Despite this overwhelming view in favour of maintaining the single party system, the Commission (known as the Nyalali Commission – named after the Chairman, the late Chief Justice F. Nyalali), still recommended that the country return to multiparty rule. This decision was strongly influenced by overwhelming political changes, which were taking place all over the world and within countries neighbouring Tanzania. The recommendation was accepted and the Government had to amend the Constitution in order to provide for the introduction of multiparty politics.

In 1998 the government published a White Paper on constitutional review. A Committee under the chairmanship of Hon. Mr. Justice Robert Kisanga, a respected judge of the Court of Appeal, was appointed by the President to

collect the views of the people on the issues that ought to be considered in a constitutional reform. One of the issues that most people called for was the introduction of independent candidates to vie for parliamentary and presidential elections without being attached to a political party. The Kisanga report had included the 'independent candidate' issue in its recommendations. The Executive publicly disowned these recommendations. It said the Commission had overstepped their terms of reference by addressing issues that they were not required to address. Many people perceived the appointment of a respectable Judge in the Commission as a step in the right direction. The subsequent rejection of the Committee's findings left many wondering: another strategy for the Executive to use the judiciary to achieve its own objective? The damage to the reputation of one of most respected judges and the institution of the Judiciary did not really matter.

Other members of the Judiciary have also served or serve in numerous other bodies in Tanzania and elsewhere in the Commonwealth. The lessons learnt from the Tanzanian experience reveal, *inter alia*, that the likelihood of damaging the credibility of the Judiciary far exceeds the benefits of appointments to such Commissions.

# LAW REPORTS

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## PROVINCIAL COURT JUDGES' ASSOCIATION OF NEW BRUNSWICK V. R.; ONTARIO JUDGES' ASSOCIATION V. R.; R. V. BODNER; ATT.-GEN. OF QUEBEC V. CONFERENCE DES JUGES DU QUEBEC

IN THE SUPREME COURT OF CANADA

McLachlin C.J.C., Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.  
22 July 2005

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*Judicial independence – remuneration issues – role of independent commissions – power of governments to reject recommendations – appropriate test in judicial review*

The Supreme Court heard consolidated appeals from courts in Alberta, New Brunswick, Ontario and Quebec. In each province, the Provincial Government had departed from the recommendations as to judicial remuneration made by the commission responsible for making such recommendations: the recommendations concerned salary levels, pension arrangements and the relationship between the salaries payable to judges of different courts.

The Court in its judgment observed that the appeals raised the important question of judicial independence and the need to maintain independence both in fact and in public perception. Litigants should be in no doubt that they were before a judge who was demonstrably independent and motivated only by a search for a just and principled result. The concept of judicial independence had evolved over time, notably in the context of judicial remuneration. In *Valente v. R.* (1985), Le Dain J. held that what was essential was not that judges' remuneration be established by an independent committee, but that a provincial court judge's right to a salary be established by law. In the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* (1997), the Supreme Court had held that the commissions were intended to remove the amount of judges' remuneration from the political sphere and to avoid confrontation between governments and the judiciary, but that their recommendations need not be binding. In some Provinces there were binding recommendations; in most not.

The Court expounded the principle of judicial independence, derived from both common law and the Canadian Constitution. Citing earlier decisions (*Valente v. R.*; *Beauregard v. Canada* (1986) and *Ell v. Alberta* (2003)), the court said that judicial independence was necessary because of the judiciary's role as protector of the Constitution and the fundamental values embodied in it, including the rule of law, fundamental justice, equality and preservation of the democratic process. There were two dimensions to judicial independence, one individual and the other institutional. The individual dimension related to the independence of a particular judge. The institutional dimension related to the independence of the court the judge sat on. Both dimensions depended upon objective standards that protect the judiciary's role. The components of judicial independence were security of tenure, administrative independence and financial security.

The *Prince Edward Island Reference* established that financial security embodied three requirements. First, judicial salaries could be maintained or changed only by recourse to an independent commission. Second, no negotiations were permitted between the judiciary and the government. Third, salaries might not fall below a minimum level.

Compensation commissions were expected to become the forum for discussion, review and recommendations on issues of judicial compensation. Although not binding, their recommendations, it was hoped, would lead to an effective resolution of salary and related issues. Courts would avoid setting the amount of judicial compensation, and provincial governments would avoid being accused of manipulating the courts for their own purposes. Those were the hopes, but they remained unfulfilled. In some Provinces and at the federal level, judicial commissions appeared, so far, to be working satisfactorily.

In other Provinces, however, a pattern of routine dismissal of commission reports had resulted in litigation. Instead of diminishing friction between judges and governments, the result had been to exacerbate it. Direct negotiations no longer took place but had been replaced by litigation. These regrettable developments cast a dim light on all involved. In order to avoid future conflicts such as those at issue in the present case, the principles of the compensation commission process must be clarified.

The court set out its understanding of the commission process. A number of criteria that must be met to ensure effectiveness were identified in the *Prince Edward Island Reference*. One was that the commission's work must have a 'meaningful effect' on the process of determining judicial remuneration. The essence of the appeal depended on whether 'meaningful effect' meant a binding effect or referred to an open process. The court held that it was the latter.

'Meaningful effect' did not mean binding effect. A commission's report was consultative. The government might turn it into something more. Unless the Legislature provided that the report was binding, the government retained the power to depart from the commission's recommendations as long as it justified its decision with rational reasons. Absent statutory provisions to the contrary, the power to determine judicial compensation belonged to governments. That power, however, was not absolute.

The commission's recommendations must be given weight. They had to be considered by the judiciary and the government. The government's response must be complete, must respond to the recommendations themselves and must not simply reiterate earlier submissions that were made to and substantively addressed by the commission. The emphasis at this stage was on what the commission has recommended.

The government could reject or vary the commission's recommendations, provided that legitimate reasons were given. Reasons that were complete and that dealt with the commission's recommendations in a meaningful way would meet the standard of rationality. The government had to deal with the issues at stake in good faith. Bald expressions of rejection or disapproval were inadequate. Instead, the reasons must show that the commission's recommendations had been taken into account and must be based on facts and sound reasoning. They must state in what

respect and to what extent they departed from the recommendations, articulating the grounds for rejection or variation. The reasons should reveal a consideration of the judicial office and an intention to deal with it appropriately. They must preclude any suggestion of attempting to manipulate the judiciary. The reasons must reflect the underlying public interest in having a commission process, being the depoliticization of the remuneration process and the need to preserve judicial independence.

The *Prince Edward Island Reference* judgment stated that the government's response was subject to a limited form of judicial review by the superior courts. The government's decision to depart from the commission's recommendations must be justified according to a standard of rationality. The reviewing court was not asked to determine the adequacy of judicial remuneration. Instead, it must focus on the government's response and on whether the purpose of the commission process had been achieved. This was a deferential review which acknowledged both the government's unique position and accumulated expertise and its constitutional responsibility for management of the province's financial affairs.

The court's analysis should be as follows:

- (1) Has the government articulated a legitimate reason for departing from the commission's recommendations?
- (2) Do the government's reasons rely upon a reasonable factual foundation? and
- (3) Viewed globally, has the commission process been respected and have the purposes of the commission – preserving judicial independence and depoliticizing the setting of judicial remuneration – been achieved?

The court expounded the new requirement listed as the third stage of the analysis. At that third stage, the court must consider the response from a global perspective. Beyond the specific issues, it must weigh the whole of the process and the response in order to determine whether they demonstrated that the government had engaged in a meaningful way with the process of the commission and has given a rational answer to its recommendations. Although it might find fault with certain aspects of the process followed by the government or with some particular responses or lack of answer, the court had to weigh and assess the government's participation in the process and its response in order to determine whether the

response, viewed in its entirety, was impermissibly flawed even after the proper degree of deference had been shown to the government's opinion on the issues. The focus shifted to the totality of the process and of the response.

In light of these principles, if the commission process had not been effective, and the setting of judicial remuneration had not been 'depoliticized', then the appropriate remedy would generally be to return the matter to the government for reconsideration. If problems could be traced to the commission, the matter could be referred back to it. Should the commission no longer be active, the government would be obliged to appoint a new one to resolve the problems.

The court examined the facts arising in each appeal. It found in the case of Alberta, New Brunswick and Ontario (where the issue concerned only pensions as the salary recommendations were binding) that the justifications advanced by the

government for rejecting the commission's recommendations meet the rationality standard. In considering the Alberta appeal, the court expressly rejected one submission by the provincial government that the judicial independence of Justices of the Peace did not warrant the same degree of constitutional protection that is provided by an independent, objective commission.

However in the case of Quebec, where there had been a long history of controversy over judicial remuneration, the court held that the government's response did not meet the standard of rationality. It failed to address the most important recommendations and the justifications given for them. Rather than responding, the government appeared to have been content to restate its original position without answering certain key justifications for the recommendations. The matter was remitted to the Quebec Government and the National Assembly for reconsideration in accordance with the judgment.

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## SOS-SAVE OUR ST. CLAIR INC. V. CITY OF TORONTO

IN THE ONTARIO SUPERIOR COURT OF JUSTICE (DIVISIONAL COURT)

Matlow, Greer and MacDonald JJ.

3 November 2005

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*Judicial bias – reasonable perception of bias – one member of a court involved in public controversy on another issue involving one party – tasks of different members of the panel*

In October 2005, the Divisional Court consisting of Matlow, Greer and MacDonald JJ allowed an application for judicial review of a decision of the City of Toronto to construct a dedicated streetcar route on a certain road in the city. Before the reasons for that decision were published, an application was made by the City, the unsuccessful party in the main proceedings, that Matlow J. should recuse himself, and that the application be remitted for a new hearing before a reconstituted panel of the Divisional Court. The basis for the application was the judge's well-known opposition to a joint venture between the City and a developer for the construction of a large retail-condominium development, 'the Thelma project', on the street in which he lived.

### THE JUDGMENT OF MATLOW J.

In accordance with practice and at the request of the parties, Matlow J. himself dealt with the

question whether he should recuse himself on the ground of a reasonable apprehension of bias. He held that the application was untimely: a party who believed that grounds exist for alleging an apprehension of bias must raise those grounds as soon as practicable, and must not remain silent, relying on such grounds only if the outcome in the case proved unfavourable. (His Honour cited *Eckervogt v. R.*, 2004). By failing to raise the issue promptly, the City had in effect waived any issue as to perceived bias.

He observed that

'a party is not entitled to raise frivolous allegations of reasonable apprehension of bias just to be able to avoid one particular judge and then obtain another who may be perceived as likely to be more favourable to the party's cause. Judge shopping is not a legitimate exercise and judges try to prevent it from occurring. It is even more deplorable for a party against whom an adverse judgment has already been granted to raise frivolous allegations of reasonable apprehension of

bias in order to have that judgment set aside so that the party might have another opportunity before another judge, or panel of judges, to attempt to do better’.

He found that this was indeed what had happened in the case before him.

His Honour referred to the five cases to which the City was a party in which he had sat since 2002: in four he, or the court of which he was a member, had decided in favour of the City, and in one an appeal by the City failed.

Of his active opposition to the Thelma project, His Honour spoke of the fact that he had had clear evidence of what he perceived as wrongdoing by officials of the City. He cited the advice given to the Canadian Judicial Council that

‘As a ratepayer and citizen the judge is entitled to have and express views on a purely local and municipal question provided, of course, that the judge realizes that in so doing the judge must be disqualified from any participation in any litigation arising from the matter’.

There was no reason why he need disqualify himself from all future litigation that involved the City.

The test for finding reasonable apprehension of bias was that adopted by the Supreme Court of Canada in *Wewaykum Indian Band v Canada* (2003). The court had to ask ‘what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?’

His Honour set out, at considerable length, the history of his opposition to the Thelma project and the grounds on which his concerns were based, noting that ‘no one associated with the City ever said anything to me about the propriety of what I was doing, either as a private citizen or as a judge. Only in this motion did it become an issue’.

He declared himself satisfied that, on all of the facts disclosed, reasonable persons would say that the moving parties have no reason to fear coming before him and that they can continue to feel confident that he would always judge cases in which they are involved fairly and accordingly they would agree that the moving

parties have failed to establish any reasonable apprehension of bias on his part.

#### THE JUDGMENT OF GREER AND MACDONALD JJ.

It had been agreed that the other members of the court would respond to the decision of Matlow J. on the application that he recuse himself, and consider the alternative application that the case be remitted to another panel of the court. They confirmed that in the earlier hearing each member of the panel had reached the same conclusion independently of the other, and that Matlow J., who, as the senior judge present, spoke last in the panel’s private deliberations, had at no time tried to influence their decision.

However,

‘We were unaware of Justice Matlow’s e-mails to local politicians and to City Officials. We were unaware of his e-mails to Mr. John Barber [a journalist] commencing with the one sent from the Court House in Sudbury. We were unaware of his involvement in the proceedings before the Ontario Municipal Board. We were unaware that Justice Matlow assisted in the preparation of materials for an application to the Superior Court of Justice which was eventually withdrawn on consent. We were unaware that Justice Matlow delivered the bundle of documents to the attention of Mr. Barber at the offices of the *Globe and Mail* on October 5, 2005 the day before we commenced hearing the original application in this matter. We do not suggest that Justice Matlow misled us; we now understand that from his perspective there was no need to inform us of these activities’.

They disagreed with Matlow J: they were of the view that an objective third party would more likely than not to find a reasonable apprehension of bias. In other words, a reasonable right minded person, informed of the history of Matlow J.’s activities, was more likely than not to conclude that the decision-maker, whether consciously or unconsciously, would not decide fairly.

They referred to a report by the Canadian Judicial Council in 2002 which reprimanded a justice of the Quebec Superior Court who had given a newspaper interview concerning the legality of a real estate transaction involving his wife and others. The report observed:



‘A judge speaking about a matter likely to come before the court harms both the judiciary as a whole and the sound administration of justice. Such conduct undoubtedly gives rise to a reasonable suspicion by litigants that if it came to a hearing the matter would probably not be handled with complete impartiality’.

It was not for them to say that Matlow J. ought to recuse himself. ‘But in circumstances where we conscientiously believe there is a perception of bias, it is open for us to stand down on the grounds that we believe that the matter is proceeding in breach of the principles of natural justice. Accordingly, we find that the panel must be struck and a new panel constituted to hear the application *de novo*’.

#### MATLOW J.’S COMMENTS ON THE JUDGMENT OF THE OTHER MEMBERS OF THE PANEL

Matlow J. declared himself ‘dismayed’ at the decision of his colleagues. There was ‘no

principled reason which justifies the taking of such extreme and unprecedented steps in the circumstances of this case’. Even had he come to the conclusion that his actions and comments had created a reasonable apprehension of bias, his colleagues should have continued serving on the panel and decided that the judgment should still be maintained. The decision now reached would have draconian consequences for a blameless party. Given that it was for His Honour alone to determine whether he should recuse himself, his colleagues were duty bound to accept his decision. They had no right to take an opposite view because they had no jurisdiction to do so.

In January 2006, the Ontario Court of Appeal refused leave to appeal.

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## INDAH DESA SAUJANA CORP SDN BHD V. JAMES FOONG CHENG YUEN

IN THE HIGH COURT OF MALAYSIA

Vincent Ng J.

23 November 2005

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*Judicial independence – civil action against judge – extent of immunity for administrative acts and acts outside territorial jurisdiction – judges not Government servants*

In October 2002, the plaintiffs obtained a default judgment in the commercial division of the High Court against a bank. That judgment was later stayed, and it was said that the default judgment had been obtained by irregular and quite peculiar means. Meanwhile the plaintiff, relying on the judgment, issued a writ of seizure and sale against the properties of the bank, instructing the court officers to have the payments made directly to themselves. The bank contacted the first defendant, then head of the Civil Division of the High Court, who was on leave in Singapore, and he directed that the money be paid into court. In the event, the execution was stopped and the bank’s cheque was returned. The plaintiffs now brought an action against the judge, and the Government of Malaysia as his employer, for

RM24,362,312 (some US\$6.5million) with interests and costs, the loss the plaintiffs claimed to have suffered. The plaintiffs also applied to restrain and prevent the Attorney General or any of his officers from representing the first defendant.

The application for an order restraining the Attorney-General from acting for the first defendant rested on assertions that the first defendant’s conduct was unrelated to his judicial duties, and that, as the plaintiffs had alleged that the judge had committed corrupt practice [an allegation not supported by any evidence], the Attorney-General would be in a conflict of interest situation should he act for the judge as he is also the guardian of the public interest. In fact the plaintiffs also asserted that the first defendant was sued as a judge so that their pleaded case on this application made no sense. The court also held that it was the duty of the Attorney-General to represent the Government and any body or person who performs any functions under the

Constitution. He was therefore duty bound to represent a judge who performs functions under the Federal Constitution so as to defend and protect the office and the institution of the judiciary in the interest of the administration of justice. He had to represent a judge in an action against him in cases where the judge had acted in the performance of, or in good faith believed himself to be performing, the judicial duties that he was required to carry out by reason of his position as a judge. The application was therefore dismissed. Should the Attorney-General decide not to represent a judge in a non-criminal matter, it would be proper for the Malaysian Bar to provide representation.

In considering the case against the first defendant, Vincent Ng J. reminded himself that a judge must not import his personal feelings or extrapolate the realities of his judicial experiences or circumstances into the judicial making process in the case before him. A plaintiff is entitled to a just and well-considered determination of his cause before the judge 'even if his cause is against another brother judge named James Fong, James Bond or James Non'.

He considered Malaysian and Singapore authorities on the practice of striking out proceedings as an abuse of process. On the merits, the plaintiffs were 'woefully wrong' in arguing that the money should have been paid directly to them. The way in which the default judgment had been obtained meant that the plaintiffs had not come to court with clean hands. By filing the writ of seizure and sale, the plaintiffs were cynically attempting to steal a march on the expected application by the bank for a stay of the judgment in default; and a stay was indeed granted three days later. The plaintiffs had treated the concept of justice and the judiciary with utter contempt when they instituted the instant suit, where they would not even yield to any benefit of the doubt, even if there are grounds for doubt, to a senior judge of the High Court.

The court referred to the common law and statutory principle of judicial immunity, and Indian, New Zealand, Canadian and Australian decisions. Vincent Ng J. cited Lord Denning MR in *Sirros v Moore* (1975):

no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are

protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a Court of Appeal or to apply for habeas corpus, or a writ of error or certiorari, or take some such step to reverse his ruling. Of course, if the judge has accepted bribes or has been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear.

Counsel had been unable to locate any authorities where the judge had acted administratively outside his territorial jurisdiction and while on leave (as happened in the instant case). Nonetheless, the court was entirely satisfied that the immunity accorded to judges should extend to all administrative acts and duties that the judge is required to perform from time to time, whether or not within the limits of his jurisdiction provided that he at that time in good faith believed himself to have jurisdiction.

The indemnity must cover administrative acts, as some judges (particularly the Chief Justice, the President of the Court of Appeal, the Chief Judge (Malaya), the Chief Judge (Sabah and Sarawak), and the principal judges of the Commercial and Civil Divisions Kuala Lumpur High Courts and the respective State High Courts) were required to carry out certain administrative duties as judges.

There was a real, strong public policy reason for judges to have immunity:

'otherwise, nobody in his right mind would become a judge. Take this present case, for example. The first defendant was sued for RM24,362,312 on what was essentially an administrative act that he was expected or assigned to perform as head of the Civil Division while in

Malaysia, though he had acted while on leave in Singapore. Even if by some supernatural attributes a judge could live on mere water, fresh air and sunshine, the gross savings from this income for this 12 to 18 years of service on the bench would be insufficient to meet even a quarter of the sum claimed’.

The immunity also must extend to acts performed outside the territorial jurisdiction. No legal provision barred a judge of the High Court from making any administrative directions while out of the country. ‘A judge who goes out of the country carries his judgeship with him. This is the reason why he is expected not to let his hair down while overseas: he does not stop being a judge and transform himself into a libertine as soon as he leaves our shores even on a non-judicial frolic of his own’. In any event, the first defendant had at that time, in good faith, believed himself to have jurisdiction and power to do the act complained of even though on leave in Singapore. It was now accepted that the judge had no personal interest in the act; he acted perforce in clearly very urgent and exigent circumstances,

and in any event he was not acting in the clear absence of all jurisdiction; he believed he was acting in faithful performance of his judicial duty as head of the Civil Division; and there was no other judge in his division who was appointed to take charge in his absence from whom the bank or its lawyers or court officers could have sought directions.

The case against the Government of Malaysia as second defendant rested on vicarious liability of a master for his servant. The plaintiffs had in effect thereby sought to relegate judges to the position of government servants. This was a serious affront against the doctrine of the separation of powers vis-à-vis the executive, the legislative and judiciary in a constitutional system. It was beyond question that a judge was not a Government servant. There was no cause of action against the second defendant.

The plaintiffs’ action against both the defendants was bound to fail; was wholly bereft of any cause of action and was clearly scandalous, frivolous and vexatious and an abuse of court process. The action was struck out with costs to the defendants.

#### APPLICATION FOR ASSOCIATE MEMBERSHIP

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Address: .....

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Judicial position: .....

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