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The last issue of this *Journal* contained an article by the Honourable Joseph Sinde Warioba, a Justice of the newly-established East African Court of Justice. That court has now handed down its first judgment, one which shows the value of, and the (proper) limitations on the powers of, such an international court.

In *Mwatela v East African Community* (App. 1 of 2005), three members of the East African Legislative Assembly challenged the validity of a meeting of the Sectoral Council on Legal and Judicial Affairs held in September 2005 and the decisions taken by that meeting in relation to four Bills pending before the Assembly. All were Private Member's Bills.

The Council of Ministers of the Community decided in 2004 that policy oriented Bills ought to be submitted to the Assembly by the Council, as opposed to being submitted as Private Member's Bills. The Council therefore decided to assume responsibility for the four pending Bills. After advice from the Sectoral Council, at the challenged meeting, it withdrew two Bills from the Assembly and requested that proceedings on the two other Bills be stayed.

Article 14 of the Treaty empowers the Council to establish 'from among its members' Sectoral Councils to deal with particular matters. The Council decided in January 2001 to constitute meetings of Attorneys-General of the Partner States as a Sectoral Council on Legal and Judicial Affairs. The Court held that in so doing the Council acted *ultra vires*, for two of the Attorneys were not members of the Council. Further, at the September 2005 meeting, two Attorneys were represented by deputies: there was no power to rely on deputies, and the individuals concerned, not being Ministers, were ineligible to be members of the Council of Ministers and so of Sectoral Councils.

The Court then had to consider what was the position of the Bills before the Assembly. The Inter-University Bill as well as the Immunities and Privileges Bill had received a First Reading, and had in the Court's view, become property of the Assembly. Accordingly, the Court could see legal basis for the purported decision of the

Council to take over and withdraw Bills. Once a Bill was in the Assembly, its permission was needed to withdraw a Bill, whether the Bill in question had been a Private Member's Bill or a Community Bill.

The Court referred to Article 59(2)(a) of the Treaty which declares that the Assembly must not:

'Proceed on any Bill, including an amendment to any Bill that, in the opinion of the person presiding, makes provision for any of the following purposes:

- (i) For the imposition of any charge upon any fund of the Community;
- (ii) For the payment, issue or withdrawal from any fund of the Community of any moneys not charged thereon or the increase in the amount of any such payment, issue or withdrawal;
- (iii) For the remission of any debt due to the Community'.

It was irrelevant how a Bill was introduced: the provision addressed the legislative competence of the Assembly. The Court noted that to determine the applicability to the Bills of this provision would have required it to delve into the provisions of the Bills in great detail. The Court deemed it wise not to make such an investigation but to leave it for whoever was aggrieved with any of the Bills to raise the matter in the Assembly.

This seems, with respect, an admirable example of a Court resolving what was clearly a highly charged political issue by clear-headed interpretation of the Treaty, which helped clarify the roles of the institutions of the Community. The Court also showed a proper respect for the powers of the Assembly to make its own judgment in respect of Bills before it.

The cases noted in our Law Reports section touch on a number of sensitive issues. Murray Gleeson, the Chief Justice of Australia, in his wide-ranging paper on judicial independence, mentions a pending case on the controversial power to appoint Acting Judges. That case, *Forge v Australian Securities and Investments*

Commission, is noted in this issue. The challenge to the practice followed in New South Wales failed, but we have much sympathy with the strong dissent of Kirby J. We note a New Zealand case, *R v Te Kabu*, indecisive in itself but showing that the issue is a live one in that jurisdiction too. *McKenzie v British Columbia* applies the (unwritten) constitutional principle of judicial independence to members of tribunals exercising court-like functions.

Independence of the judiciary is underlined in the Latimer House Guidelines. They have been used as a point of reference in a critique by the CMJA of proposals concerning the Scottish judiciary. The proposals for judicial appointments are not compatible with the Guidelines: for example, the judiciary itself would have no role in appointing any members to the Judicial Appointments Commission. Other concerns include imprecise drafting of possible disciplinary offences by judges. The CMJA has voiced similar concerns in relation to the proposed new Constitution for Gibraltar, about which the Chief Justice spoke in critical terms at the opening of the legal year in October. The draft would also enable the Governor to disregard the advice of the Judicial Services Commission in certain cases. Beyond these particular concerns lies an important question: the Guidelines were endorsed by Commonwealth Heads of Government; should they not be followed in spirit and in letter?

Our last issue noted a case in the Supreme Court of Canada about the method of fixing judicial remuneration. The issues rumble on: *Ontario Deputy Judges' Association v Ontario* is the latest example, and a paper by Justice Kathleen McGowan, also in this issue, sets out the background.

That trips abroad for Conferences are highly desirable parts of judicial experience is no doubt the unanimous view of those who attended the very successful CMJA triennial

conference in Toronto a few months ago, from which a number of papers in this issue come. But there is now authority for the proposition, provided by what was in other respects unseemly litigation: *Reilly v Alberta*, noted herein.

The articles come from almost every continent and cover a wide range of issues. Issues about the rights of Muslims are currently the subject of much public debate in the United Kingdom, and there are echoes of similar issues, as well as those affecting Rastafarians, in Justice Kentish's paper from Barbados. There is an informed view of the anti-corruption efforts in Kenya from Justice Angawa. Two papers have an island setting: Geoffrey Care's examination of 'udal law' will be a wholly new topic to many. As Justice Ward of Fiji remarks, so (happily) will the problems of dealing with insurrections and the declared abrogation of the Constitution under which judges sit; anyone facing that situation should recall the wise advice he offers.

I end this Editorial with some items of news. One is of the appointment of the Hon Justice Charles Mkandawire of the High Court of Malawi as the founding Registrar of the SADC Tribunal, the seat of which is to be in Namibia. We hope to publish an account of his work in a future issue. A former member of the CMJA Council Justice Booshan Domah of the Supreme Court of Mauritius has been appointed to act concurrently as President of the Seychelles Court of Appeal. Our congratulations to both.

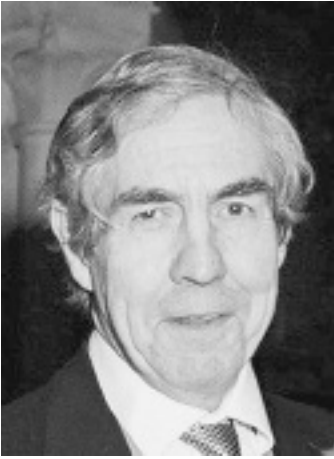
The second is of the establishment of the International Law Book Facility (ILBF). It is based in the UK and seeks to provide printed legal texts to legal professional bodies, advice centres, pro bono groups, law schools, institutions and individuals involved in access to justice in common law jurisdictions of Africa, Asia and the Caribbean. Further information can be found on its website, www.ilbf.org.uk

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

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

PROFILE: THE RT. HON. SIR HENRY BROOKE

Executive Vice President



I succeeded Michael Lambert as Executive Vice-President of CMJA at the Toronto Conference in September, and the editors have asked me to say something about myself and my links with the Commonwealth.

I was born into a political family, and my father and my brother were both Cabinet Ministers in the UK in their time. This may have helped me to understand the political importance of the Commonwealth, although I have never been involved in party politics myself.

My first direct involvement with Commonwealth matters came in 1961. I was then 25, and I had just obtained a non-law degree at Oxford. While I was studying for Bar exams (which you could do by correspondence course in those days), Lord Denning asked me to base myself at Cumberland Lodge, near Windsor, and help him to encourage the Inns of Court to bring large groups of bar students for long weekends there, to enable them to meet judges and other senior members of their Inns. About 70% of all the bar students in London then came from the overseas Commonwealth, and during the course of that job I met people from many different parts of the world. The present Chief Justice of Nigeria, Justice Alfa Belgore, spoke to me warmly about those days when I visited Abuja in November.

As chairman of the Bar Council's Race Relations Committee 30 years later I encountered plenty of English barristers who had been born in the overseas Commonwealth, or whose parents had emigrated from a Commonwealth country to Britain. When I moved from that job to the task of teaching English judges and magistrates about the different people from different cultures who appeared before them as witnesses or defendants, I used to warn them not to rely on stereotypes. People from Monserrat might be very different from people from Jamaica, and the countries of Africa contained within them many different tribal cultures, and they would quickly learn that a little learning might be a dangerous thing.

During my 18 years as a judge, I visited Canada (four times), Australia, India, Cyprus, Ghana, Barbados and Singapore, and I have received many visits from judges in those and other countries when they have come to London.

In Canada and Australia I took part in the biennial conferences of the World Wide Common Law Judiciary series. This series was started by US judges in Washington DC in 1995, and has afforded 30-40 of us the opportunity to meet every other year to discuss matters of contemporary interest to the judiciary. Relations with politicians and the media, developments in the field of IT, and different aspects of judicial education have always featured high on the list of the topics we have discussed. Next year I intend to speak about Alternative Dispute Resolution, a topic which has moved quickly up our judicial agendas in recent years.

In India and Barbados I took part in multi-disciplinary conferences which centred round criminal justice and alternatives to custody. I see that I started my address to the Bridgetown conference in 1994 by saying:

"I have been asked to speak to you to-day about sentencing trends in common law countries. I am an English judge, and I will have very little to say about other common law countries, which have each

gone their separate ways since achieving their independence from England. Every country possesses its own historical traditions and its own peculiar cultures, which in turn affect its people's attitudes towards crime and punishment, so that one would expect different countries to develop differently. The one thing the common law countries possess is a law based ultimately, and sometimes more than two hundred years ago, on the common law of England."

In Canada, Australia and Cyprus I was a delegate at the conferences of the Commonwealth Lawyers' Association, and I also attended their 2005 conference in London. At Melbourne in 2003 I spoke about the way that judgments from all over the Commonwealth are now being posted on the Internet on the sites at www.bailii.org or www.worldlii.org free of charge. I returned to this theme in an article published in the Commonwealth Lawyer in 2005 when I said:

"Another great blessing of modern technology is that when we post an important judgment on a website at the time we are handing it down in court, we know that it will then be communicated electronically throughout the country – indeed, throughout the world - the same day to everyone who has a "need to know", and this does not only mean lawyers."

In Singapore and Australia, and also during visits to Washington DC, I marvelled at the way that those jurisdictions were making confident progress in using applied technology in their courts. At the CMJA regional conference in Ghana in August 2005, I described the thoughtful way in which English judicial trainers have been developing and implementing a training strategy to ensure that more and more of our judges would be adept at using PCs in aid of their judicial work.

Turning to CMJA's affairs, on my visit to Toronto in September 2006 it became very obvious that the CMJA must now increase its individual membership. We cannot balance our books by relying solely on the income from "member associations", some of whom are rather slow in paying. I hope that every member of CMJA will do their best to persuade other judges and magistrates to join us.

Finally, I told the General Assembly at that conference that I possessed none of Michael Lambert's accountancy skills. The knowhow I will be bringing to this post is different. But we are united in our belief in the importance of the Rule of Law and the independence of the judiciary, which the CMJA exists to foster and preserve. As Executive Vice-President it is my role to act as the Council's "eyes and ears" in our dealings with our excellent small Secretariat. I will do my best to discharge the trust the Council has shown in electing me.

THE RIGHT TO AN INDEPENDENT JUDICIARY

The Hon. Justice Murray Gleeson

Chief Justice of Australia. A paper given at the Commonwealth Law Conference, September 2005.

Judicial power is 'the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property' (*Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ). Not only are citizens subject to such power; they have the right to invoke its exercise in their own interests. Like all forms of governmental power, it exists for their benefit. More than 200 years ago, Marshall CJ said, in *Marbury v Madison* (5 US (1 Cranch) 137 (1803) at 163):

'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.'

Justiciable controversies, amenable to the exercise of judicial power, take various forms. They often involve the government itself. A criminal trial for a serious offence is conducted as a contest between the executive government and a citizen. Civil disputes arise not only between citizens, but also between citizens and the executive government. In a federal system, based upon a written constitution dividing power between a central authority and regional authorities, disputes arise between citizens and governments, and between governments themselves, concerning the limits of power. The Universal Declaration of Human Rights, art 10, the International Covenant on Civil and Political Rights, art 14(1), and the European Convention on Human Rights, art 6(1) declare that, in the determination of civil rights and obligations, and criminal responsibility, all people are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Independence is not a prerequisite of judicial office, for the personal benefit of judges. The impartial administration of justice according to law is a power and a duty of government. The judges to whom that responsibility is given

must be free of any external influence other than the law itself. The independence of judges was said recently by the Privy Council to be 'all but universally recognised as a necessary feature of the rule of law' (*Independent Jamaica Council for Human Rights (1998) Ltd & Ors v Marshall-Burnett* [2005] UKPC 3). Article 4 of the Beijing Statement of Principles of the Independence of the Judiciary asserts that independence is essential to the proper performance by the judiciary of its functions in a free society observing the rule of law. It affects both the quality of judicial performance and the acceptability of decisions. Confidence in the administration of justice depends upon a general assumption that judges act according to law, and free from pressure or interference of a kind that might deflect them from their duty.

The values of impartiality and independence are closely related. Judges take an oath to do right by all persons, without fear or favour, affection or ill-will. Their capacity to honour that obligation does not rest only upon their individual consciences. It is supported by institutional arrangements. Citizens are not required to have blind faith in the personal integrity of judges; and judges are not required to struggle individually to maintain their impartiality. The Constitution, written or unwritten, of a society provides for the means of securing the independence and impartiality of judges.

Powerful litigants, private interests, or social interest groups, should be unable to subject judges to improper pressure. The executive government, in one or other of its manifestations, is itself frequently a party to litigation. Furthermore, in a representative democracy, the executive both responds to, and exerts, political pressure. Isolating the exercise of judicial power from executive pressure or interference is, therefore, the primary concern of constitutional arrangements for independence. The strictness with which legislative, executive, and judicial powers are separated varies in different parts of the Commonwealth

of Nations. In Australia, the Commonwealth Constitution requires, at the federal level, a degree of separation greater than that which exists at the State level. Even so, it is accepted as a general principle, in all common law jurisdictions, that the judicial power of government should be vested in an authority which is independent of the legislature and the executive. It is in the application of that general principle that issues arise.

In human affairs, independence is rarely perfect. In the business of government, no one part can exist in isolation from the others. Yet, because it is the right of citizens to have justiciable controversies resolved according to law by an independent tribunal exercising governmental authority, the concept of an independent judiciary must have a reasonably certain minimum content. It is possible to apply a test of independence to arrangements for the exercise of judicial power, while acknowledging that there are areas for legitimate choice. The Commonwealth provides no single model of personal or institutional arrangements for judicial independence. Constitutional and legislative choices are influenced by history, local conditions, and political realities, as much as by legal theory. Yet there are standards by reference to which the right in question can be given content.

Justiciable controversies

When Alexander Hamilton (in *The Federalist*, No 78) described the judiciary as the branch of government least dangerous to the political rights given by the United States Constitution, he said that, unlike the legislative and executive branches, it has neither force nor will, but merely judgment. The distinction between judgment and will is central to the legitimacy of the exercise of judicial power. It also affects the reach of that power. The judiciary does not set its own agenda. Courts decide controversies, but they have only a limited capacity to decide what controversies are justiciable. In general, and subject to any constitution, it is for Parliament to decide what matters may call for the exercise of judicial power. The qualification is important. In a federal system, the capacity of the courts to resolve disputes about the meaning of the written constitution, including disputes about the distribution and limitation of legislative and executive power, is a necessary aspect of the system itself. In

Australia there has never been a sovereign parliament. Before Federation, courts were accustomed to declaring the limits of colonial legislative power. Since Federation, the judicial power to decide the meaning of the Constitution has been treated as self-evident.

Furthermore, Charters or Bills of Rights, according to their forms, create potential issues for judicial decision. The scope for judicial review of legislative and administrative action may wax or wane, but the constitutional arrangements of most members of the Commonwealth involve an irreducible minimum. The concept of the rule of law, whether operating as a constitutional assumption, or as part of the common law through the principle of legality, or as an ideological fetter upon legislative action, itself gives content to a requirement of justiciability. It does not, however, mean that all forms of dispute must be resolved by legal process. Legislation may create, define, and limit many rights and obligations in such a fashion as not to involve curial intervention. The apparatus of civil justice is expensive and cumbersome, and the rule of law does not demand that all questions affecting entitlements or liabilities be decided by courts. In practice, administrative decisions affect the rights of most citizens to a greater extent than judicial decisions.

It is accepted generally that the administration of criminal justice is essentially a field reserved for judicial power (*Liyanage v The Queen* [1967] 1 AC 259). Even in that area, legislatures have the capacity for choice. Diversionary schemes, especially for juvenile offenders, may be employed to direct certain forms of delinquency away from the court system. Administrative penalties are widely used as a substitute for criminal procedure, even in the case of some serious offences, such as tax evasion.

In all jurisdictions, tribunals which form part of the executive rather than the judicial branch of government are employed in functions that might alternatively be given to courts. Australia had a long history of centralized wage-fixing by industrial tribunals. Assigning decisions of those tribunals to executive or judicial power was a problem that led to some major constitutional cases. Specialist tribunals, whose members lack many of the indicia of independence customarily associated with judges, are created by parliaments in all juris-

dictions. Only the innocent would suppose that it never occurs to legislators that this could be a means of circumventing judiciary authority. The independence of courts is not always welcomed by those of whom they are independent. It may be seen as a restriction upon a government's capacity to govern. The response may be to deprive courts, not of their independence, but of their jurisdiction. The capacity of the political branches of government to limit the scope of judicial authority, by providing for dispute resolution by tribunals and agencies which form part of the executive, cannot be ignored. At the same time, it increases the importance of judicial review of administrative action.

The availability of judicial review of the decisions of administrative tribunals, and the possibility of immunisation against review by legislative devices such as the privative clause, are matters that go beyond the scope of this paper. However, they form part of the context in which relations between the three branches of government operate.

How much independence?

In recent years, courts in Australia (e.g., *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 78 ALJR 977), Canada (e.g., *Valente v The Queen* [1985] 2 SCR 673; *R v Beauregard* [1986] 2 SCR 56; *R v Généraux* [1992] 15 CR 259; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3), South Africa (*Van Rooyen v The State* 2002 (5) SA 246 (CC)) and Scotland (*Starrs v Ruxton* (2000) 2 SLT 42), and the Privy Council in a Caribbean appeal (*Independent Jamaica Council for Human Rights* (1998) *Ltd v Marshall-Burnett* [2005] UKPC 3) have had to measure arrangements for particular courts against constitutional requirements of judicial independence and impartiality. Noting the variety of arrangements that exist in practice, and acknowledging the room for legislative choice, the courts have nevertheless identified certain essential requirements for both the personal independence of judges and the institutional independence of courts. They involve freedom from external interference in decision-making in particular cases, and in the administration of courts, although those two subjects overlap.

Security of tenure, and financial security, are essential for the personal independence of judges, and are commonly provided for specifically in written constitutions (e.g., Australian Constitution s.72). Article III of the United States Constitution has been a model for provisions of this kind. On the other hand, the requirements for institutional independence are rarely specified.

In the United States, federal judges are appointed for life. Some State judges are elected. Most Commonwealth jurisdictions make provision for compulsory retirement at a certain age. The Act of Settlement provisions concerning removal of judges of superior courts have been followed widely, but procedures for complaints against judges, and for what recent United Kingdom legislation (Constitutional Reform Act 2005) calls 'discipline', differ. In some Commonwealth jurisdictions, the appointment of judges for fixed, renewable terms is accepted. In Australia, the Constitution does not permit the appointment of acting judges to federal courts, but in some Australian States, as in the United Kingdom, such appointments have been common. A constitutional challenge to that practice is awaiting hearing. In Scotland, the practice of appointing temporary sheriffs was found to be incompatible with the European Convention on Human Rights (*Starrs v Ruxton* 2000 SLT 42).

The assignment of business within a court, although from one point of view administrative, bears so directly upon decision-making that it is essential that it be within judicial control. The same is true of certain other aspects of the conduct of a court's business, such as fixing times and places for sitting. In practice, however, some of those matters are so closely tied up with the provision of resources by the executive that co-operation with the public or civil service is necessary.

Funding

This brings me to the question of the provision and application of funds. Most courts are not self-funding. Nor should they be. The concept of 'user-pays' has only limited relevance to access to justice. When a court resolves a dispute between two private litigants, it does so in the interests of the entire community, and in the exercise of governmental power. Courts are not merely publicly funded dispute resolu-

tion facilities. It is difficult to know who might be regarded as the users of the services of a criminal court. Most courts cannot be fully independent financially. They must obtain their resources from the other branches of government. Yet the arrangements made concerning those resources may affect the capacity of courts to fulfil their responsibilities; and they may also affect both the reality and the appearance of the freedom of courts from executive interference. Constitutions operate at the level of convention as well as law, and considerations of propriety, as well as enforceable obligation, come into play.

Within Australia, practice varies. The reasons for the differences are historical rather than ideological. The federal courts, including the High Court, have one-line budgets. They receive an amount annually by parliamentary allocation. The judges, assisted by the courts' internal administrators, make decisions about the application of that amount. This gives the courts themselves the ability, within the limits set by the total funding received, and by necessary commitments such as staff salaries and maintenance of buildings, to set their own priorities for expenditure. The application of funds is subject to parliamentary scrutiny. No doubt, unjustifiable expenditure in one year would result in a reduction in funds made available in the next year. Even so, the ability to set priorities is a significant form of independence. With the exception of South Australia, State and Territory superior courts are administered as cost centres in a government department. Although there is consultation with the judiciary, expenditure priorities are decided ultimately by the executive. Having worked in both systems, my preference is for the federal model.

Subordinate courts

So far, I have confined attention to superior courts, and the judges of those courts. Yet much, indeed most, judicial power is exercised by judicial officers who are not judges of superior courts. How do the principles that flow from the right to an independent judiciary apply to them? Do those principles allow for the possibility that some courts, and some judicial officers, may be less independent than others? Are the rights of citizens to the exercise of judicial power by impartial and independent tribunals sufficiently protected by a system that gives a full measure

of independence to a small class of superior judges, equipped with supervisory powers, and a lesser measure of independence to other judicial officers who attend to most of the business of the justice system?

In most Commonwealth jurisdictions, judicial officers at different levels of the court system traditionally have been subject to different regimes of appointment and removal, tenure, remuneration, and performance review. Of course, within many courts there are decision-makers, such as registrars and clerks, who are not judicial officers, but who perform functions ancillary to those of the judges. Commonly, they are members of the public service, employed by the executive branch. Furthermore, even countries whose constitutions involve a relatively strict separation of powers entrust particular, usually specialised, forms of decision-making and dispute resolution to tribunals that operate outside the mainstream judicial system. In the United States, for example, most federal judges are appointed under, and enjoy the tenure and independence conferred by, Article III of the Constitution, which deals with the judicature. Nevertheless, pursuant to Article I, dealing with the legislative branch, Congress has conferred adjudicative authority upon territorial courts, military tribunals, a court of veterans' appeals, and a court of federal claims. Judges of those courts do not have life tenure, like Article III judges, and they do not all enjoy the same constitutional protection against salary reduction.

In the United Kingdom, the Act of Settlement provisions concerning judicial tenure applied to judges of superior courts. Much judicial power was exercised by judicial officers to whom those provisions did not apply. Others are better qualified to discuss the regime established by the Constitutional Reform Act 2005.

The most familiar example of the problem concerns magistrates. In Australia, as in a number of other parts of the Commonwealth, the position of the magistracy continues to evolve. Until recently, there was no federal magistracy. Summary federal judicial power, civil and criminal, was exercised by State stipendiary magistrates. They, in turn, until relatively recently, were part of the State public service. They exercised many administrative, as well as judicial, functions. Unlike judges, few of

them came from the private legal profession. Until the middle of the 20th century they did not have to be qualified to practise law. Most had spent their working lives in the public service. They were appointed by an official of the Attorney-General's Department. They were subject to Departmental discipline. Their salaries and superannuation arrangements were fixed within the public service, and they were graded in accordance with performance reviews by Departmental officers. Although exercising extensive judicial power, they were firmly within the executive branch of government.

That has now changed. The change in the status and independence of the magistracy is one of the most significant and beneficial developments of the last 30 years in the Australian justice system. In New South Wales, the Judicial Officers Act 1986 took magistrates out of the executive, and placed them in the judiciary. Magistrates, like Supreme Court and District Court judges, can now be removed only by the Governor, upon an address of both houses of Parliament. They are subject to the same complaints procedures, administered by the Judicial Commission of New South Wales. Some aspects of their remuneration, especially in relation to superannuation, continue to reflect the public service background of the magistracy, but, since 1986, an increasing number of magistrates have been recruited from the practising profession. Although there have been pockets of resistance, the trend has been towards assimilating the position of magistrates, in all matters concerning their independence, with that of judges. Similar developments have occurred in other Australian States. The new Federal Magistrates Court was created under Chapter III of the Constitution. Its members have the same protection against removal as other federal judges, and there is a substantial overlapping of jurisdiction between the new court and the Federal and Family Courts. The remuneration of all federal judges and magistrates is fixed by the same tribunal, whose decisions are made openly and independently, subject only to the possibility of parliamentary disallowance.

In *Van Rooyen v The State* (2002 (5) SA 246 (CC)), the Constitutional Court of South Africa considered whether the South African Constitution requires that all courts in the judicial hierarchy must have their independence protected in the same way and to the

same degree. That question was answered in the negative. Emphasis was placed on the supervisory role of the higher courts, and the protection which that gives to the courts whose operations are subject to such supervision. The decision turned upon close scrutiny of the relevant South African legislation, in the context of South African society. In 2004, in *North Australian Legal Aid Service Inc v Bradley* ((2004) 78 ALJR 977), a case concerning remuneration arrangements for the Chief Magistrate of the Northern Territory, the High Court of Australia acknowledged the continuing evolution in the position of magistrates in Australia, and held that the legislation there in question, and the arrangements made pursuant to that legislation, did not offend principles of judicial independence.

In the past, there has been general acceptance of different degrees of independence among those exercising judicial power. The theoretical basis of that acceptance is likely to be subjected to closer scrutiny. Realities must be accommodated; change will not proceed evenly; and issues are blurred by the difficulty of drawing a clear dividing line between judicial and other decision-makers. Even so, if the right of citizens to an independent judiciary is to be recognized in full measure, in the longer term it may be difficult to justify significantly different levels of independence within the permanent judiciary.

I leave to one side the matter of the widespread use, in many jurisdictions, including the United Kingdom, of acting or temporary judicial officers. In practice, much judicial power is exercised by people whose services are engaged on a part-time basis. In some courts, this is a method of dealing with temporary shortages of judge-power. In others, it is a permanent feature of the system. Because this is the subject of pending litigation in Australia, I will say no more about it.

Appointment

Although in some civil law countries there is substantial involvement of judges of higher courts in the appointment, supervision and discipline of judges of lower courts, in the common law tradition judges are appointed by the executive government and, at least in the cases of judges of superior courts, the power of removal is with Parliament. In these respects, as in the matter of resources, judges cannot be

completely independent of the other branches of government.

As to appointment, customs and procedures vary. Whatever method is adopted, the right to an impartial and independent judiciary requires that neither the reality nor the appearance of impartiality or independence be compromised. This leaves room for choice. How it relates to a practice of popular election of judges is a matter that does not, I think, arise within the Commonwealth. Nor, at least so far, are we concerned with a procedure of parliamentary interrogation of prospective appointees. In Australia, in 1913, the government in Canberra sounded out a prospective appointee to the High Court, Mr Piddington, on his views about the federal balance. He said he was a strong centralist. He was appointed. When the exchange became publicly known, he felt obliged to resign. Some recent canvassing by the media of the possibility that an Attorney-General might question prospective appointees, privately, about their legal inclinations appears to overlook three matters. First, there is the unfortunate case of Mr Piddington. Secondly, the most frequent litigant before the High Court is the Commonwealth Attorney-General. Thirdly, most people appointed to the High Court have already had substantial judicial experience, and their judicial record is publicly available.

No one suggests that a record of past decision-making compromises the future impartiality of a judge. Even the fact that a judge has decided the same point of law on an earlier occasion does not mean disqualification from a later case that raises the same point. The system requires an open, not a blank, mind. It assumes that judges are amenable to persuasion. What, however, of expressions of legal opinion to an appointments authority, or some other body set up to consider prospective appointees? What of formal applications for appointment that canvass such matters? It was the privacy of Mr Piddington's communication of his centralist inclinations that compromised his impartiality. If, in a previous judicial capacity, he had displayed such tendencies for all to see, who could have suggested any impropriety in his appointment?

Reference has been made above to acting or part-time judges. Is this a legitimate means by which governments may assess the suitability

of prospective appointees? Suitability has many aspects. It may include temperament, diligence, and such basic skills as the capacity to evaluate evidence and to compose reasons for judgment. Is it reasonable for a government to look for a reliable method of evaluating suitability before making a full-time appointment? Or does it compromise the impartiality of part-time judges if litigants are aware that a judge's prospects of permanent appointment may depend upon making a favourable impression on the executive? Questions such as this were examined by the High Court of Justiciary in the Scottish case of *Starrs v Ruxton* (2000 SLT 42). They deserve wider debate in other jurisdictions, especially with increasing non-professional interest in the process of appointment.

In a federal system, where the balance of power between federal and State governments is often a sensitive issue, the appointment of the members of the ultimate court that decides constitutional questions usually rests with the federal government. It might explain why, in Australia, at the federal level, neither of the major political parties has shown much interest in proposals to surrender to a Commission or similar authority the power of appointment, or of recommending appointments, to the High Court.

Removal

The traditional formula for the removal of judges, or at least superior judges, upon an address of Parliament on the grounds of proved misbehaviour or incapacity serves the interests of independence. Yet, in an age that demands accountability in all aspects of government, it does not satisfy everybody. Appropriate accountability serves two purposes. It promotes good decision-making, and it gives effect to the democratic idea that no power should be uncontrolled. The problem is to strike a balance between those purposes, on the one hand, and the requirements of impartiality and independence on the other.

There now exist, in different Commonwealth countries, and within those countries, various mechanisms designed to strike that balance. For 10 years, when I was Chief Justice of New South Wales, I was also President of the Judicial Commission of that State. The Judicial Commission was set up in 1986 to receive complaints against judicial officers. It is not

difficult to devise a suitable method of dealing with serious allegations against judges. If there is an allegation of a crime, criminal justice takes its course. If there is an allegation of incapacity, or non-criminal misbehaviour, so serious that it may warrant removal, then ultimately it is a matter for Parliament. It may be necessary to establish either standing or ad hoc procedures to filter complaints, or investigate facts, but these are to enable Parliament to exercise its proper function. The involvement in those procedures of persons or bodies external to Parliament, including members of the judiciary, is handled differently in different places.

The real difficulty is in dealing with complaints that, even if made out, would not justify removal. All complainants believe their complaints are serious. But only a very small percentage of the complaints I have seen could possibly warrant removal. Creating a formal procedure gives rise to an expectation that, if a complaint is found to be justified, some sanction can be applied. Most complainants are not satisfied by being told that a judge will be spoken to. What forms of sanction, short of removal, might there be?

The exposure of judges to public or private censure, or some penalty falling short of removal from office, is, at least in Australia, a controversial topic. The judiciary is not a disciplined force, subject to command, like the armed services. The independence of judges includes independence of one another. Chief Justices and others may develop formal or informal procedures of appraisal in order to enable them to discharge their responsibilities, but there is an obvious danger if performance review extends beyond matters such as timely delivery of judgments into areas relating to substantive decision-making. The justice system has its own well-established system of performance review: it is the appellate process. Judges enjoy, as a matter of public policy, substantial immunity from civil and penal sanctions for erroneous decisions. In the Supreme Court of the United States, in *Forrester v White* (484 US 219 (1988) at 226-227), O'Connor J said that '[i]f judges were personally liable for erroneous decisions, the resulting avalanche of suits ... would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits'. A system which exposes judges to the possibility of reprisals of any kind for the

manner in which they exercise their judicial functions needs to be measured carefully against the imperatives of maintaining their impartiality and independence.

Accountability

A predictable area of future tension between the political branches and the judiciary results from increasing demands for accountability in relation to functions which are described as administrative, but which are closely related to the judicial process. Where it is the function of a head of jurisdiction, or judge administrator, to assign members of a court to hear particular cases, or to allocate the business of a court for disposition according to certain internal arrangements, the capacity to exercise that function free from external interference is an essential aspect of judicial independence. The Supreme Court of Canada has identified 'matters of administration bearing directly on the exercise of [the] judicial function', including assignment of judges, sittings of court and court lists, allocation of court-rooms and direction of staff engaged in that function (*Valente v The Queen* [1985] 2 SCR 673 at 708-709). These processes affect the efficiency of courts, and often involve the application of substantial resources. The public, and the other branches of government, want to be satisfied that the courts are using the funds made available to them wisely. Demands for a suitable level of accountability for the way in which courts apply public money are natural and inevitable. The task of devising appropriate forms of accountability consistent with the requirements of independence is a challenge for modern government, including the judiciary.

Accountability for the application of resources is one thing; accountability for decision-making is another. Judges work in public; they give reasons for their decisions; and those decisions are routinely subject to the appeal process. That, however, does not satisfy everybody. Much of the work of judges attracts little public attention. Some of it attracts a lot of attention, public comment, and political controversy. The sentencing of offenders is an example. What is called the law and order debate sometimes involves opportunistic demands, not merely for the reduction of judicial discretion, but also for sanctions for unpopular decision-making. If judges could be penalised, or publicly censured, because their

decisions displeased the government, or some powerful person or interest group, or, for that matter, most of the community, then the right of citizens to an independent judiciary would be worthless.

There are those who, accepting fully that judges should not be exposed to sanctions because their decisions are unpopular, would see a difference in cases of error. The appeal process reveals judicial mistakes, and some of those mistakes fall outside range of matters upon which different opinions are fairly open. Judicial mistakes may have very damaging consequences. The common law confers on judges an immunity from civil liability. The basis of the immunity is the constitutional imperative of judicial independence. It is difficult to reconcile that immunity with some alternative system of administrative penalties or sanctions, falling short of removal for incapacity. Sanctions for misconduct falling short of misbehaviour that warrants removal are difficult to devise, in a manner that respects independence. Even more difficult are sanctions for error that falls short of demonstrating incapacity. This is a topic that is certain to produce tensions, especially with the increasing size of the judiciary, and the increasing range of judicial officers who are regarded as being entitled to full independence.

Effects of reorganisations

Removal of judges might result from the abolition or restructuring of courts. Subject to the requirements of a Constitution, it is ordinarily for Parliament to decide, from time to time, the configuration of a nation's court system. In Australia, the Constitution mandated the creation of a Federal Supreme Court, to be called the High Court of Australia, but it is for Parliament to decide what other federal courts are to exercise the judicial power of the Commonwealth. The Federal Court and the Family Court were not created until the 1970's, and the Federal Magistrates Court was created very recently. The Federal Court took over the jurisdictions formerly exercised by the Federal Court of Bankruptcy and the Australian Industrial Court. Those courts no longer exist. Obviously, legislatures must be able to respond to changing needs and circumstances by creating and abolishing courts. Is there any legal obligation, or established convention, which requires that judges who

lose office in this way should be appointed to some equivalent office?

In New South Wales, the Constitution Act 1902, in s.56 covers the issue. It provides that a person who held an abolished judicial office is entitled, without loss of remuneration, to be appointed to and to hold another judicial office in a court of equivalent status. (Article 29 of the Beijing Statement of Principles of the Independence of the Judiciary is to the same effect as s 56.) When the Compensation Court of New South Wales was abolished, its members were appointed to the District Court. Such transfers are not always without difficulty. The District Court exercises extensive criminal jurisdiction, and work of that kind would have been new to some of the former Compensation Court judges. Even so, the transfers were required by the Constitution Act, and worked satisfactorily. It is not hard to think of some specialist courts whose members might have difficulty relating to other work. Of course, they may not want to try, but the problem does not arise in the case of judges who do not wish to be re-located. Abolition of courts or of judicial offices usually takes place for reasons that have nothing to do with an attack on judicial independence. Yet there may be exceptional cases where issues of independence are involved. In the absence of a provision such as s.56, it may not be easy to find a legal, as distinct from a political, basis for a remedy.

Appointment of Judges to Commissions and Inquiries

Reference has already been made to the common practice of conferring judicial power upon persons other than regular judges, by which I mean full-time judges who enjoy the security of tenure and remuneration ordinarily associated with independence. There is an equally common practice of engaging the services of regular judges for the performance of functions which may benefit from the exercise of judicial skills, but which do not involve the exercise of judicial power. Not only is this practice common; it is popular with parliamentarians, and the public. Usually it involves the executive arm of government taking advantage, (not necessarily unfair advantage), of the independence associated in the public mind with the judicial arm. When calls are made for a 'judicial inquiry' to be set up, they may be based upon an appreciation of certain judicial skills, but they reflect, above all,

a demand for fairness of process and independence of decision-making. Nothing better confirms the judiciary's impartiality than the importance which is so often attached to having a serving or retired judge for an inquiry into some controversial matter which may have nothing to do with the law. Judges are in demand on these occasions, not because they have any special reputation for wisdom, but because they have a special reputation for independence and impartiality. Does this practice carry with it any dangers for the very qualities which are thought to justify its adoption?

In the April 2005 edition of the *Law Quarterly Review* there is a paper by a senior English judge examining this topic in the light of practice in the United Kingdom and Israel (J Beatson, Should Judges conduct public inquiries? (2005) 121 LQR 221). Recent legislation in the United Kingdom, the Inquiries Act 2005, specifically deals with certain matters relating to the conduct of public inquiries by serving judges. In a book published in 2004, *Centennial Crisis: The Disputed Election of 1876*, the Chief Justice Rehnquist of the United States considered the practice of Justices of the Supreme Court of the United States serving in extra-judicial capacities. He referred to such famous examples as Justice Roberts' inquiry into the circumstances of the Japanese attack on Pearl Harbour, Justice Jackson's service on the Nuremberg War Crimes Tribunal, and Chief Justice Warren's inquiry into the assassination of President Kennedy. His opinion was that in extraordinary circumstances of grave national consequence such service may be justified. Plainly, in all but extraordinary circumstances, it would not be contemplated. War seems to create special cases. During World War II, Sir Owen Dixon, while on the High Court, served as Chairman of the Central Wool Committee, the Australian Shipping Control Board, the Marine War Risks Insurance Board, the Salvage Board, and the Allied Consultative Shipping Council of Australia, and also as Australian Minister to Washington. In 1950, he attempted to mediate a dispute between India and Pakistan over Kashmir. Sir William Webb, while a member of the High Court, was President of the International Military Tribunal for the Far East, in Tokyo.

In 1955, Sir Owen Dixon said that, in retrospect, he did not altogether approve of his own extra-judicial service ((1955) 29 Australian

Law Journal at 272). He also said that, with only one very trifling exception during the Great War, the High Court of Australia has always maintained the position that its judges would not accept appointment as Royal Commissioners. That position was first asserted by Chief Justice Knox, it was reasserted in the 1920s, it was maintained by Chief Justice Dixon, and it has been maintained to the present day. In brief, in the Supreme Court of the United States, and the High Court of Australia, extra-judicial service has been rare and extraordinary, and has been confined substantially to times of war or grave national emergency. In Australia, members of the High Court are not available to serve as Royal Commissioners.

As to other federal judges in Australia, their position is affected by the separation of powers required by the Constitution. Non-judicial power may not be conferred on federal courts, but federal judges, appointed as *persona designata*, may take on functions that do not involve the exercise of judicial power provided such functions are not incompatible with their status and independence, or with the exercise of the judicial power of the Commonwealth, or with the maintenance of public confidence in the exercise of the judicial power of the Commonwealth. The High Court has cited the opinion of the Supreme Court of the United States in *Mistretta v United States* (488 US 361 at 407 (1989)):

'The legitimacy of the Judicial Branch ultimately depends upon its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.'

That is a salutary warning even in jurisdictions where there is no constitutionally required separation of powers, such as the Australian States. There are well understood practical dangers of judges being drawn into political controversy by an injudicious decision to take on an inquiry in which partisan interests are involved. It may be that the reason why the executive seeks a judge for an inquiry is that it is obvious that it may arouse political passions, and it is hoped they may be cooled by a neutral inquirer. That might be a good reason for the judiciary to decline to be drawn in. What is worse, however, is a case where an inquiry is

given a task which is of such a nature that its performance cannot be completely independent of executive or legislative influence. It is one thing to seek to turn the judiciary's reputation for impartiality to public advantage; it is another thing to use that reputation to give to partisan executive or legislative action a spurious appearance of impartiality.

In most Australian States, including New South Wales, the practice in relation to judges acting as Royal Commissioners or conducting inquiries is much the same as it is in the United Kingdom. It is accepted, although opinions differ about its wisdom in particular cases. There is an important practical issue: the method of selection of the judge to be invited to do the job. Plainly this can be relevant to the appearance of impartiality. The Australian Guidelines to Judicial Conduct tell judges that if the executive government is seeking the services of a judge for a non-judicial appointment, the first approach should be to the Chief Justice or other head of jurisdiction, seeking the approval of that person for the appointment of a judge from that jurisdiction, and seeking approval to approach the judge in question. Judges should not deal directly with the Attorney-General or other representative of the executive government without the prior approval of the head of jurisdiction who has the responsibility of considering the propriety of the judge accepting the proposed appointment.

The exceptional State is Victoria. In 1923, Chief Justice Irvine wrote to the Victorian Attorney-General declining a request that he invite one of the judges of the Supreme Court of Victoria to undertake a Royal Commission, and expressing the view that it was generally inappropriate for judges to do other than hear and determine issues of fact and law in the context of the resolution of a justiciable controversy. In 1954, the judges of the Supreme Court of Victoria, with the support of the Victorian Bar, adopted a resolution that, except in a matter of national importance arising in times of national emergency, it is undesirable that any judge should accept nomination as a Royal Commissioner. The Chief Justice of Victoria has told me that this remains the view of her Court.

Conclusion

It would be wrong to assume that the political branches of government are natural enemies of judicial independence. The Act of Settlement was the work of a Parliament which saw that its own interests lay in supporting the judiciary's independence of the executive, that is, the King. Similarly, in modern democracies, executive dominance of the political process, potentially weakening the power and influence of parliaments, gives legislators a continuing interest in preventing executive dominance of the judges. In a representative democracy, parliaments are composed of shifting power groups, and those who today are in the ascendancy will one day be in opposition. Politicians, even when in power, are not so short-sighted as to overlook the possibility that the interests they represent may in future need the protection of a non-compliant judiciary. Judge Clifford Wallace of the United States, referring to an earlier work by William Landes and Richard Posner, observed that '[t]he predictability that comes with judicial independence also benefits the political branches of government' because 'interest groups have increased faith in the endurance across administrations of legislation they support'.

The economic significance of the predictability that comes with the rule of law and judicial independence is widely acknowledged. Speaking in Australia in March 2005, the Chief Justice of the People's Republic of China, Xiao Yang, said:

'Thirty years ago [in] China ... the law and the judiciary only focused on punishment, while the judiciary's function of impartial judgment was totally obliterated. Judicial organs and officials were [equated] with other government departments and common civil servants while judicial independence was totally neglected ...

Since reform and opening up in 1978, fundamental changes have taken place in China's politics, economy and society and they have put forward new requirements for [the] judicial system. The understanding of the judiciary by the government, society and people has also changed. A new set of judicial concepts as part of political civilization is taking shape.'

In Asia and the Pacific region, 'judicial reform' is high on the agenda of developing economies. The reasons are pragmatic as well as ideological. As well as protecting the rights of citizens, an independent judiciary is good for government, and good for business. Impartial, predictable, rule-based adjudication in open justice administered by independent courts is a necessary condition of economic progress.

To ask whether judges deserve their independence is like asking whether parliamentarians deserve their freedom of speech. It should not be difficult to explain to the public, and to those in the political branches of government, why they need, benefit from, and have a right to, an independent judiciary. Providing and reinforcing that explanation is a responsibility of the modern judiciary. It is not enough to justify our independence to one another. There is an educational role for us to take up. Legal practitioners, and law teachers, are our allies in that task, but we should not assume that we are facing a hostile audience. In Australia, and in many other parts of the Commonwealth, it is unlikely that there would be a direct challenge to the concept of judicial independence. What is more likely is that some people, not understanding why it exists, or what it involves, will make well-intentioned demands, in the name of accountability, which are inconsistent with independence.

How well equipped are we to explain to citizens their right to an independent judiciary, and to encourage them to value that right? Most superior courts in Australia and, I assume, in other parts of the Commonwealth, have Public Information Officers. Those people are not there merely for the purpose of reacting to emergencies, and dealing with the demands of the media. Perhaps we should be making better use of their potential. We can hope, and sometimes reasonably expect, that political leaders and civil servants will understand why our independence exists, and what it requires, but it is unrealistic to expect those of whom we are supposed to be independent to assume the burden of justifying that independence to the public. Modern judicial organization and leadership has, in the broadest sense of the term, a political dimension. Representing the judiciary to the political branches of government, and to the public, and explaining independence in an age of accountability, is a challenge. The ways in which different judiciaries address that challenge will be influenced by local circumstances. There is always the likelihood that claims of independence will be seen as self-interested. The message that needs to be communicated and constantly reinforced, in the manner appropriate to the time and place, is that an independent judiciary is indispensable in a free society living under the rule of law.

UDAL LAW AND ORKNEY AND SHETLAND COLONIALISM IN OUR OWN BACK YARD?

Geoffrey Care

*'Enough we've had
Of rule that's bad,
To make us sad –
Aye, drive us mad!
In Shetland'*

William Fordyce Clark
Shetland News 1887

Orkney and Shetland are those bits of the United Kingdom which are often shewn in a box on the right hand side of maps and weather forecasts! There is no doubt that they are a part of the United Kingdom, but the question is what sort of a part? Are they wholly integrated in the same way as Wales or the Hebrides? Or do they have a different status?

The answer to the question has far-reaching implications: not just in the area of private land ownership and whether it is feudal or allodial in character, but the rights of the Crown Estate Commissioners to claim dues for the use of the foreshore from the udal owners, the rights to both the sea bed and what lies underneath it and fishing rights too. Indeed whether the islands are even a part of the European Union or have a status similar to the Channel Islands or the Isle of Man, or none at all, like Norway.

Joy Squires wrote a paper 'Re-visiting 'Internal Colonialism': the case of Shetland'¹ re-examining a proposition put forward twenty years earlier by Michael Hechter (*Internal Colonialism. The Celtic Fringe in British National Development 1536-1966* Routledge & Kegan Paul 1975 and 'Internal Colonialism Revisited' in *New Nationalisms of the Developed West*, Allen and Unwin 1985) which was, briefly, as follows 'Commerce and trade among members of the periphery tend to be monopolised by the core..' For which he was, not surprisingly, roundly condemned. The impetus for the attention which was focussed upon this issue was probably the fact that, even at that time, oil revenues had given the United Kingdom £100 billion, not to mention

the ongoing income to the Crown Estates Commission. But the historical reasons for the resentment which underlies this debate are to be found in the history of these islands: the more recent events including the clearances carried out by the Scottish Lairds, illegally it is suggested.

The history

The Vikings arrived in Shetland and Orkney and the Western Isles and the Isle of Man at some time around AD 872-900, and they settled. Before then there had been inhabitants there for at least 5,000 to 6,000 years and it is believed that they were Picts. What happened to them no one seems to know. Perhaps they were assimilated since the difference between them and the new settlers was only size, or so it is thought! The Scots seem to have been settled in the Western Isles at that time and they certainly settled more and more in Shetland and Orkney in the centuries that followed. But the islands were owned by Norway which in turn was a part of Denmark.

Whether the impetus for settlement was political or economic, or a mixture of both, there is no doubt that the Norwegian settlers retained close links with Norway and even into the 18th century cases were being referred to the court in Bergen (See *Galloway and others (Udalmen of Orkney) v. Earl of Morton* 1752 F.C.i.39; M.16393, known as *the Poundlar Case*).

The relationship between the Norwegian king and the earls of Orkney was at times difficult and ambiguous, but until 1468–69 the Norwegian Crown always maintained some sort of political authority in Orkney and Shetland. Despite this, the Norse Jarls had become extinct in 1231 the earldom passing to the Scottish House of Angus, whence according to Drever was introduced a nascent feudal Scottish sphere of influence (*Udal Law in the Orkneys and Zetland*, revised and reprinted from Green's *Encyclopaedia of the Law of Scotland*, 1914).

The feudal system

It is said also that in the 11th Century feudal law was introduced into Scotland, via the clan system, by Margaret the second wife of Malcolm Ceanmore (then the King of Scotland). She was also the granddaughter of Edmund King of England. This may explain why she introduced this system since it came to Great Britain with the Conquest by William. Under this system all land was owned by the King and distributed by him as he saw fit in return for numerous obligations, such as supplying troops when the King needed them. The feudal system was not the legal system of the Norse people and is not now. The legal system of the Norse settlers was allodial or Udal (Odel or Odal) which they brought it with them in much the same way as British settlers brought the common law when they settled lands, to become part of the Commonwealth by conquest, cession or, as *terrae nullius* where no one was there before them.

The kernel of Udal Law in relation to land and its incidents is that, in contrast to feudal law, it has no ultimate human ownership: since the coming of Christianity it is owned by God alone. But as a system it is just as much a comprehensive one as is the Common Law. It includes rights of inheritance and succession, weights and measurements and money; government, administration, lawmaking and justice as a whole. Land tenure extended into the sea, including both the foreshore and the (much disputed) seabed.

Udal law - rights

The right to the foreshore under udal law carried with it various rights which were an important economic asset, although their extent is difficult to determine. For example the present capital of Shetland, Lerwick, originally consisted of detached houses on a plot which was bounded on one side by the sea. In time a road was built in front of these houses between them and the seashore. The owners, including a Mr Smith, asserted their rights to the foreshore as an adjunct of their alod by force of their udal tenure. The Harbour Trustees asserted rights derived from a grant by the Crown of the Crown's feudal right to the foreshore. Mr Smith won: the court said that the foreshore (and other land) of Shetland

was allodial not feudal: *Smith v Lerwick Harbour Trustees* 1903 5 F 680.

In Norway udal tenure included rights to whales, seals, wreck and even the belongings of shipwrecked mariners. In Iceland the owner of the foreshore had the right to everything caught between the foreshore and netlog (boundary) which extended to the depth of twenty meshes of seal net. Between the netlog and open sea the owner had the right to what was driven ashore (*reki*). Looking at later Orkney and Shetland records, it can be seen that the owner of the foreshore had similar proprietary rights, including bait within the ebb, and '*latrom ok lunnendom*', which has been variously translated as 'sealing places and appurtenances', that is hunting places of the seal, and 'lots and parts'. In a perambulation of disputed marches in 1583-84 it was held that the owner had a just right 'to the ground and all the wear that comes ashore within the foresaid marches'.

The impignoration

Going back to the history, the Western Isles (Hebrides) were ceded by Norway to Scotland in 1266 for an annual rent of 100 marks which by 1460 had fallen into arrear. That debt was discharged on 8 September 1468 at the marriage of Margaret, the daughter of King Christian of Denmark and Norway to James III of Scotland. King Christian could not however afford the dowry of 60,000fl so he paid 2,000fl in cash and *pledged* (not, be it noted, *ceded*) Orkney in 1468 for 50,000fl (and this is where the whole argument begins). He still had not got enough of the 'readies' as they say now, to pay the rest of the dowry in cash, so for the balance of 8,000fl he then also pledged Shetland in 1469 'on the same terms' as Orkney. He also instructed the people of the islands to pay their *skat* (tax) to the Scottish Crown; by so saying it is said he thereby confirmed the Right of Redemption in the pledge. In 1470 King James III of Scotland acquired the Earldom of Orkney and in the following year 'annexed' it to the Crown; by this annexation he also acquired an heritable interest.

Sovereignty over the islands had not been ceded and therefore it seems was still reserved to the Norwegian Crown. This fact has been protested by Denmark on at least seven occasions since, the last firm recorded attempt

being by the Treaty of Breda in 1667, though even as late as 1749 Frederick V made a further attempt. Sovereignty in the sense of the exercise of power as head of state and defining the relationship with the people as opposed to the land has indeed been exercised continuously by the Scottish Crown since 1468 but the question is what rights, prerogative or otherwise, has the Crown in relation to the ownership of the land or the ability to alter the law relating to any of the incidents thereof?

Which laws?

This article does not provide any answers to the issues but points to the history of the islands, the treatment of its peoples and its natural wealth with some of the case law which signals questions to which answers may yet remain to be given.

Some pointers can be derived from history. In 1567 the Scottish Parliament discussed whether Orkney and Shetland should be subject to and enjoy their '*aune lawis*' (their own laws) rather than Scots Law: they concluded that they should but whether this became an Act is not known for certain.² In 1611 an Act was passed which abolished Norse Law. It said nothing of udal land law.³ There was no longer available a coherent written code of Norse customary law in language of general use. Such aspects of the old law as survived depended on memory and oral tradition and came to be regarded as in effect customs grafted onto a general corpus of Scots law. Thus some aspects of udal tenure, including now superseded rules on succession, rights over the foreshore and of salmon fishing, scat, scattald and commonty and certain weights and measures, were tolerated as divergences from the general law.

In 1669 an Act of Annexation was passed in the reign of Charles II.⁴ In effect this removed the rights of the Lords of Shetland and the Earls of Orkney, the preamble asserting that it '*..will be the great advantage of his Majesty's subjects dwelling there that without interposing any other Lord or superior betwixt his Majesty and his Officers...*'. Arguably this restored the position of the islands as at 1469 making them Crown dependencies. Unfortunately this was not the end to oppression. Much of the land is owned by the lairds, who are of Scottish descent, and the ancient language of the islands, Norn, survives only in

a few words, the teaching of it having been suppressed. It was the conduct of the Earl of Morton, one of Balfours' needy and rapacious courtiers, that gave rise to *The Poundlars Case* 1750-59, already referred to as one referred not to the Scottish courts but to the court in Bergen, Norway.

Issues of Crown ownership

Since under Udal (or allodial) law the King did not own the land, so the argument goes, he was unable to pass any title to it, nor is the owner under any obligations to a superior landlord. The liability to pay tax (*skat*) being simply a contribution to maintain a government, as it is today. In contrast the system which applies now in Scotland, and has since the Conquest applied in England, is feudal. What is yet to be clearly established is the extent to which the Udal Law system remains a part of the present legal system of Orkney and Shetland and in what ways. Until this question is answered, we will not know whether Shetland and Orkney is able to assert its claims to a greater share in the wealth of what lies in and under the sea and has any greater right to manage its own affairs than the rest of the United Kingdom.

The Crown Estates Commissioners' rights over such matters as marina, salmon fishing, moorings, dredging, sovereignty and territoriality of the sea and seabed, and the minerals below, are bound to be issues which will be hard fought over. Land ownership, inheritance, treasure trove and so on are important pointers since the case law so far has been concerned with such matters but in themselves they are rarely causes for litigation or dispute. Those areas of law relating to weights and measures can be found in the earlier title documents and some records of the Lairds but have no current interest.

Issues of relevance

Another reason for finding an answer is simply recognising that when it comes to current developments in communications, culture and trade links, Shetland has much in common with Norway, Denmark, Faeroe and Iceland: more with Scotland but little with England. At the present time trade between countries in the Scandinavian Region is increasing and air links and ferry lines too.

As mentioned, the issues involved are complex and this article can do no more than point to some of the considerations which need to be examined in order to try to reach answers. But ultimately, even then, before there is to be any final resolution I would expect it to be necessary to have a definitive decision of a court, possibly a supra-national one.

To those who would say that Udal law is archaic, I reply that it is no more so than is the common law. It is accepted that even within Udal land tenure itself there are local variations but this did not affect the kernel of ultimate ownership. This is particularly apparent when studying rights in the seabed.⁵

Effects of passage of time

One of the major planks in the argument of those who contend that Udal Law is neither effective nor operative, and that the reality of the original Pledge in 1469 has long since gone, is the passage of time. There seems, however, to be little authority for this proposition and some positively against it (*Spence v Union Bank of Scotland* (1894) 31 SCR 904; 1 SLT 648 OH), and nowhere has anyone attempted to put a date when that can be said to have occurred - nor is there agreement on the consequences of that loss: has there been in effect a full transfer of sovereignty and dominium?

Others take the view that by gradual abandonment of allodial ownership the Crown has acquired feudal rights. Again, there has been no study of how, if the Crown had never acquired feudal rights in the first place, abandonment can give it something it never had. But as an examination of the cases show, it does seem to be generally accepted by the courts that Udal law survives in some ways and to some extent and in some areas of Shetland and Orkney in the case of land tenure. There is no agreement how it does or why, nor if it applies in other areas.

Decisions of the Courts

In *Lord Advocate v Balfour* (1907 S.C. 1360. 15 SLT 7), where the issues involved salmon fishing rights in Orkney, Lord Johnston held this a matter for Udal not feudal law. The Crown had no right to salmon fisheries prior to 1468, and had none now. More generally, the feudal system of Scotland was not the legal system of Orkney. Lord Johnston found that

‘nothing has occurred since 1468 which amounts to a general acceptance in Orkney of the Scots Feudal System, and still less of its customary incidents’. In *Smith v Lerwick Harbour Trustees*, referred to earlier, the Crown’s claims were rejected. Compare *Lerwick Harbour Trust v Moar* (1951 SLT (Sh Ct) 46), which relates to other land not held on udal tenure. Then in *Spence v Earl of Zetland* (1839 3 Browns Supp 610), Lord Jeffrey held

‘there is not the slightest appearance of its ever having been held that the overlord of these islands of Shetland had been the original proprietor of all the lands they contain. There is no feudal supremacy, and there is not a shadow or trace of an original property in the lord or sovereign’.

It was held in *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* (1976 SC 161; 1979 SC 156) that the right of the Crown to the seabed was a right of property under English and Scots law; that case involved the mainland of Scotland. In *Shetland Salmon Farmers Association v Crown Estate Commissioners* (1991 S.L.T. 166) it was held that Udal law did not expressly deal with ownership of the sea bed and that the Crown had a right of property in the sea bed by virtue of the prerogative. In regard to whales it was held in *Bruce v Smith* (1890 17 R 1000) that a whale culled below low water mark and dragged up between high and low water mark and sold belonged to the claimant. However the court dealt with the case as if it were custom, in Scotland, even though it may equally have derived from Norse law.

Sovereignty and the sea

When it comes to fishing in the open seas, the issue takes on a more complicated and political hue. The history and the references are extensive and call for the expert attention of one well versed in sea law. Some of the significant actions appear to be essentially acts of diplomacy but I will set out some of those which may indicate what the parties thought at the time.

In 1274 the Gulathing states, ‘Fishing grounds in the common belong equally to all’. But there were then numerous complaints to the English Kings. In 1415 King Erik of Norway and Denmark complained to Henry V about English infringement of Icelandic fishing rights

off Iceland. Norse ownership extends out to the Marebekke (the early name for the edge of the Continental Shelf). Henry prohibited English fishing in Norse or Danish island waters (included Orkney and Shetland). Then there were a number of decisions between 1420 and 1622 restricting fishing in 'Land-kenning' [sight of land] in one way or another.

One of the questions which arises is does the Crown by extending sovereignty and jurisdiction automatically acquire proprietary rights in Orkney and Shetland amounting to ownership, or may there not be competing proprietary rights to the seabed?⁶

The Continental Shelf Act 1964 purports to vest the Continental Shelf's natural resources in the Crown. But on what basis? If the Crown has no proprietorial rights in the dry land how can it claim to own the extension into the sea? Of course it has sovereignty in the sense that it has jurisdiction.

A global view

Looking at the case law elsewhere, there are decisions in Canada regarding aboriginal rights, decisions in Africa such *Amodi Tijani* ((1921) 2 AC 407, PC) which are inconsistent with the notion that the common law native title was merely permissive which the Crown could terminate. All these and others have been exhaustively reviewed in the major decision in Australia, *Mabo v Queensland* ((1992) 175 CLR 1) which examined at great length all the case law in relation to the preservation of native rights after the Crown took possession of the country: the Crown must prove its title just like anyone else. The rights of indigenous peoples have received much attention in the Commonwealth Policy Studies Unit and it included in its remit a brief study of Udal law.⁷

Perhaps a study of the predicament and the recent case law of the Chagos Islanders may indicate what the Courts of the United Kingdom may decide and how any Government may act. The Chagos Islanders were expelled by the British Government and ever since have pressed claims to return and/or receive adequate compensation. Laws LJ in *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* ([2001] QB 1067) recounted their sad story in compelling detail when he held that the Islanders enforced removal was unlawful. The Ordinance under

which the expulsion was effected was outwith the Constitution of the Territory: a power to make laws for the 'peace, order and good government' of a territory required its people to be governed, not removed. Ouseley J in another judgment (*Chagos Islanders v Attorney General* [2003] EWHC 2222) went out of his way to name the treatment meted out to the Islanders as shameless. Although it accepted the judgment, the Government enacted a new Constitution in which the absence of any right to live in the Territory became an Article of Constitution in *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* ([2006] EWHC 1038 (Admin)) the Divisional Court declared the Article irrational on public law grounds and quashed it: it was not made in the interests of the Territory but in the interests of the United Kingdom and of the United States. But the islanders have not been allowed to return.

Conclusion

The bottom line which a study of this line of cases may reveal is that the outcome of any domestic court may be immaterial and that therefore only if subsisting rights, if there are any, were to be upheld by a supra-national court, whose decision was binding on the United Kingdom, could such rights be enforced.

- 1 <http://www.psa.ac.uk/cps/1996/squir.pdf>. I am indebted to her for her paper but I was not consciously seeking to plagiarise her title or ideas.
- 2 APS iii, 41.
- 3 RPC ix 181-2.
- 4 Acta Parliamentorum Caroli II 1669 p 566.19.
- 5 See Jane Ryder writing in Stair.
- 6 See Jane Ryder, 'Udal Law; an Introduction', Northern Studies, Vol.25, 1988.
- 7 CPSU Summary Report of the Indigenous Rights in the Commonwealth Project, 2001-2004 by Helena Whall. The headnote states '*The Commonwealth remains a quarter of a century behind the United Nations in regards to recognition and protection of the human rights of Indigenous Peoples, and has lost an opportunity to modernise its values*'. Appendix 2 dealt with comparative law such as property rights in the foreshore and seabed.

A fuller version of this article with much more extensive citations can be obtained from the author via the CMJA.

PROTECTION OF MINORITY RIGHTS BY THE COURTS: THE BARBADOS EXPERIENCE

The Honourable Madam Justice Elneth Kentish,
Judge of the High Court of Barbados
A paper at the CMJA triennial conference, 2006.

Article 27 of the International Covenant on Civil and Political Rights (ICCPR) which was concluded on 16 December 1966 provides:

In those states in which ethnic religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

However, the term ‘minorities’ is not explicitly defined in the ICCPR. As a highly regarded textbook (Rhona K.M. Smith, *International Human Rights*, Oxford University Press, 2003, at p. 312) observes, ‘one of the main problems associated with minority protection under international human rights law has been the lack of a universally accepted definition of what constitutes a minority’. For the purposes of this paper, the absence of a universally accepted definition is no less problematic: although Barbados became a signatory to the ICCPR as early as in 1973, its provisions have not been incorporated into the domestic law of Barbados. Further, it is to the Constitution of Barbados and the fundamental human rights and freedoms entrenched therein that one must turn to discover a juridical basis for the general protection of human rights; and in the Constitution there is no specific mention or recognition of minorities or of the enforcement of provisions relating to minorities.

Nevertheless, the concept of minorities is necessary given the nature of the Barbadian population with its distinct ethnic, religious and, to a lesser extent, linguistic groups. Revisiting Article 27 of the ICCPR, a useful definition may be constructed in terms of the attributes ascribed therein to a minority:

A minority is a group of persons constituting a numerical minority of the population of a state having either ethnic, religious or linguistic characteristics differing from those of the majority of the population and bonded by a collective desire to maintain its ethnic, religious or cultural identity.

Juridical Basis of Human Rights

Section 11 of the Constitution of Barbados which enshrines fundamental human rights and freedoms, guarantees to every person in Barbados: ‘the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest ... life, liberty and security of person; protection for the privacy of his home and other property and from deprivation of property without compensation; the protection of law; and freedom of conscience, of expression and of assembly and association’. Sections 12 to 23 of the Constitution provide for the protection of those fundamental rights and freedoms and section 24 affords a right of access to the High Court for redress by any person who alleges that any of the protective provisions under sections 12 to 23 has been or is being or is likely to be contravened in relation to that person. Until such time as the provisions of the ICCPR are incorporated into the domestic law of Barbados, persons belonging to minority groups in Barbados may obtain redress on an individual basis for any alleged breach of that person’s fundamental rights and freedoms by an application under section 24 to the High Court of Barbados, and only by that path.

Judicial Enforcement of Minority Rights

Two cases selected for examination are instructive. They have the potential to display the approach taken by judges of the High Court

and Court of Appeal towards the protection of minority rights and to reveal that issues of minority rights might arise directly or indirectly and across vastly different areas of the law.

Hinds: interlocutory stages

The first, the case of Richard Hinds, is interesting both for the simplicity of its facts and the different approaches taken by the judges of the High Court and the Court of Appeal in its passage through the court system.

On 1 July 1991 Richard Hinds was arraigned before a judge and jury on the charge that on 24 December 1988, he unlawfully and maliciously set fire to a house with intent to injure. He pleaded not guilty. On 3 July he was found guilty of arson and sentenced to imprisonment for eight years. His appeal against that conviction and sentence was subsequently dismissed and his conviction and sentence affirmed. He did not exercise his right to appeal to the Judicial Committee of the Privy Council, then the final court of appeal for Barbados. Instead, by a notice of motion filed 26 July 1993, he applied for redress under section 24 of the Constitution in relation to several breaches of his constitutional rights. He made the Attorney General the first respondent and the Superintendent of Prisons the second respondent.

One of these breaches, the cutting of his hair, is relevant to this paper. In his application he sought, pending its determination, a conservatory order or an injunction to restrain the Superintendent of Prisons from cutting or in any way shortening or interfering with his hair. In an affidavit filed in support of his application, Hinds affirmed, inter alia, that he wore his hair in a style commonly called “dreadlocks”, that he had grown them because of his religious beliefs and that he wished to retain them but that the Superintendent of Prisons was threatening to cut his hair under the Prison Rules.

Rule 87 of the Prison Rules provides:

Arrangements shall be made ... for male prisoners (unless excused or prohibited on medical or other grounds) to shave regularly and to have their hair cut as required. The hair of a male prisoner may be cut as short as is necessary for good appearance.

His application for the conservatory order was heard by Belgrave J. who refused the order sought. In dismissing an appeal against the decision of Belgrave J. the Court of Appeal stated that ‘the act which Hinds sought to prevent was not irreversible and the case was not like one in which an appellant seeks to prevent the execution of a sentence of death’. This logic determined the interlocutory proceedings for the conservatory order.

Hinds: substantive issues

Before the substantive application came on for hearing before Blackman J. the original notice of motion was amended to include as an alternative claim ‘a declaration that the applicant, while imprisoned at Glendairy Prison ... is entitled to practise his Rastafarian religion and that all attempts to cut and/or shorten and/or interfere with his hair are and/or would be in breach of his rights to freedom of conscience, thought or religion as enshrined in section 11 of the Constitution and protected by virtue of the provisions of section 19 of the Constitution’.

In the course of the hearing, counsel for Hinds relied on *Teterud v Gillman* (385 F Supp 153 (SD Iowa, 1974; affd *sub nom Teterud v Burns* 522 F 2d 357 (8th Cir, 1975)). *Teterud*, an American Indian inmate, requested that he be permitted to wear his hair in the traditional Indian style for religious reasons. Permission was denied. He successfully challenged, under the Civil Rights Act, the enforcement of the prison’s hair regulation on the ground that the regulation infringed his First Amendment right to the free exercise of religion.

In his decision Blackman J. distinguished *Teterud* from the case of Hinds on the ground that in *Teterud* ‘the issue of religion was clearly and strongly stated at the outset in terms of the summons and in the submissions before the court, but in *Hinds* religion was not made a focal point either at the [hearing of the] conservatory application before the High Court or at the Court of Appeal’.

He therefore dismissed the application of Hinds for a declaration that his constitutional right to freedom of conscience, thought or religion had been infringed, holding that ‘in [his] view the importance of the issue of religion ought to have been expressly stated in the motion as originally filed, and full

arguments made before the High Court and Court of Appeal’.

At this point, the application had engaged the attention of two different High Court judges as well as the Court of Appeal. All three courts had failed to grapple with the issue. This failure seems to suggest albeit very faintly, a reluctance by the courts to accept that a general issue of protection of minority rights was involved in the resolution of the dispute before them. While it may be true that the issue of religion was only expressly stated in the amended notice of motion, yet four years later in 1997, the Court of Appeal using the same amended pleadings as those before Blackman J, made a *volte-face*: *Richard Hinds v Attorney General* (Civil Appeal No. 20 of 1997). The Court of Appeal recognised that the allegations by Hinds as to the infringement of his constitutional rights could not be side-stepped. Any claim for redress for breach of the Constitution had to be enquired into.

The claim of Hinds that the cutting and continued cutting of his hair was unconstitutional was founded on section 19(1) of the Constitution:

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience and for the purpose of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observation.

The Court of Appeal considered the affidavit of one Peter Alleyne, a practising Rastafarian, who deposed that the tenets of the Rastafarian religion, among other things, forbade the cutting of the hair on one’s head and attributed much significance to the wearing of dreadlocks. It also considered the affidavit of the Superintendent of Prisons, the gist of which was that the Prison Rules required the religious denomination of every prisoner to be ascertained and recorded upon reception, and the treatment of the prisoner as a member of that denomination until alteration of the records, and allowed for the prisoner to be visited by the prison Chaplain or a member of the denomination of which he is a member; and

that from the records of the applicant there was no evidence of his being a member of any religious denomination or of his having been visited by the Prison Chaplain or a member of any other religion.

The Court adopted the approach of the Federal District Court in *Teterud* that in considering whether the hair regulation infringes upon the plaintiff’s constitutional right to the free exercise of his religion, two issues must be considered: firstly, whether or not an Indian’s cultural and traditional beliefs constitute a religion, and secondly, whether the plaintiff possesses a sincere belief in his creed.

Relying on *R v Hines and King* ((1971) 17 WIR 326, a decision of the Court of Appeal of Jamaica), the court accepted that there is a religious sect known as Rastafarians. The real issue, therefore, was whether Hinds was a *bona fide* Rastafarian as the court expressed the opinion that ‘the mere wearing of “dreadlocks” by a male prisoner [did] not ipso facto denote membership of the Rastafarian religion or that his belief is honest, held in good faith or sincere’. On the facts Hinds was unable to satisfy the second limb of the *Teterud* test outlined in since the court held that nowhere in his affidavit did he affirm or depose that he was a member of the Rastafarian religion or that he told the Superintendent or any one else at the Prison that he was a member of that religion. Accordingly, his application for redress failed.

The different treatment by the courts of the substantive merits of the *Hinds* case illustrates a close relationship between a court’s perception of its constitutional role and the final decisions it makes defining the scope of human rights. In turn that constitutional role may be shaped and influenced by the prevailing fears, expectations and aspirations of the society. Unlike today, in the 1980s and early 1990s when *Hinds* was engaging the attention of courts, neither the Rastafari religion nor the wearing of ‘dreadlocks’ found ready acceptance within the wider Barbadian society. The changing attitude of society towards the wearing of ‘dreadlocks’ and Rastafarians may explain away not only the dissimilar treatment but also the reversal by the Court of Appeal of its earlier position.

PvP

Child Care Board v S. P. and N. P and Straker (No. 324 of 1997 (P v P)) arose in the Family Division of the High Court in an area of law distinctly different from that of *Hinds*. On 23 June 1997 two minor girls aged 17 and 16 ran away from home and sought shelter at the home of a female friend, one Straker. They were the children of an East Indian Muslim couple and Straker was a non-Muslim black Barbadian. Some three days later the Child Care Board (the Board) received a telephone call advising the whereabouts of the girls and requesting that officers of the Board come to see the girls.

Two officers of the Board interviewed the girls who informed the officers that they had run away because the older, in particular, was being pressed into an arranged marriage with a prospective husband from India whom she had seen only by a photograph and both were being pressured into leaving school because their parents did not want them mixing with boys as this was not allowed under Islamic culture. The girls expressed other grievances: they were not allowed to invite any of their school friends to their home; they were banned from using the telephone and were not allowed to stay up at night unless their father was also awake; there were also allegations of threats, of aggression and hostility by their parents towards the girls. The decision to leave home was triggered by an argument between the younger girl and her father over an organiser-book he had taken away from her and in which he found the names of boys not from the Muslim community. The girls firmly stated that they wished to continue their secondary education and that they did not wish to return to live with their parents.

The Board also interviewed the parents who admitted the proposals of marriage but stated that after protest from the older girl, the proposals were dropped. The mother explained that they wished the girls to continue their education by correspondence course as under Islamic culture girls were not allowed to mix with boys. The allegations of threats, of aggression and hostility were also denied by the parents.

Against that background the Board filed an application seeking orders relating to the

wardship, care and control, maintenance and general welfare of the children.

By a cross application filed by the parents, the issue of minority rights was strongly presented. The orders sought included orders committing the care and control of the minors to their parents. The application continued:

Alternatively, an order that the minors do reside with a person or persons of the Muslim faith and/or Indian descent familiar with the culture, religion and way of life of the parties, the names of such persons to be provided by the first and second defendants and investigated and approved by the Board;

That in the event the care and control of the minor children be committed to a person other than the first and second defendants, that the defendants shall retain all their parental rights other than the actual care and control and shall have the right to decide on the religious upbringing and education of the minors and shall have those rights jointly with the Court; ...

That all necessary and proper directions be given for the religious education and upbringing of the minors in accordance with the faith, beliefs and practice of the Muslim religion.

An order that the minors be counselled by psychiatrist Dr. Ermine Belle who has intimate knowledge of the family and the Muslim religion and culture and/or that the minors attend and be counselled by a female priest/counsellor of the Muslim faith.

Dramatic reports of the matter in the print media and in particular photographs of the girls in shorts, which exposed their uncovered arms and legs, splashed across the front pages of the daily newspapers, exacerbated the sensitive and traumatic nature of the applications before the court. What appeared to be the issue was the right of the defendants as members of the minority Muslim community to raise their minor children in accordance with the cultural, religious practices and beliefs of the Muslim religion and their ethnic origin. However, a close perusal of the three orders made by the court gives no indication that the applications involved this issue. As no written decision was given in *P v P*, the writer sought to ascertain

the approach adopted by Waterman J, as he then was, in determining the application from informal discussion with Waterman JA and with Reifer J (then counsel for the defendant parents).

Under the first order made on 2 July 1997 the girls were made wards of court; they were to remain at the residence of the third defendant, a non-Muslim black woman; and they were to attend counselling with access to the parents as specified. Under the second order made on 9 July 1997 a gag order was made, prohibiting publication by the media of any information relating to the applications before the court. The wardship, access and counselling orders previously made were confirmed. The girls were removed from the care and control of the third defendant. Their aunts were appointed as their guardians and their care and control were vested in the Board. Under the third and final order made on 5 January 1998 the girls were to be returned to the care and control of their parents within two weeks; they were to spend week-ends with their aunts; the wardship and counselling orders remained except that in the case of the older girl the wardship order would cease on her attaining the age of 18 years.

In the informal discussion Waterman JA revealed that he considered that the applications of the Board and the parents were brought in an highly charged emotional atmosphere with strong racial, religious and cultural overtones. It was desirable in the best interest of all parties and the wider society to defuse the situation. Accordingly, he personally interviewed the girls. From that interview, he concluded that the fundamental cause of the problem lay in the ever-present conflict between the needs of adolescents for greater freedom, and the strict rules, customs and expectations of their parents.

He recognised that it was anathema to the parents that the girls had sought refuge in the home of a non-Muslim black woman and that they were also traumatised by the action of the girls as it reflected negatively on them as parents in the Muslim community. Sensitive to these unhelpful factors, he steered the parties away from any ventilation of the religious, cultural or ethnic issues raised in the application of the parents. He adopted a conciliatory approach based on communication and counselling, using the personnel

resources of the Board and other professionals that would allow healing of the fractured family relationships. Undergirding this approach was the recognition and appreciation that the family unit was of critical importance to the welfare of the girls and the integrity of the family unit would make for their full re-integration into their own culture.

That the methodology used by Waterman J in analysing the problem and searching for a solution acceptable to all parties, was appropriate and contained the potential for success, was eloquently confirmed by Reifer J, who recorded that in her professional judgment, Waterman J 'had ably and wisely side-stepped the inflammatory issues which, if pursued, could possibly have had catastrophic results and militated against the eventual healing of the family unit'.

The approach of Waterman J seems to be consonant with the proviso contained in section 24 of the Constitution of Barbados which prohibits the court from exercising its powers of redress if it is satisfied that adequate means of address are or have been available to the applicant under any other law.

Reflections

P v P did not involve a direct claim by the parents that their right, as members of a minority Muslim group, to raise their minor children according to their Muslim religion and East Indian culture was being infringed. The issue arose indirectly in response to the application of the Board for orders relating to the wardship, care and control, maintenance and general welfare of the girls. Nonetheless, the case illustrates that whether issues of the infringement of minority human rights arise directly or indirectly the court is first obliged to analyse the facts and circumstances to determine whether a remedy is available to the applicant under any other law before it can properly consider the issue under the Constitutional provisions.

On the other hand, the applicant in *Hinds* raised directly the infringement of his right as a member of the Rastafarian religion to practise his religion freely. *Hinds* neatly illustrates that where the court is satisfied that there is no alternative remedy available, it must accept its responsibility to enquire into the alleged breaches if the applicant is not to be

denied the protection to which he is entitled under the Constitution.

Faced with the task of undertaking an enquiry into claims for redress of constitutional rights, judges must be prepared to make a decision as to whether any particular action is in violation of the human rights provisions enshrined in the Constitution. That enquiry requires an interpretation of those provisions and judges must not be timid or restrictive in their interpretation as to deprive claimants of the redress to which they would otherwise be entitled for breach of their fundamental rights and freedoms.

The interpretative process is therefore crucial to the proper enforcement of minority rights. In construing the human rights provisions of a constitution, judges should cultivate an understanding that the spirit of the constitution is just as important as the language of the constitution. They must diligently search for answers to a central question: what is the nature and scope of the human rights provisions as enshrined in the constitution? That is a necessary condition for discharging the obligation of interpretation.

While it is necessary that judges approach the interpretative process with a 'liberal, imaginative and sympathetic mind', they should heed the wisdom of Lord Bingham of Cornhill CJ,

as he then was, in a keynote speech delivered at the Cambridge Centre for Public Law's Winter Conference in 1999:

... it [is] very important that the judges particularly the most senior and conspicuous judges should resist any temptation to cultivate reputations as liberals or strict constructionists, or anything else. It has always been a great strength of our system that the judges decide cases as they come without giving any thought at all to whether this or that decision will be favourably or unfavourably regarded ... Judges must not give thought to their record, and should not be afraid of accusations of inconsistency or what others see as such.

This temptation may well be avoided if judges were to regard fidelity to the law and the concomitant analyses as their touchstone.

Finally, to be effective guardians of minority human rights, judges must be aware of, and sensitive to the range of cultural beliefs, customs, institutions and ways of life that exist within their society so that decisions on issues of minority human rights, in particular, might not be flawed by their subconscious bias and prejudice. And I suggest that such an awareness and sensitivity can best be engendered through a sustained programme of judicial training.

THE STRUGGLE FOR JUDICIAL INDEPENDENCE IN CANADA

The Hon Justice Kathleen McGowan, Ontario Court of Justice
A paper at the CMJA triennial conference 2006.

I will speak to you today of the struggles of the provincial courts because that is where my heart and soul have been for the past thirteen years. However, let me say at the outset that were it not for the state of democracy in this country we would not have been able to challenge certain government actions and attitudes so that while we have been, at times, critical of various governments, we acknowledge that without the democratic process and the recognition by all of the separation of powers, we would not have achieved what can only be described as a remarkable improvement in the independence of the judiciary in this country.

In the past two decades, Canada has experienced unprecedented litigation, instigated primarily by the judiciary who have sued their governments successfully in a bid to secure financial independence. The history of this litigation serves as a manual of 'how to's and 'how not to's for establishing the limits to our financial independence.

Prior to all of this litigation the provincial court judges in Canada were paid at the pleasure of their respective governments. Often the judges and their representative associations found themselves negotiating their salaries with the very Ministers of Justice whose prosecutors appeared daily in their courts. It was not unusual for the Executive Branches of Government to break promises to the judges. The general attitude was that provincial judges were civil servants and were to be treated like the unionized employees, only without the backing of a union to protect their interests. I once heard a judge declare that he would decide cases in a certain way because he knew 'which side of the bread the butter was on'.

We now have a solid jurisprudence dealing with the principle of judicial independence and our Supreme Court has spoken sometimes with brilliant insight and sometimes a little disappointingly on the subject. However, no one can gainsay that the pronouncement of the Supreme Court in the *Prince Edward Island Reference* case is anything short of a bulwark.

I recall rather vividly sitting in the chamber of the Supreme Court listening to some very eminent lawyers argue a series of cases, now collectively referred to as the *PEI Reference Case* ([1997] 3 S.C.R. 3). Chief Justice Lamer had queried counsel for the Province of Prince Edward Island about the test for an infringement on judicial independence and that learned gentleman responded, 'My Lord, you will know it when you see it.' Shortly thereafter counsel for the Manitoba Judges, Mr. Robb Tonn rose to respond and in a classic retort said to the court: 'My friend says that you will know it when you see it, well my Lords and Lady, you are looking at it!'

And what was the Supreme Court looking at? It was a decade of litigation brought in almost every province in the land by judges and, in one case, by two accused persons who alleged they could not get a fair trial in the province of Alberta because the judges' salaries were at the mercy of the very government which was prosecuting them. This was a shameful situation and one which cried out for relief.

In a judgment which was initially criticised by academics and politicians, the Supreme Court of Canada declared that provincial judges were governed by the Constitution Act and their financial independence was jeopardized unless the process for determining their compensation could be depoliticised. The Court recommended a commission based process should be established to recommend in a fair, effective and impartial way the remuneration of all judges. However, the Supreme Court did not require that the commissions' decisions be binding on the government. Needless to say only three governments passed legislation requiring that the recommendations be binding: Ontario, Nova Scotia and the North West Territories.

So, how does the commission process work? Well, constitutionally, a commission must be appointed which is itself independent and impartial. Generally the commissions are

created by legislation which sets out their composition, mandate and term of office. Most commissions have at least three commissioners representing the judiciary, the government and a neutral officer who is usually the Chair. The commission will set up hearings and invite submissions from interested parties and the public. Invariably, the most detailed submissions come from the judges and the government. The commission will carefully consider all of these submissions and then provide a written report with its recommendations. The parties can return to the commission for clarification or can seek a judicial review if they feel the commission has erred. A government that rejects a non binding recommendation is required to provide a rationale which is considered and is not merely a reiteration of its own position before the commission.

The inherent problem with a non binding process is that governments have always had the luxury of spending the taxpayers' money according to political expediency. So, even where a commission makes a completely rational recommendation for improvements to judicial compensation, the government may feel that the extra money should be dedicated to potholes or some other endeavour which will be more popular with the voting public

Not surprisingly, commission recommendations in some provinces have been soundly rejected by government, resulting in another round of litigation to clarify when governments can reject recommendations and what remedies exist for failure to comply with the constitutional requirements for an independent judiciary.

Let me give you some examples of Government disdain for the process:

Perhaps the most outrageous example occurred in Saskatchewan in the 1990's. In consultation with the judiciary after much expensive litigation a statute was passed which created a transparent and binding commission process for provincially appointed judges. Under this process the government appointed the Commission which conducted full hearings. Of course the Government participated in those hearings. The commission awarded a salary increase which the government found to be unpalatable and reacted by passing legislation to repeal the Commission process, abolish that Commission, void its

award and provide retroactively that no rights were created by the Commission award, and no action could be brought to enforce the commission's recommendations. Only after litigation which was clearly headed to the Supreme Court of Canada did the Government back down and reinstitute another commission process, albeit not a binding one.

Let's look at some other examples. The provincial judges of Quebec have had *three* Commissions in a row, all appointed by the Quebec Government of the day, all fully participated in by those Governments, all with expert evidentiary input, all recommending improvements in salaries and/or pensions for those judges, who have very broad jurisdictions but abysmally low wages. And every one of those awards has been dishonoured and rejected by the government.

Most recently, all federal judges in Canada were affected by a Government refusal to implement the recommendation of an independent Quadrennial Commission, which awarded the judges an increase of approximately 10%. The minority Liberal Government indicated it would introduce legislation to implement the salary increase. Unfortunately the Bill died on the Order Paper when the government fell. The new Conservative Government decided not to endorse that recommendation and instead introduced a Bill authorizing a raise of only 7.25%.

In the past decade, there has been litigation over government refusals to honour the recommendations or awards of these constitutionally required commissions, in every province save Nova Scotia.

In a 2005 decision called *Bodner* (see the June 2006 issue of this *Journal*, at p. 35), the Supreme Court of Canada reviewed the test it set in the *PEI Reference Case* for a government's right to reject a commission's recommendations and set parameters for the judicial review of government's actions. The Court noted at paragraph 30 that the reviewing court

'must focus on the government's response and on whether the purpose of the commission process has been achieved. This is a deferential review which acknowledges both the government's unique position and accumulated

expertise and its constitutional responsibility for management of the province's financial affairs.'

In terms of remedy the court concluded at paragraph 44 of the judgment:

'...if the commission process has not been effective, and the setting of judicial remuneration has not been 'depoliticized', then the appropriate remedy will generally be to return the matter to the government for reconsideration.'

With respect I sincerely doubt that you can remedy a politicised decision by sending it back to the politicians for review. I can only hope that Supreme Court's belief in government's good faith proves better than my doubts.

Chief Justice Lamer called for the depoliticisation of the compensation process for judges and to an extent that has happened. However, there is still too much political pressure on governments to reject salaries that may look impressive to the average wage earner. Sadly, the friction between the executive and judicial branches of government has not abated, even though that is clearly the intent of the commission process.

I began my comments today by pointing out that we have learned the 'how to's and 'how not to's of establishing a financially independent judiciary. I conclude by pointing out that experience has taught us that if we are to have an effective and truly financially independent judiciary it is absolutely essential that we achieve a divorcing of politics from judicial compensation. Those of us who have been involved in this struggle for a number of years believe that a truly effective judicial compensation commission in Canada must be

independent, transparent and effective and have the following attributes: it must be regular, that is, appointed on a statutory scheme every three or four years; it must be appointed on time within its mandate; its hearings and recommendations must be public so as to be accountable; one or all members must be legally trained; Government and the judges must both have meaningful input into the membership of the Commission; the Commission must have the jurisdiction to retain outside experts; and finally, it must bind both the government and the judiciary.

Let me now close with a short story that illustrates wonderfully just how important it is that judges be the guardians of their own independence. The story was told to me by a highly respected judge who has long since passed away. This fine gentleman was appointed to the bench in the early 60's and as was the custom in his jurisdiction his salary was paid jointly by the province and the municipality. A practice had developed whereby the Crown Attorney and the Chief of Police would meet with the judge before court every day and review the docket and decide what was going to happen with the cases. The learned judge thought that this practice was improper and announced that he would discontinue it. The Chief of Police complained to the Mayor who directed the judge to reinstitute the practice or have his salary reduced. The judge refused and in short order a bylaw was passed reducing the municipality's portion of his salary to \$1.00 a year. Fortunately for the judge, the Crown Attorney recognized that this was wrong and eventually the province took over and reinstated the judge's full salary and the judge went on to establish a well deserved reputation for fairness.

I rest my case.

FROM UPHEAVAL TO INSURRECTION THE COURT'S ROLE: A SOUTH PACIFIC PERSPECTIVE

The Hon Justice Gordon Ward, Justice of the Supreme Court of the Fiji Islands
A paper at the CMJA triennial conference 2006.

When considering the possible problems of judicial office, few would anticipate that they might include the need to deal with a revolution or similar civil unrest. Most of us can confidently assume we will complete our appointments without any such problem. We have been able to read of the testing times judges have experienced in, for example, Southern Rhodesia, Grenada or Lesotho with interest and often sympathy but in the knowledge it will probably not happen to us (eg see *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645; *Mitchell v DPP* [1986] LRC (Const) 35; *Makanete v Lekhanya* [1993] 3 LRC 13). Happily, for the vast majority of Commonwealth judges, such situations are likely to continue to be of academic interest only.

That was certainly the position in the small island Commonwealth countries of the South Pacific. Most achieved independence in the period from 1963 to 1980 and showed, for some years, a remarkable degree of political stability. The judges in those countries had every reason to feel secure, safely protected by the terms of recently negotiated and accepted constitutions. Unfortunately, events in Fiji in 1987 not only shocked the region out of that complacency but also seemed to be the trigger for varying degrees of political unrest around the region.

Whenever such a situation arises, the judges will have to make an assessment of the status of the new regime and its legal effect on their position. Judgments from other jurisdictions will assist and it is not the purpose of this paper to deal with that aspect.

Taking four examples, I would like to look at the more immediate, practical side, namely the manner in which the judges themselves should react - particularly in the early moments when a step in the wrong direction may well set the judiciary on a course it will be hard to correct later.

Fiji: the first episode

The first trouble in Fiji arose in 1987 in when members of the military entered Parliament and took over control from the elected multi-ethnic Labour government.

Although the coup was largely bloodless, there followed a period of instability with a marked breakdown of law and order. The judges and magistrates reacted quickly by meeting with the then Chief Justice in order to decide on a common approach. They discussed the legality of the new regime and agreed that they should make it clear that the Court would continue to sit on the authority of their appointments under the provisions of the Constitution. Notes were sent, for example, to the Governor General stating the Court's position.

Over the next few weeks, the judges held court sittings as normally as possible. The military authorities reacted by placing some under house arrest. One judge continued to hear applications for *habeas corpus* in his home. Another judge was imprisoned without charge by the authorities and remained in prison for some days.

Eventually, following a demand by the military head of the government that they should take an oath of allegiance to the new regime, the High Court and Court of Appeal judges and most magistrates resigned. A fresh judiciary appointed from candidates willing to take the new oaths was greeted with derision by the legal profession and the court lasted only a very short time.

The military regime was able to remain in power and eventually produced a new Constitution by decree which was followed by the election of a government. However, it took some years to re-establish the judiciary. It is notable that, when some of the previous judges agreed to return once an election had been held, their return was applauded – a reaction which was, I feel, an acknowledgment of their earlier principled stand.

Fiji: the second episode

The country struggled reasonably successfully to recover from the adverse effects of the coup. In 1997 a new Constitution was unanimously passed by Parliament. In 1999 the first general election under the new Constitution again resulted in a Labour-led coalition, this time with a Fiji-Indian Prime Minister. Next year, in May 2000, a group of armed Fijians supported by units of the Army, invaded Parliament, took members of the Government hostage and held them in the Parliamentary complex for some months.

The judiciary again needed to make similar decisions to those in 1986. They were advised that they should continue as judges but as appointees of the, by then, military regime under a 'deemed' military Oath of Office.

Unfortunately, the judiciary did not reach any consensus. Although the Chief Justice called a meeting of some of the judges, they were split as to the position they should take. The majority of judges felt they should acknowledge that the Constitution had been abrogated and accept the *de facto* legitimacy of the military government. A minority insisted that the Constitution remained in force and that they were bound by the oaths they had taken under it. Despite the failure to agree, the Chief Justice made a public statement that the judiciary supported the military. The courts continued to sit but with the minority making it plain that they continued to regard themselves as sitting under and bound by the 1997 Constitution.

One of those judges stated the position as she saw it (Shameem J, 'Maintaining Judicial Independence in Fiji', International Women Judges' Conference, 3-7 May 2006):

'Then came a period of uncertainty. A member of the public challenged the abrogation of the Constitution in one of our courts, but his challenge was not heard for six months. (Chandrika Prasad v Republic of Fiji and the Attorney General of Fiji, HBC 217/2000 in which Prasad filed an originating summons for a declaration that the 1997 Constitution was still in force as the supreme law of Fiji). How did we maintain judicial independence when the judiciary itself was divided and the Chief Justice was supporting the executive? ... It was certainly a most diffi-

cult time for those of us who tried to uphold the rule of law against our own colleagues. The difficulties arose in several ways ...'

The difficulties she described included the selective allocation of controversial cases and the transfer of some of the minority judges to the criminal division. In fact the problems were even more profound. The Chief Justice and other High Court judges advised the military and assisted by drafting legislation including a judiciary decree setting aside Constitutional provisions relating to the court system.

Fiji is a relatively small jurisdiction and so these actions soon became public knowledge. The President of the Fiji Law Society, Peter Knight, wrote to the Chief Justice on 9 June 2000 stating the 'strong views' of the legal profession:

'... that the involvement of the Judiciary in helping the military draft the decree of the administration of justice is inconsistent with the position that the 1997 Constitution has not been abrogated. ... It is not the function of the Judiciary to exercise legislative powers ... In our view the judiciary has failed in its oath to uphold the 1997 Constitution ... It cannot be seen openly to condone criminal activity. It should state as a matter of record that it will continue to occupy and function in its judicial role in the same uncompromising manner as it had done prior to 19th May.'

The Fiji Court of Appeal at that time consisted primarily of judges from neighbouring countries, principally New Zealand and Australia. One of the judges (from New Zealand) sent an email to the members of the Court suggesting that the 'Australian and New Zealand judges' should resign. He referred, with some justification, to the situation in Fiji at that time as a step towards *apartheid*. However, following further correspondence between the members of the Court, it was agreed they should assess the situation purely as Fiji judges and, as such, their duty was to continue to sit in accordance with their appointments under the Constitution. By that time, the stance taken by the High Court judges was known. The Court of Appeal judges all continued to sit.

In March 2001 the interim government's appeal in *Chandrika Prasad* reached the Court of Appeal. The decision of the interim government to challenge the decision through the normal appeal process was, I believe, an acknowledgment of the continuing independent stance that the Court of Appeal had maintained. The Court dismissed the appeal and declared, *inter alia*, that the 1997 Constitution had not been abrogated and remained the supreme law of Fiji.

Solomon Islands

Solomon Islands consists of a number of major islands each of which has some degree of autonomy exercised through a provincial council. There are considerable racial and linguistic differences between, and indeed within, the provinces. The capital, Honiara, is on Guadalcanal and, inevitably, has representative populations from all the regions. Those from the neighbouring island of Malaita were numerically and influentially the largest minority and, historically, there had been strong rivalry between the peoples of Guadalcanal and Malaita.

Simmering discontent in the Guadalcanal people, arising from the feeling their province was being taken over, suddenly erupted into serious violence in the 1990s. Rival militias were formed and violent clashes resulted in many deaths, serious violence and substantial damage to property. In a depressingly short space of time there was effectively a total breakdown of law and order and of normal civil administration and a situation little short of civil war prevailed in much of the country.

Despite the danger and the almost total lack of an effective police force, the courts decided they must attempt to continue to function. It was a brave step and more than one judicial officer was threatened. In one case, a magistrate was severely beaten up and injured. The lack of an effective police force meant that any criminals had to be left at large because neither the police nor the prisons could hold them. Effective protection for the judges was impossible.

The lack of police, of prosecution and of other normal processes effectively prevented the courts functioning except in a very small number of cases. However, the members of the judiciary ensured that the courts did sit and

could be seen to do so. Following the arrival of a regional intervention force, RAMSI, and the restoration of law and order, the court system was still intact and ready to function.

Tonga

The last example is Tonga and is from the opposite end of the spectrum in terms of challenges to the judiciary. The problem arose from an attempt by the government to ban a newspaper which was frequently critical of the government and more recently had extended its criticism to individual members of the royal family. A number of methods were used by the Government each of which was, in turn, successfully challenged in court.

Following this, the Princess Regent withheld the royal assent to three minor bills which had been requested by the court. Her stated reasons were taken up by some Cabinet Ministers in Parliament and led to a sustained personal attack on the Chief Justice and the previous Attorney General in Parliament. Although the sole purpose of the bills was to bring the law into line with a recent Court of Appeal ruling on the selection of criminal juries, allegations were made that the purpose of the bills was to assist the previous Attorney General to challenge a jury in a civil action in which he was engaged against one of the same ministers. The attack was unjustified and misrepresented the effect of the bills but the Chief Justice received no support from the Attorney General.

The Chief Justice was due to go abroad before the next sitting of Parliament and so he wrote a note setting out the old and new provisions and explaining the meaning and purpose of the amending bills. A copy was addressed to each Member of Parliament. All copies were seized on the orders of the Minister who had led the attack but one copy was overlooked. When found by a Member, it was copied and distributed to all Members.

The consequences

These were three different countries and very different situations but each required the judiciary to decide how to confront an unexpected change in what had, hitherto, been familiar ground. In each case, public confidence in the courts was at stake.

In the Fiji cases, the judiciary, although led by the same Chief Justice on both occasions, followed very different courses. The course followed in the first coup was, I suggest, sensible and proper. The judiciary met and only acted in a way upon which all agreed. Although they had to resign in the end, prior to that the judges had made the court's stance on the Constitution clear and reassured the public that any challenge could still be determined by an impartial and independent judge. When, later, the courts were to be re-established, some of the previous judges returned with their integrity unchallenged.

On the second occasion, I believe wrong decisions were made. It must be acknowledged that it was very difficult situation. The legitimate government had been overthrown by usurpers proclaiming themselves to be the government. The hostages' lives were in serious danger and it was clear that a wrong step could increase the risk. The military was claiming to have taken over in order to avoid more serious breakdown of law and order but, whatever the motives, it too was acting illegally and the decrees it passed were based on its assertion that the Constitution had been abrogated.

The public needed to know the true position. I would suggest that, at that point, the judiciary had no justification in considering themselves released from their oaths to uphold the Constitution. The court had no responsibility for the maintenance of order; that was for the executive. Its duty was to uphold the Constitution until it had been lawfully abrogated and to reassure the public of the position by a clear statement. This was no 'glorious revolution' greeted with universal acclaim, neither had it reached a position where the doctrine of necessity applied. Instead, the Chief Justice declared the judiciary supported the illegal military administration, a political statement, and soon after that, its active provision of advice and assistance in drafting decrees also became public knowledge. The only avenue for members of the public to challenge the legality of the military regime was still through the courts but that statement and the actions of the judiciary suggested the issue had been predetermined.

When differences of opinion appeared between the members of the judiciary, they were not

resolved before action was taken. Perhaps it was thought that the situation in the country did not allow time to resolve them but it is clear the concerns of the minority judges were overridden or disregarded. At the time, the unfortunate effect was that it became public knowledge that some courts accepted the continued existence of the Constitution and others did not. The scope for forum shopping was demonstrated only too clearly when members of the judiciary themselves attempted to re-allocate constitutional cases. The serious long term effect is that, whilst some middle way might have been found at the time, failure to do so has left deep divisions which have not been healed to this day and public respect for the courts remains at a low ebb.

Members of the Solomon Islands judiciary, especially the magistracy, were in serious danger both personally and in respect to their families. The lack of any effective police force meant the magistrates' courts had very few cases in the areas where the trouble was most intense and so they were able to maintain a relatively low profile. However, as has been stated, that was not, in itself, sufficient to remove the danger and continuing to sit required considerable personal courage.

The courts are now firmly established throughout the country and are rapidly clearing the inevitable backlog which grew prior to the arrival of RAMSI. The public as a whole appears to recognise that the courts have never changed and present confidence in the system stems from the determination of the judges to maintain their constitutional role.

In Tonga, the action of issuing a written explanation arose from the lack of any other way of explaining the judiciary's position in Parliament. Had it been possible to rely on the Attorney General to do so, there would have been no need for the action taken. However, I consider the issue of an explanation by the judiciary itself was, in retrospect, unwise and led to an unfortunate result.

Whilst the intention had been to explain the bills in an uncontroversial way, the unexpected, unauthorised manner in which it was distributed gave increased significance to the note and drew the court, as a result, into the debates almost as if it was a party to the political struggles then going on in Parliament.

In the event, the matter died a rapid death but it left a rift between the courts and some members of Cabinet which took many months to heal. Had there been a court information or media officer, the personal involvement of the judiciary could have been avoided.

The lessons

As I have stated, the purpose of this paper is not to advise on the legality of such situations but to see if there is any way in which judicial officers can be ready, faced with such unexpected events, to act in a manner that will be most likely to ensure the best course is followed.

The principal lesson we can see from these examples is that neither the likelihood of such a situation arising nor the form it will take can be predicted. Thus no formal suggestions or procedures can be formulated. However, it is almost certain that in any such situation, the independence and the integrity of the judiciary will be directly challenged or indirectly placed in peril.

Undoubtedly the consequences of any decisions made or actions taken will be profound. As these cases show, a wrong step may cause serious and possibly permanent damage to the reputation of the court whilst a good decision could strengthen public respect. In the end, each situation will present its own individual problems and so the following can be no more than suggestions based on our experiences in the South Pacific.

1. The first, immediate step should always be to summon a meeting of all, or as many as possible, of the judicial officers.

At that meeting, the principal aim must be to reach consensus on the course to be taken. The situation and its effect on all levels of courts should be ascertained and any decision taken should apply to all courts. Inevitably the magistrates will be more exposed to direct interference and that may be exacerbated by geographical isolation in many cases. Care must therefore be taken to ensure they are fully involved in the discussion.

2. No action should be taken which acknowledges an abrogation of the Constitution unless and until it is accepted as the inevitable consequence by all the judicial officers who will have to act under it.

It is hard to envisage any case, apart from a clear 'glorious revolution', where the proper decision can be other than to adhere to the Constitution, abide by the officers' judicial oaths and maintain the legal and constitutional position of the courts which existed before the challenge arose.

3. No public statement of the court's position should be made until the meeting has been held and reached consensus.

Once it has been reached, the court's position must be clearly stated to the public by the senior judge on behalf of the whole judiciary. No statement should be made which appears to suggest any political stance.

4. Where unanimity is impossible, the court should continue to uphold the Constitution under the terms of the judicial oath.

If the dissenting view is to accept the abrogation of the Constitution and is held by a very small minority, the minority judges should be taken off court work until any appeal process has been concluded. It is undesirable that the public should see that the sitting judges are divided. However, all judicial officers should appreciate that the decision involves serious considerations of personal integrity and they should respect the decisions of judges who may hold differing views.

As I have stated, I am dealing with this topic solely from the South Pacific perspective; a region which has been fortunate in the lack of violence in most cases. I appreciate that judges from other parts of the world may feel that the situation places their personal safety in such peril that it becomes the principal consideration. That must be a matter for each individual judge but, if his decision is based on such considerations, he should make that fact plain to his fellow judges. Whilst expediency should not be part of the decision about the position of the judiciary as a whole, it must be borne in mind that each judge's personal decision may involve issues of personal security or of the safety of close family members. In such cases, special arrangement may have to be made.

Where there is any comment by the new regime or in the media about the position adopted by the court, it should only be answered after consultation with all judicial officers.

If there is a media officer or official spokesperson, all subsequent public statements should be made through that officer. If not, they must be made only by the senior judge on behalf of the whole judiciary.

6. Any demand by the illegal regime that judicial officers take an oath which is contrary to the constitutional oath should

be refused by the senior judge on behalf of the whole judiciary.

The principal duty of all judicial officers is to maintain the courts under the Constitution. If the only alternative is resignation it should be by the whole judiciary and stated to the public to be such.

The overriding aim must be consensus. If that is achieved, all statements and actions can be made by the judiciary as a body and all public utterances can be made solely by the senior judge on behalf of the judiciary as a whole. Unanimity is probably the greatest safeguard against unlawful action against any individual judge.

DOROTHY WINTON TRAVEL BURSARIES FUND CONTRIBUTIONS WELCOME

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

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

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

The Bursary will be used to assist participation of judicial officers to attend the Triennial Conferences of the Association in future. **Contributions to the Bursaries should be made** (by cheques drawn on a UK bank, bank transfers- making clear what the transfer is related to or bankers draft **made payable to CMJA**) and should be sent to the Commonwealth Magistrates and Judges Association at Uganda House, 58 Trafalgar Square, London WC2N 5DX, UK.

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

DEALING WITH CORRUPTION IN THE JUDICIARY: THE KENYAN EXPERIENCE

The Hon Lady Justice Mary Angawa, High Court of Kenya
A paper at the CMJA triennial conference 2006

One of the arrangements made at the time of Kenya gaining independence from Britain was that the Ministry of Agriculture and the Judiciary would still, to some extent, remain in the hands of the British. The Ministry of Agriculture was headed by white Kenyans to safeguard the agriculture sector and to ensure the fair distribution to the Africans of land, whilst the judiciary retained a majority of expatriate Judges, Magistrates and personnel at the level of the Court of Appeal and the High Court. They served under contracts, and their salaries were supplemented by the British Government. This meant that their terms of services were better than those of the local Kenyans.

When it came to dealing with misconduct within the Judiciary, it would often be left to the Registrar of the High Court of Kenya to deal with the Magistrates. It was envisaged that the Judges would require no discipline. There was little done to instill discipline in the Judiciary, especially as the bench was being Africanized. Cases of Magistrates being drunk on duty, with no action taken, encouraged some Magistrates to become bold enough to take bribes. In the 1980's a lady Magistrate asked a litigant for a bribe. Not being satisfied after she was paid, she asked for more, this time for a trip to London with her boyfriend together with the full payment of her shopping bills. On her return she asked for Kshs. 50,000/- more and was paid. The litigant on attending court found a different magistrate handling his case and understandably rightly fainted. The lady magistrate had been asked to resign.

There had earlier been an instance of two judges who were alleged to have been corrupt but no action had been taken. A new Chief Justice called the two judges to his chambers and confronted them with the allegations. Both accepted that they ought to retire.

Weaknesses

The Executive weakened the Judiciary by appointing Chief Justices two to three years

before their retirement age of 74 years; since independence 1963, Kenya has had 11 Chief Justices. In the 1980s and until 2003 there had been 8 Chief Justices appointed for a period of 2 to 3 years. (This is an average of 2.5 years per Chief Justice.). This rapid change of Chief Justices undermined the ability of the Judiciary to put in place a system that would safeguard it from interference by the Executive and its independence. Each Chief Justice would deal with corruption in a different way. The most common method used in Kenya would be to appoint a senior judge to investigate another judge or magistrate who was said to be corrupt and report to the Chief Justice. An adverse report would lead to the transfer of such a judge or magistrate to another station. This did not solve the problem and no-one had actually been taken before any tribunal.

Another Chief Justice, in order to deal with indiscipline, because a judge refused to go on transfer, went to the Executive and Parliament and amended the law to remove judges' security of tenure in order to give the Chief Justice power to discipline that judge.

The effect of this was to have the Executive interfere in the decision-making of individual judges.

Steps Taken

During the period 1960 to 2006, there had been several commissions and committees set up dealing with the Judiciary. Out of all these, I will deal with five. At first the inquiry dealt with the issue of security of tenure where magistrates and judges were employed on contract with only a few being on permanent and pensionable terms. Security of tenure was an important safeguard of the independence of the judiciary. Judges who were employed on contract were fearful that their contracts would not be renewed, and this created a 'culture of fear'. The Chief Justice of Gibraltar as a judge in Kenya recalls being told by the Chief Justice that his contract would not be renewed if he did not handle a certain case in a certain manner.

The Warihuhu Committee report of 1980 recognized that the courts required to be localized with Kenyans. The absence of effective training meant that the transition to a local bench was not effectively carried out. Because the salaries of expatriate judges were supplemented by their respective countries, they did not raise the issue of higher judicial salaries. There were weaknesses in the courts administration. Training of support staff was seen as lacking. The courts were not situated in the respective provinces and a recommendation was made to decentralize the courts to make them accessible to all.

The Mbithi committee report of 1991 and the Kotut committee appointed to inquire into the terms and conditions of service of the Judiciary recognized that improved terms of service were crucial. The judiciary should be allowed to recruit its own personnel. The delinking the judiciary from the Civil Service was also recommended. This was to have been implemented by the Akiumi Committee.

In 1998 the Kwach committee on the administration of justice recommended that there be enhancements in court performance, physical facilities and case-load management. For the first time it recognized that corruption was a problem. Though the recommendation of this committee were to have been implemented by the Hon Mr. Justice Gicheru, there was an absence of political will. Three other committees in their reports in 2002, 2003 and 2006 called for the full implementation of this report.

The Report of the Integrity and Anti-Corruption Report Committee of 2003 (the Ringera report), a committee set up during the Kibaki Government exactly five years after the 1998 report, came out boldly in recognizing that the problem of the judiciary was not rooted in the non-delivery of justice, incompetence or inefficiency but was rooted in corruption. This committee was asked to investigate 'the nature, level and impact of corruption in the judiciary and make recommendations'. It named 23 judges (out of 50), 82 magistrates (out of 250) and 43 paralegals as being involved in corruption. Many of the judicial officers resigned. A few remained to face the tribunals. Only one Court of Appeal judge had been cleared and is now back to the bench in the same grade that he held before. Magistrates named appeared before the Judicial Service Commission and some have

been absolved as not being corrupt and are back to work.

The Effect of Corruption

The Judiciary had reached a level where corruption was crippling it, and it no longer had the moral standing to deliver justice. This had been recognized and acknowledged by the Advisory Panel of eminent Commonwealth Judicial experts a year earlier in 2002. Whilst the experts were examining the discussion-draft of that chapter of the Constitution of Kenya dealing with the Judiciary, they were given a mandate to make recommendations on the Judiciary generally and in particular the establishment and jurisdiction of the courts to administer the measures necessary to ensure the competence, accountability, efficiency, discipline and independence of the Judiciary. During their investigations 'the panel was shocked and dismayed by the wide-spread allegations of corruption in the Kenyan Judiciary... The public confidence in the independence and impartiality of the judiciary had virtually collapsed'.

Though the Judiciary had earlier taken steps by setting up a Judicial Code of Conduct, it had not been fully implemented. Anti-corruption courts were set up administratively but were challenged as having no proper legal basis for their legal existence. The new government repealed the Prevention of Corruption Act (Cap 65) and in its place enacted the Anti-Corruption and Economic Crimes Act 2003 (No. 3 of 2003). The former Act and the Penal Code set lighter penalties whilst the latter Act established an enhanced maximum sentence. The discrepancy between the Penal Code and the Anti-Corruption and Economic Crimes Act 2003 still needs to be resolved.

When the Ringera report was released, the method of exposing corruption by judges and magistrates was most certainly not in line with the Rule of Law. A list of the named Judges was published in the papers. This meant that the right to be heard before being condemned was denied to those judicial officers. Even the Hon. Justice Kanyeamba admitted that this method of exposing alleged corrupt judicial officers was incorrect. It was a method described as radical surgery necessary to combat corruption so that it was permanently eliminated. The Kenyans obtained much praise from all over the world for this bold action.

Indeed those effects are felt where you now have judges and magistrates delivering well-researched judgments with an ever-improving court process and structure.

The fight against corruption continues, with magistrates being arrested and charged with corruption as recently as a few months ago. Action is now being taken immediately for misconduct. To this end, the Hon. Justice J. E. Gicheru is to be highly commended for the brave, bold and courageous action that he has taken in fighting corruption. The Chief Justice set up the latest committee in March 2005 and it delivered its report in January 2006. This committee took a more humane way of dealing with corruption. The purpose of the committee, known as the Ethics and Governance Sub-committee of the Judiciary (the Onyango-Otieno committee) was to collect information relating to the integrity of the entire judiciary staff and court process. It was to investigate all cases of alleged corruption and unethical behavior and other allegations of lack of integrity.

The present situation

The Judiciary therefore recognized that the fight against corruption was not over. The Onyango-Otieno Committee on receiving allegations of corruption would require the particular officer to reply to the said allegations. Any complaint put to the committee would be held in confidence. The name and address of the complainant was required to be disclosed. This was to ensure that the complaints were not merely malicious. The right to take further action rests with the Chief Justice. Positive steps are being taken in Kenya to deal with corruption. As the saying goes, 'Rome was not build in a day'. The vice of corruption will take a long time to eradicate.

But, if you ask the common man in the street about corruption in the judiciary, he would say that corruption is worse today than ever before. How can this be with the reforms undertaken? The cost of paying bribes has gone up, but is still affordable by the rich. Corruption today had become subtle and invisible. Dealing with corruption when you can see and identify it is easy. Just set up a trap and make your arrest.

But when the corruption has become invisible and so subtle that you cannot recognize it, identify it, or detect it, it is much more difficult to deal with.

The other crucial problem may be that many of the judicial officers may not know what corruption is. The Ringera Committee recommended that there be education as to what amounts to corruption. For instance, a magistrate adjourned a matter to 2.30pm of the same day. The advocate attended at 2.00 pm and waited for one hour. Neither his opponent nor the magistrate was present. On making inquiries, he is told that his matter had been dealt with at 1.30 pm in chambers. On examining the court records, they showed that the matter had actually had been dealt with at 11.30 am. Without a doubt justice had been perverted. This is corruption.

The Kenya Magistrates and Judges Association, the Kenya Women Judges Association and the Judges Welfare Association can rise to the occasion and play an important role. Educating its members on anti-corruption behaviour can be effective. The Kenya Magistrates and Judges Association have taken up the mantle and produced a proposal entitled *Demystifying the Administration of Justice in Kenya* (February 2006). Part of the recommendation in the proposal is for a peer-review mechanism. This is where pressure from colleagues is brought to bear upon the corrupt judicial officers to desist from being corrupt. The officers know each other and are the best persons to police each other and the paralegal staff. The proposal also urges that members of the public should be sensitized and educated as to their rights by having an open day in court. This proposal is yet to be funded and implemented.

Conclusion

Corruption in the judiciary is real. To deal with it requires acceptance that it does exist. Judicial officers may not actually know corruption apart from direct bribe-taking and interference from the Executive. Education of judicial officers, and also the computerization of court records, may solve the problem.

LAW REPORTS

R v TE KAHU

NEW ZEALAND COURT OF APPEAL

William Young, Chambers and O'Regan JJ, 28 September 2005

Acting judges – whether successive appointments as Acting Judge permissible – issues of judicial independence

The prosecution in this murder case wished to rely on evidence obtained by intercepting communications on the authority of a warrant issued by Neazor J, an Acting Judge of the High Court. Neazor J was initially appointed an Acting Judge in August 1998; after successive re-appointments he had served as an Acting Judge for four and a half years at the date of the warrant. The relevant legislation, s 11A of the Judicature Act, empowers the Governor-General to appoint any former Judge to be an acting Judge for such term not exceeding 2 years ... as the Governor-General may specify. There is no provision corresponding to that in s 11 of the Act, dealing with temporary judges, that 'Any person appointed a Judge under this section may be re-appointed, but no Judge shall hold office under this section for more than 2 years in the aggregate'.

It was argued for the appellants that the power to appoint a former Judge as an Acting Judge was limited to one term not in excess of two years and that therefore Neazor J ought not to have held office at the time he issued the warrant. Or that Acting Judges were confined to 'non-sitting judicial functions' and that the issuing of interception warrants was outside that category.

THE COURT noted that non-tenured Judges, holding either temporary or acting warrants, were used not only in the High Court but also in the District Courts and the Supreme Court. It recognized that a retired Judge who holds an acting warrant might well wish to secure a renewal of that warrant. It was not altogether far-fetched to suppose that a Judge who became unpopular with the government of the day would not receive appointment (or renewal of appointment) as an Acting Judge. It was still less far-fetched to suppose that Judges

might come to believe that. That meant that there was scope for the perception that Judges who were concerned about reappointment on an annual or biennial basis, and thus might be anxious not to create any waves, were not as independent as those who had permanent tenure.

The Court cited decisions in a number of other Commonwealth jurisdictions, including *Starrs v Procurator Fiscal* (1999) 8 BHRR 1 and *Millar v Dickson* [2001] 1 All ER 1041 striking down the use of temporary sheriffs in Scotland, and *Valente v R* [1985] 2 SCR 673, the Canadian decision concerning acting judges holding office during the pleasure. However,

'Given the possibility of judicial promotion, our judicial system cannot fully insulate Judges from the accusation that they are, for this reason, tempted to favour the Executive. Indeed, the same is true in all other countries that have legal systems similar to our own. Further, and importantly, any judicial system must rely ultimately on the personal integrity of the Judges who serve in it and the traditions of the offices they hold. The legislation proceeds on the reasonable basis that someone who has held office as a tenured Judge will be sufficiently inculcated with independence to withstand the temptations associated with the Acting Judge system. Indeed, those who have held judicial office are likely to react with incredulity and indignation at any suggestion that a Judge would allow considerations of fear or favour to influence a judicial decision.'

On the interpretation of the Act, the Court held that re-appointment was permitted, and rejected the argument as to 'non-sitting judicial functions' as baseless. Given the lack of full argument and the effect of decisions on other aspects of the appeal not noted here, the Court

declared itself reluctant to express a concluded view on the question whether the appointment of Acting Judges under s 11A of the Judicature Act was consistent with the concept of judicial independence implicit in s 25(a) of the New Zealand Bill of Rights Act. For similar reasons, the Court was not inclined to enter into the

question whether it should grant a declaration that the current systems associated with appointment and/or use of Acting Judges was incompatible with the New Zealand Bill of Rights Act: the evidence was not adequate to enable this question to be fairly assessed.

REILLY v ALBERTA (PROVINCIAL COURT, CHIEF JUDGE)

ALBERTA COURT OF QUEEN'S BENCH
Rawlins J, 24 May 2006

Powers of a Chief Judge – judge's 'professional allowance' – attendance at conference abroad

Under the relevant Alberta legislation, a Provincial Court judge is entitled to a professional allowance each year to be used for prescribed purposes 'as authorized by the Chief Judge'. The purposes are (a) the attendance at relevant conferences and seminars that are related to the carrying out of the duties and functions of a Provincial Court Judge; (b) the buying of books and journals that are related to the carrying out of the duties and functions of a Provincial Court Judge; (c) the maintenance of memberships in judicial and professional organizations; and (d) the purchase of security systems for a Provincial Court Judge's home and the monthly service charges for those systems.

The applicant, Judge Reilly, asked the Chief Judge for approval of the use of his professional allowance to attend a conference in Caux, Switzerland organized by the Moral Re-Armament Movement. The particular session Judge Reilly wished to attend was entitled 'Peace-Building Initiatives' which Judge Reilly considered relevant to the matters concerning the indigenous peoples of Canada. The Chief Judge refused approval, characterizing the session as a political philosophy seminar, and asserting that nothing in the conference was concerned with the administration of justice. Judge Reilly sought judicial review of the Chief Judge's decision.

RAWLINS J considered two issues: whether the Chief Judge's decision impinged upon Judge Reilly's judicial independence; and

whether the decision was within the authority of the Chief Judge.

Having reviewed the Canadian cases on judicial independence, Rawlins J rejected Judge Reilly's argument that the purpose of the professional allowance was the improvement of individual judges' skills and knowledge as judges and that, therefore, the professional allowance was essentially adjudicative in nature, rather than administrative. It was not the case that allowing any oversight over the use of the professional allowance would constitute an interference with a judge's adjudicative function.

The Supreme Court of Canada had made it clear that not all matters which affect or are of importance to judges are matters touching upon judicial independence. Specifically, the Supreme Court has said that not all matters that have or may have a financial impact on judges are matters going to their financial security; and that control by the executive branch over certain discretionary benefits did not constitute an attack on judicial independence. Here approval of professional allowance expenses was in the hands of the judiciary, rather than the executive.

The primary purpose of the professional allowance was not to confer a financial benefit on individual judges, but to ensure that the public received the benefit of a well-educated judiciary. This could be so only if the resources allocated were put to their proper purpose. This required an objective, rather than subjective, assessment of proposed uses of the professional allowance.

On the second issue, Rawlins J noted that defining the role of the Chief Judge required achieving a delicate balance so as to give the role meaning without infringing upon the judicial independence of individual judges. He cited a number of articles in which differing opinions were expressed as to how the balance should be struck. Under the Provincial Court Act of Alberta, the Chief Judge had ‘the power and duty to supervise the judges in the performance of their duties’, with a non-exclusive list of powers which did not make reference to the judges’ professional allowances. In a previous case involving Judge Reilly, it had been held that ‘while a chief judge can exercise his administrative independence (or exercise the Provincial Court’s administrative independence) to a degree, a chief judge cannot interfere with a judge’s individual adjudicative independence, or be perceived to interfere with that judge’s individual adjudicative independence.’

However, the decision in this case did not touch Judge Reilly’s adjudicative independence; it did not infringe Judge Reilly’s judicial independence and was within the Chief Judge’s authority.

Rawlins J recognized that Judge Reilly’s interest in the administration of justice to aboriginal peoples was both important and sincere. The Provincial Court, as the court of first instance for many litigants, had taken on an expanded, problem-solving role, particularly with unrepresented and aboriginal litigants. But the Caux Conference was of such a general nature that it failed to meet the standard of learning needed to enhance even the expanded role now played by the Provincial Court. He recognized that judges should not be restricted to conferences and seminars held in Canada:

‘There are many offshore judicial legal conferences which are of tremendous educational benefit. Contact with our judicial colleagues in other parts of the world provides a broader perspective for the bench and can be very beneficial to all levels of the judiciary. Even so, it is reasonable to measure the educational value of such offshore experiences against some objective criteria.’

Judge Reilly’s application was dismissed.

ONTARIO DEPUTY JUDGES’ ASSOCIATION v ONTARIO

ONTARIO COURT OF APPEAL

Moldaver, Simmons and Lang JJ.A., 25 May 2006

Judges’ remuneration – deputy judges paid on a daily rate – entitlement to an independent process for fixing judicial remuneration

Deputy judges of the Ontario Small Claims Court hold part-time appointments for a renewable three-year term. They are paid on a *per diem* basis, the rate being fixed by the Lieutenant Governor in Council. It had remained unchanged since 1982. The Ontario Deputy Judges’ Association sought an order requiring the provincial government to establish an independent commission to determine their compensation. At first instance, the judge held that the current rate of remuneration fell below a minimum acceptable standard and that an independent commission was required

to protect the financial security of the deputy judges.

THE COURT held that the current Order-in-Council process for fixing the remuneration of deputy judges did not pass constitutional muster. An independent body was required, as deputy judges were entitled to an independent, objective, effective process for determining their judicial remuneration. The Court relied on the Canadian Supreme Court’s decision in *R v Valente* [1985] 2 S.C.R. 673, where that court asserted that financial security was an essential part of judicial independence and said that ‘the essence of [financial] security is that the right to salary and pension should be established by law and not be subject to arbitrary

interference by the executive in a manner that could affect judicial independence’.

In the instant case, individual independence was not the primary issue, given that most deputy judges sat on a part-time basis so that their judicial remuneration was not their primary source of income. The institutional dimension of judicial independence was, however, critical to the case. Fundamental to the separation of powers was the depoliticization of the relationship between the legislative and executive branches on the one hand and the judicial branch on the other. When the government failed completely to address judicial remuneration, the entire process was in danger of becoming highly politicized. Such a danger became manifest in this case when a group of Toronto deputy judges withdrew their services for a one month period in 2005. This withdrawal illustrated how the lack of an independent remuneration process could politicize the issue of financial security and why depoliticization of judicial remuneration was essential to the maintenance of the separation of powers. The existing Order-in-Council process provided no separation whatsoever

between the remuneration of deputy judges and the political process. Rather, the process was purely political; it was a government process, not one independent of government. Further, the process was not objective because the government had a direct political interest in the outcome. This lack of objectivity was evidenced by the government’s refusal to provide any rationale for the freeze in the deputy judges’ judicial remuneration, other than to say that the issue was one for the government alone to decide. Finally, the process could hardly be said to be effective when there had been no determination of whether the 24-year old *per diem* rate remained appropriate.

The Court allowed the appeal in part, however, so as to leave the details of the new process to be determined by the government subject to the *caveat* that the process chosen must meet the criteria of being independent, effective and objective. It also set aside as unnecessary the finding of the judge below that the current salaries of the deputy judges fell below a constitutionally acceptable minimum level.

FORGE v AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

HIGH COURT OF AUSTRALIA

Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ, 5 September 2006.

Acting judges – validity of their appointment

Legislation in New South Wales permits the appointment of Acting Judges in the Supreme Court for a period not exceeding 12 months. Litigation between the parties involving alleged breaches of the law relating to financial services was begun in that court and judgment was given by Foster AJ. When the case eventually reached the High Court of Australia, the appellants took the point that the appointment of Foster AJ was invalid. He had served until the age of 70 as a judge of the Federal Court of Australia and from then until age 75 served five successive terms as an Acting Judge in the NSW Supreme Court.

GLEESON CJ set out some agreed statistics. As at 31 December 2001, there were 45 permanent Judges (including Judges of Appeal

of the Supreme Court of New South Wales. During the preceding calendar year 20 persons (all of whom were retired Judges of either the Federal Court or the Supreme Court, or serving Judges of the District Court) had been appointed as acting Judges or Judges of Appeal for specified terms. Some of those terms were for a year; others were for shorter periods, typically three months. None of the persons appointed as acting Judges were practising barristers. He observed:

‘In a perfect world, an Executive Government would appoint exactly the number of permanent judges required to enable all courts to operate efficiently and effectively, all courts would have consistent and predictable caseloads, there would be no temporary shortages of

resources, there would be no need for delay reduction programmes, and the size of courts would expand to meet litigious demand. ... No such world exists.

The appointment of acting judges, supplementing permanent judicial resources, has been an aspect of the administration of justice in New South Wales, and in other parts of Australia, from the beginning. Until fairly recently, most acting judges were practising barristers who agreed to accept judicial appointment for a limited term. Sometimes, Judges of a lower court were appointed, temporarily, to a higher court. There are two main reasons advanced in opposition to appointments of the first kind. First, barristers who are appointed as acting judges are said to lack the necessary appearance of impartiality, especially if they are hoping for permanent appointment. Secondly, governments may be tempted to make acting appointments in order to avoid their responsibility to provide an adequately resourced, permanent, full-time judiciary. Depending on circumstances, there may be substance in such concerns.'

The Chief Justice referred to the Privy Council's decision in *Kearney v HM Advocate* 2006 SC (PC) 1 which held that the Scottish system of appointing practising advocates as temporary judges was consistent with the requirement of the European Convention on Human Rights for 'an independent and impartial tribunal established by law'.

The appellants argued that to comply with Chapter III of the Australian Constitution, State Supreme Courts must continue to answer the description of 'courts'. In Gleeson CJ's view, State legislation which empowers the Governor of a State to appoint acting judges to a State Supreme Court did not, on that account alone, deprive the body of the character of a court, or of the capacity to satisfy the minimum requirements of judicial independence. Minimum standards of judicial independence were not developed in a vacuum. They took account of considerations of history, and of the exigencies of government. Judicial independence and impartiality is secured by a combination of institutional arrangements and safeguards. Acting Judges of the Supreme Court of New South Wales were appointed by

the same authority as appoints permanent Judges; they took the same judicial oath; they might be removed only by the Governor on an address of both Houses of Parliament; and their remuneration was fixed by an independent tribunal. He quoted with approval a submission by the Attorney-General of Queensland that, ultimately, what stands between any judge and the temptation of executive preferment is personal character.

The challenge to the validity of the NSW legislation, and thus to the appointments of Foster AJ, failed.

In the course of a judgment reaching the same conclusion, GIMMOW, HAYNE AND CRENNAN JJ addressed the question of courts of summary jurisdiction

'History reveals that judicial independence and impartiality may be ensured by a number of different mechanisms, not all of which are seen, or need to be seen, to be applied to every kind of court. The development of different rules for courts of record from those applying to inferior courts in respect of judicial immunity and in respect of collateral attack upon judicial decisions shows this to be so. The independence and impartiality of inferior courts, particularly the courts of summary jurisdiction, was for many years sought to be achieved and enforced chiefly by the availability and application of the Supreme Court's supervisory and appellate jurisdictions and the application of the apprehension of bias principle in particular cases. But by contrast, the independence and impartiality of a State Supreme Court cannot be, or at least cannot so readily be, achieved or enforced in that way. Rather, the chief institutional mechanism for achieving those ends, in the case of the Supreme Courts, has been the application of Act of Settlement terms of appointment to the Court's judges coupled with rules like the rules about judicial immunity mentioned earlier in these reasons.

That different mechanisms for ensuring independence and impartiality are engaged in respect of inferior courts from those that are engaged in respect of State Supreme Courts is, no doubt, a product of history: not least the historical fact that

the inferior courts of England were often constituted by persons who were not lawyers or, if legally trained, held no permanent full-time appointment to office. But the differences that may be observed as a matter of history between, on the one hand, the inferior courts in Australia and their English forbears and, on the other, the colonial, and later State, Supreme Courts, do not deny the central importance of the characteristics of real and perceived independence and impartiality in defining what is a ‘court’ within the meaning of the relevant provisions of Chapter III.’

KIRBY J dissented. In his view, the number and type of acting appointments made in NSW were such as to amount to an impermissible attempt to alter the character of the Supreme

Court. What was intended as a statutory provision for occasional and exceptional additions to judicial numbers, in special circumstances, had become a means for an institutional arrangement that was incompatible with the role of the State courts, particularly the Supreme Court. It had made the courts beholden to the Executive for regular short-term reappointments of core numbers of the judiciary. This was offensive to basic constitutional principle. The time had come for the High Court to draw a line and to forbid the practice that has emerged in New South Wales, for it was inimical to true judicial independence and impartiality.

CALLINAN J agreed with the majority judgments, as did HEYDON J, who gave a detailed account of the history of the use of Acting Judges in Australia.

MCKENZIE v BRITISH COLUMBIA (MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL)

IN THE SUPREME COURT OF BRITISH COLUMBIA
McEwan J, 8 September 2006

Judicial independence – tribunals – unwritten Constitutional principle applicable to tribunal members when tribunal exercises functions equivalent to those of a court

The petitioner served as an arbitrator in the British Columbia Residential Tenancy Office. She had served for 11 years and had an unblemished record. A new Director acted to implement changes which would limit the number of cases the petitioner could handle, the effect of which would be to reduce her income by one-third. When she made representations against the changes, her appointment was terminated under the Public Sector Employers Act, some one year into a five-year term. No reasons were given for the decision nor for its subsequent confirmation after a flawed reconsideration process carried out without sight of the documents. Under pressure, the Ministry referred to the petitioner’s allegedly inappropriate objection to the new policies.

McEWAN J, in stating the facts, observed that it was manifest that the petitioner was terminated simply for having the temerity to stand

up for herself. The respondents had conceded that there was procedural unfairness and that the dismissal must be quashed on that ground. Having dealt with an issue as to the interpretation of the legislation under which the dismissal was effected, McEwan J addressed the underlying constitutional issue.

The petitioner submitted that there are unwritten constitutional imperatives which include the rule of law, and that judicial independence was integral to the rule of law; that because residential tenancy arbitrators fall at the ‘high end’ of the spectrum of administrative tribunals, their function within those principles required that they be independent; and that it followed that if the relevant legislation was interpreted to mean that members of such tribunals might be subject to arbitrary dismissal, it was unconstitutional as inimical to the unwritten constitutional principle of judicial independence, which was an essential incident of the rule of law.

McEwan J referred to Canadian authorities on judicial independence, *Reference re Remuneration of Judges of the Provincial*

Court of Prince Edward Island [1997] 3 S.C.R. 3; and *Ocean Port Hotel v. British Columbia (Liquor Control, General Manager)* (1999) 174 D.L.R. (4th) 498. In the latter, the Supreme Court of Canada held that, in the absence of constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. This was the basis for the respondents' argument in the present case that legislatures are only constrained by the rule of law (within the boundaries of the constitution) in the sense that they must clearly comply with legislated requirements as to manner and form. The petitioner referred to two later decisions, *Bell Canada v. Canadian Telephone Employees Assn.* [2003] 1 S.C.R. 884 and *Ell v. Alberta* [2003] 1 S.C.R. 857. *Bell Canada* concerned the Canadian Human Rights Tribunal which operated very much as a court. *Ell* dealt with some Alberta justices of the peace: the Supreme Court held that the principle of judicial independence applied to the position of justices of the peace. Justices were required to be independent because they exercised judicial functions related to the basis upon which the principle was founded.

McEwan J expressed the view that the correct analysis lay in taking a functional approach rather than in sifting and parsing the words of various judgments for some residue of authority for what was, in fact, a fairly straightforward proposition.

'This brings the discussion around to the sort of functions that may be performed interchangeably by courts or tribunals. As we have seen, it is certainly within the competence and discretion of legislatures to transfer some realms of decision

making from the courts to tribunals better adapted to address limited jurisdictions. It sometimes happens that such decision-making is moved back and forth. We have seen that in 1984 the return of the residential tenancy arbitrators' jurisdiction to the courts was contemplated. A recent example in British Columbia is the winding up of the Expropriation Compensation Board and the reversion of its jurisdiction to the Supreme Court.

The Respondents' position is quite simply that when government removes an area of adjudicative jurisdiction from the courts it is liberated to constitute the tribunal in any manner it sees fit. As we have seen, this means, in the case of residential tenancy arbitrators, that it considers its responsibility to the public discharged by the assignment of arbitrators who may be terminated at any time simply for getting on the nerves of Ministry functionaries. It should not be forgotten that these arbitrators are sometimes called upon to adjudicate as between the government and its own tenants....

A tribunal, constituted to try issues of law as between private citizens that is equipped with none of the indicia of independence required to ensure impartiality or to engender public confidence or respect, must necessarily run afoul of the unwritten principle of independence. The work of residential tenancy arbitrators is a judicial function that "relates to the basis on which [that] principle is founded.'

The dismissal and reconsideration decision were set aside, and declarations made as sought by the petitioner.

BOOK REVIEW

Corruption and Misuse of Public Office by Colin Nicholls QC, Tim Daniel, Martin Polaine, John Hatchard (Oxford University Press, 2006) £135.00

This book offers a functional guide to corruption law and its evolution in the UK and an analysis of international agreements and perspectives, stressing both the similarities between different domestic jurisdictions and also the international nature of modern corruption. As the authors comment, ‘whereas in the United Kingdom at least, corruption had been regarded as relating solely to what is commonly called bribery, it was regarded internationally as including other offences such as misuse of public office, embezzlement, and misappropriation of state assets’ (pp 4-5). The authors show that the word ‘corruption’ is derived from the Latin word *corruptus* meaning broken. Its derivation emphasizes the destructive effect of corruption on the fabric of society and the fact that its popular meaning encompasses all those situations where agents and public officers break the confidence entrusted to them.

Chapters 2 to 5 examine the development and current state of corruption laws in the UK from the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906 to the most recent amendments made in Part 12 of the Anti-Terrorism, Crime and Security Act of 2001, but they have some relevance in Commonwealth jurisdictions facing similar issues.

One of the largest tasks faced in the UK was the definition of ‘public office’, and the issue of where parliamentarians were to be treated. The special privileges of parliamentarians brought their own set of issues. Even though parliament is protected from the law in many instances, often to shelter it from undue outside influence, clearly parliament does not possess the ability to investigate allegations of corruption as thoroughly and efficiently as law enforcement bodies. The authors use the Nolan Committee and the Salmon report as examples of the evolution of corruption laws in regard to this issue, and how eventually, MPs and ministers were subjected to corruption laws like all other public officials.

Another interesting debate presented by the authors involves the presumption of guilt found in UK law in instances of bribery, and how this has been challenged and amended under international and regional pressures. Under the statutory offence of bribery in the UK, the presumption of the law is that the giving of some sort of undue advantage, influence, or gift is in fact a corrupt act, with the burden of proof that it was in fact innocently made resting on the defendant. This in many ways contravenes the European Convention on Human Rights Convention and the Law Commission has recommended its abolition. It is an example not only on the UK’s uniqueness in the area, but also of how international influence has challenged and changed UK corruption law, a major theme of the book.

Chapters 6 and 7 look at civil remedies against corruption, examining civil procedures for the procurement, recovery of losses suffered by victims of corruption, and the rules regarding who may be a claimant. Recovery mechanisms can be quite difficult to utilize, given that the illegally procured property is often outside of the jurisdiction within which the actual corruption took place, such as a Swiss bank account or a piece of property abroad. Nevertheless, Chapter 7 serves as an excellent basis for understanding how and when countries can and do offer mutual legal assistance, and more specifically, the procedures relating to the UK’s involvement in civil recoveries abroad.

Chapter 8, ‘The Regulation of Conduct in Public Life’, deals with the prevention of corruption and includes discussion of the conduct of the legislature, the executive, the civil service, local government bodies, and the judiciary. In the UK these norms are derived not only from the investigations and reports such as the Law Commission’s Report in the late 90s and the recommendations made by the Committee on Standards in Public Life, but also from international initiatives such as the Bangalore Principles of Judicial Conduct and the Limassol Conclusions. Those efforts also

have implications from a Commonwealth perspective, as many of the conventions parallel the fundamental values contained in the Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government.

The final three chapters offer explanation and analysis of the major international instruments in the fight against corruption. Starting with the UN Convention against Corruption, the book then narrows the focus down to regional efforts referencing European, African, and Inter-American efforts of eradication and prosecution. Chapter 10 has a detailed study of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. A specific example is the Lesotho Highlands Water Project, which suffered massive setbacks due to bribes being paid by construction companies to the project's committee in order to secure building contracts. The case offers insights into the jurisdictional debates that occur when multinational companies bribe abroad. The case involved the parties exchanging reward and

influence through international financial channels (Swiss bank accounts), bringing both the financial and technological elements of modern corruption to light. Finally, the case was tried in Lesotho, proving that the Third World was dedicated to the cause of fighting corruption in addition to being able to mount a successful prosecution.

Chapter 11 offers brief comparison of other national corruption laws, and chapter 12 looks at civil society's role in eradicating corruption, and the work of Transparency International and Social Accountability International.

For those dealing with corruption cases as lawyers or judicial officers in the Commonwealth, this book is an essential study of how corruption laws work in the UK and the relevance of international agreements and regulations. Where a lawyer or judicial officer may need to examine a case regarding an international agreement, more research would certainly be required, but the appendices have complete copies of the different agreements making it a valuable collection of documents.

Brett Levin, CMJA

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RIPA INTERNATIONAL

Adapting Global Training to the Local Context

Founded in 1922 RIPA International has its origins in the Royal Institute of Public Administration. RIPA International is a leading international training organisation offering a range of comprehensive public management training programmes. As our range of courses below demonstrates, we can offer significant Judicial and Legislative expertise, having provided training for Chief Registrars and Senior Judges throughout the Commonwealth. We also arrange tailored study tours to suit particular needs.

We offer the following Judicial/Legislative programmes:

Reforming Criminal Justice Systems

This programme aims to assist those engaged in criminal justice reform in their own countries by providing the most up-to-date information about 'what works' in the massive change programme now underway in England & Wales. This programme is aimed at senior personnel, for example those involved in criminal justice policy, court administration, prosecution, police, prisons, probation and the judiciary.

Case Management

The aim of this programme is to enable judges, magistrates, court administrators and other justice system professionals to design a case management regime that meets the needs of their own jurisdictions. It also seeks to equip participants with the skills needed to plan and implement changes aimed at reducing delay and enhancing public confidence in the justice system.

Judicial Records Management

This programme will explore the key principles of court records management and how they apply in the 21st Century through a combination of lectures, discussions, practical sessions and visits. You will have the opportunity to explore how the challenges of managing electronic records and achieving 'joined-up justice' are being addressed in the court system. You will also gain knowledge of successful strategies in a number of countries around the world to enhance court records systems and improve service delivery.

Legislative Drafting

This programme will put great emphasis on the individual development of your practical skills, and equip you with the means and knowledge required for drafting legislation. This programme will provide you with the opportunity to put into effect the techniques and know-how of legislative preparation that have been introduced in class seminars. Exercises will be followed by discussions and classroom critiques enabling you to learn directly from drafting mistakes made by yourself and others.

Translating Policy into Legislation

This programme aims to develop, in an interactive way, an understanding of the analytical skills required to convert policy into legislation and an appreciation of the way in which legislation needs to be drafted and structured. Participants will be encouraged to put learned skills into practice in a series of exercises.

We also offer courses covering Human Resource Development, Capacity Building, Sustainable Development, Effective Governance, Economic Management, Information Management & Systems and Media & Communication. For more information on these courses and to receive our 2006 brochure please contact us quoting reference AD/JUDR1.

