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## EDITORIAL

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Part of the burden carried by every judge and magistrate is the knowledge that the decisions made in the course of their daily work have a critical and sometimes irreversible effect on those who appear before them. That is as true in the family jurisdiction as it is in criminal trials: the decision that a parent is to be denied contact with his or her child may be more devastating than a criminal conviction. Increasingly the courts, both national and supra-national, address broad human rights questions and their rulings may affect the lives of many thousands of individuals. It has never been more important that justice should be seen to be done.

As this issue of the *Journal* was being prepared, news stories in the English press provided many relevant illustrations. The High Court had to decide (in *Dorset County Council v EH* ([2009] EWHC 784 (Fam)) on the relationship between a dementia patient's need for secure residential care and the provisions of the Human Rights Act on the deprivation of liberty. In *Re McE* ([2009] UKHL 15) the House of Lords held, with some reluctance, that recent UK legislation allowed the covert surveillance of communications between lawyers and their clients, even though these may be covered by legal professional privilege and notwithstanding the various statutory rights of people in custody to consult privately with their lawyers. Much media attention was given to the new right of the Press to attend family court hearings (though their reporting of those proceedings remains limited) and to the giving of evidence by a 4-year-old in a high-profile case of sexual abuse.

Readers will see for themselves the relevance to all that of many of the features in this issue. Sheriff Smart gives an account of the detailed provisions as to evidence by children in the courts of Scotland. That justice cannot be seen to be done if the judge is asleep provides the background to Nilay Patel's examination of

the approach recently taken by the High Court of Australia to this type of judicial failing.

We print the talk by Helena Kennedy, a distinguished human rights lawyer and a member of the House of Lords, women, HIV/AIDS and human rights. Only a few days before this issue went to press, a well-known Commonwealth lawyer speaking at the launch of an HIV/TB workplace project in Accra, called on private and public employers to create policies that would provide comprehensive care to employees living with HIV, as well as their families. She called on both private and public organisations to raise awareness about these diseases and address the stigma surrounding those living with HIV/AIDS. The speech was by Betty Mould-Iddrisu, who has given great service to the Commonwealth in her years as Director of the Legal and Constitutional Affairs Division of the Commonwealth Secretariat and who returned to her homeland early in 2009 to take up her new office as Ghana's Minister of Justice and Attorney General. She has been a good friend of the CMJA, and we wish her well in her new role.

Human rights dominate much of this issue. Karen Brewer gives an assessment of the current situation in Hong Kong, a territory in which she has long been interested and in which many of the principles of the common law, and indeed of the Commonwealth, survive the transfer of sovereignty twelve years ago. Mary Arden writes on terrorism and human rights, Abdulkadir Noormohamed gives a disturbing account of the difficulties faced by the Kenyan Human Rights Tribunal, and in our law reports section we print an edited version of the judgments in the SADC Tribunal on the expropriation of land in Zimbabwe.

Some solid reading. Ideal for the flight to the CMJA conference in the Turks and Caicos Islands!

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

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

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## THE CHILD WITNESS

*Sheriff Marie Smart, Sheriff Court of Hamilton, Scotland. A paper from the Commonwealth Law Conference, Hong Kong, reproduced with the kind permission of the Commonwealth Lawyer's Association.*

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This subject has been the cause of much debate and legislative change for a number of years in various jurisdictions. This is in recognition of the duty to ensure that any child who is to appear as a witness in court proceedings is provided with an environment and facilities which cause as little damage to the child as possible and assists the child to give meaningful testimony. While a child may be called upon to give evidence in a variety of court proceedings, it is in the criminal courts that a child most frequently appears as a witness. In this paper I examine the procedure for the taking of evidence of a child in criminal cases in the Scottish courts.

While Scotland is part of the United Kingdom it has a separate legal system from the rest of the United Kingdom, and although directly governed by the Parliament of the United Kingdom at Westminster for almost 300 years has retained that legal system. Change was introduced by virtue of the Scotland Act 1998 which resulted in Westminster devolving some of its responsibilities, including justice, to a newly elected Scottish Parliament. The new Scottish Parliament has, in the first 10 years of its existence, legislated on a number of important matters including, in an attempt to improve the position of children who have to give evidence in court proceedings, the passing of the Vulnerable Witnesses (Scotland) Act 2004. This Act is one solely concerned with making provision for the purpose of taking the evidence of children and other vulnerable witnesses in criminal or civil proceedings. While the Act includes a number of measures aimed to assist a child in giving evidence that have been in force for some years, it introduces a number of provisions that are new and likely to have wide-ranging effect.

### Some history

The provisions introduced by the Vulnerable Witnesses (Scotland) Act 2004 cannot be considered without an understanding of the history of the approach to the taking of

evidence from a child in criminal proceedings in Scotland. It is only in the last 20 years or so that the procedure for taking evidence from a child was thought to be worthy of further examination in an attempt to ascertain if it could be improved upon. Until then a child was in practice treated, in all but one respect, no differently from an adult witness.

The child, as with any other witness, was brought into the court to give oral testimony. Since pre-trial court visits had not been thought of this would probably be the child's first sight of the court. The judge and counsel would be wigged and gowned. In a jury trial in Scotland there would be 15 unfamiliar faces in the jury box watching the child. The court would be open to members of the public. Undoubtedly the most intimidating aspect of the whole procedure was the child's proximity to the accused who often sat only feet away from the child. No allowance was made for the nature of the evidence the child had to give, for example if it was of a sexual nature, or that at some stage in the course of evidence the child would be asked to identify the accused in court. It is hardly surprising that against that background many children found the experience overwhelming and often were unable to give evidence of any value to assist in determining the issue.

Where a child was treated differently from an adult witness was in the requirement that every child had to pass a test of competence before any evidence could be taken. The presiding judge had to be satisfied that the child knew the difference between truth and lies and was able to understand the duty to speak the truth. This was decided after a preliminary examination of the child in open court. Since no age limit exists in Scotland for the admission of a child's evidence, the test could be applied to a child of any age with evidence from a child of three and a half years of age being admitted. Only after the judge was satisfied as to the child's competence would the child be admonished to tell the truth if under the age of twelve,

or in the case of an older child take the oath if the judge was satisfied the child understood the nature of the oath. If the child failed the competence test the court could not hear any evidence at all from the child.

There were growing concerns about the damage caused to children called to give evidence in criminal proceedings, particularly in cases where the child was a victim of sexual abuse, and the distress and fear caused to the child by the experience of giving evidence. The result was a request to the Scottish Law Commission to examine the way in which children were required to give evidence in criminal proceedings and to make recommendations for reform. In 1990 the Commission published its report, *The Evidence of Children and Other Potentially Vulnerable Witnesses* (Scot.LawCom. No. 125) and following its recommendations the senior Scottish judge, the Lord Justice General (Hope), issued a Memorandum on Child Witnesses to the judiciary that same year.

### **The Hope memorandum**

Although many members of the judiciary had adopted informal measures in courts throughout Scotland to make the court a less intimidating environment for a child witness, the Memorandum was the first formal recognition that a child witness merited special attention. The Memorandum set out a number of measures to be taken at the discretion of the presiding judge to ensure that so far as reasonably practicable the experience of giving evidence by all children under the age of 16 caused as little anxiety and distress to the child as possible in the circumstances.

The measures included:

- the removal of wigs and gowns by the judge, counsel and solicitors;
- placing the child at a table in the well of the court along with the judge, counsel and solicitors rather than the child giving evidence from the witness box;
- allowing a relative or another supporting person to sit beside the child while he or she gave evidence; and
- clearing the court of all persons not having a direct involvement in the proceedings.

In deciding whether or not to apply any of the measures the presiding judge had to have

regard to the age and maturity of the child, the nature of the charge and of the evidence which the child was likely to be called upon to give (with particular care being taken to protect the child from trauma in cases involving a sexual element), and the relationship, if any, between the child and the accused. The judge also had to consider whether the trial was to take place before a jury or a judge sitting alone, any information the court was given concerning the temperament, health or development of the child and, whether it would be practicable to depart from normal procedure. The size and layout of the court and the availability of microphone equipment to allow the child to be heard more easily were also to be considered.

The aim was to reduce formality and put the child at ease while giving evidence, and to be aware that when a child was to give evidence in the presence of an accused charged with allegations involving a sexual element that could be damaging to the child. If the person the child was to give evidence against was a close relative, it was recognised that that might expose the child to embarrassment or fear and that the positioning of the child and the support person should be given particular importance. At all times efforts had to be made to minimise anxiety or distress to the child while recognising that the child had to remain visible and audible to all those who had to hear and assess the evidence, including the jury and the accused. An opportunity was to be given to the Crown and the representative of the accused to address the judge on what special arrangements, if any, were appropriate.

Consideration was to be given to clearing the court when a child was giving evidence which involved conduct contrary to decency and morality. In other cases clearing the court could only be done if the judge was satisfied that it was necessary in order to avoid undue anxiety or distress to the child. The guidance stressed that before any of these measures should be taken the presiding judge had to consider the general duty of the court to ensure that the accused received a fair trial and was given a proper opportunity to present his defence.

### **The 1990 and 1993 legislation**

The Memorandum was followed in 1990 by legislation (Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s.56)

specifically intended to provide further support to a child witness by permitting the child to give evidence through a live television link in criminal proceedings. An application had to be made to the court to authorise the television link. If, in the sheriff court, there was a lack of accommodation and of equipment to provide a live television link in that court the sheriff could order the transfer of the case to another sheriff court within the sheriffdom which had such accommodation and equipment. The requirement that a child identify the accused in court was removed in cases where the child was the subject of a TV link. If the child gave evidence that prior to the trial he had identified to a third party a person who was alleged to have committed the offence the evidence of that third party as to the identification by the child was admissible as evidence of such identification.

Further reforms were introduced in 1994, in the implementation of provisions in the Prisoners and Criminal Proceedings (Scotland) Act 1993, placing on a statutory basis the former common law power exercised by the court to allow the child to be screened from the accused. A provision was also introduced to allow a child to give evidence on commission with the evidence being presented in video recorded format to the court. If the commissioner had held it was inappropriate for the accused to be present in the room where the child was giving evidence the commissioner had to ensure, as with the live TV link or a screen, that the accused was able to both see and hear the child witness give evidence.

However, all these special measures designed to assist the child, could only be granted 'on cause shown', having regard to the possible effect on the child if required to give evidence if no such application was granted and whether it was likely the child would be better able to give evidence if the application was granted. In considering whether or not to grant the application, the court could take into account the age and maturity of the child; the nature of the alleged offence; the nature of the evidence which the child was likely to have to give; and the relationship, if any, between the child and the accused. The application therefore had to be supported by material that would allow the court to find cause.

In *HM Advocate v Birkett*, 1992 SCCR 850, an application made for a live television link to

take the evidence of a child aged three, where the accused was charged with attempted murder of the child, was granted: the child was described in the application as being 'frightened' of the accused. However, the application was refused in respect of the child's siblings aged six and eight and two other children aged four and six who were described in the application as being 'quiet and hesitant'. Due to the requirement to show cause for the granting of a special measure, the Crown increasingly included in such applications a report from a child psychologist as to the effect giving evidence in a court room was likely to have on the child in an effort to lend further support to the application.

### **The Vulnerable Witnesses (Scotland) Act 2004**

While the provisions that were introduced throughout the 1990s assisted child witnesses, those changes were incorporated in statutes dealing with criminal procedure and amendments to the existing law. It was only with the passing of the Vulnerable Witnesses (Scotland) Act 2004 that the first statute was introduced in Scotland dedicated to dealing with how children and other vulnerable witnesses were to give their evidence in civil and criminal proceedings. The aim of the Act was to increase support for children who were called as witnesses and help them to participate more fully in court proceedings, and to introduce new special measures designed to help a child witness give his best evidence.

The most significant reform introduced by the 2004 Act was the abolition of the competence test. From 1 April 2005 no court in Scotland is entitled to examine a child at any time before the child gives evidence to ascertain if the child understands the difference between truth and lies or understands the nature of the duty to give truthful evidence. Every child is now admitted to give evidence and admonished to tell the truth without preliminary investigation.

Equally important is the provision that all child witnesses are now entitled to give their evidence with the help of at least one special measure. The party calling the witness to give evidence is obliged to submit a child witness notice to the court, and intimate it to other parties before the trial, setting out which special measure if any the party considers to be

the most appropriate. The views of the child and parents of the child have to be taken into account, if expressed, and included in the notice. If the notice calls for a standard special measure, defined as either a live television link or a screen, with or without a supporter in conjunction with either of these two measures, the court must make an order authorising the use of that measure for the child witness. If a child witness notice is not lodged the court has the power to order that such a notice is lodged or arrange that a hearing be held before the trial.

The court has the power to order that a child witness gives evidence without the benefit of any special measure. That can only be done if the child has expressed a wish to give evidence without any special measure and the court considers that appropriate or, the use of a special measure would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice and that risk significantly outweighs any risk of prejudice to the interest of the child.

The removal of the previous requirement that cause must be shown before a special measure could be granted means that a child witness is now automatically entitled to the provision of one or more special measures. The court no longer has to have regard to the possible effect on the child if required to give evidence in the absence of special measures and whether it is likely the child would be better able to give evidence with special measures.

The Act also introduces extra protection for a child witness under the age of 12 who is to give evidence in a trial where the accused is charged with certain offences. In such cases the Act provides that the child is not to be present in the court room or any part of the court building to give evidence but is to give evidence from a remote location. This applies where the offence is one of murder, culpable homicide, a wide range of sexual offences, any offence involving an assault or an injury to any person including any offence involving neglect, cruelty or ill treatment of a child, abduction, and *plagium* (kidnapping). In these cases the evidence of the child will be taken by a live television link from a remote location or by evidence on commission.

There are two exceptions to the general rule that a child under 12 is not to be present in the

court room or any part of the court building to give evidence. One is where the child expresses a wish to be present and the court considers it is appropriate; the other, if taking evidence without the child being present would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice, and that risk significantly outweighs any risk of prejudice to the interests of the child. In addition the Act prohibits an accused from conducting his own defence in a wide range of cases where a child under the age of 12 is to be a witness and also from personally taking a precognition from such a child.

While the court is obliged to make an order authorising the use of a standard special measure where a child witness notice seeks a 'non standard' special measure the court will, if it is satisfied on the basis of the notice it is appropriate to do so, make an order authorising the use of that special measure. The 'non standard' special measures are the taking of evidence by a commissioner, the use of a supporter, and evidence in chief in the form of a prior statement.

Where evidence on commission is authorised by the court as a special measure, the evidence of the child will be taken in advance of the trial. The evidence will be video recorded and received in evidence at the trial without being sworn to. The accused is not entitled to be present in the same room where the child is to give evidence except by leave of the court on special cause shown and since the accused is entitled to watch and hear the evidence a live TV link is likely to be necessary to allow him to do so. Although evidence on commission has been available in Scotland since 1994 in criminal trials, it has to my knowledge never been used. Whether that will change under the new Act remains to be seen.

The special measure that permits a supporter to be present in court with the child for the purpose of providing support during the child's evidence is now put on a statutory footing and can be applied for as a measure on its own provided the parties citing the witness can satisfy the court that the use of a supporter is the most appropriate measure to assist the witness.

The Act also introduces a new special measure that allows a child witness to give evidence in chief in the form of a prior statement. The

statement must be contained in a document in writing, for example in a police statement, or recorded in some other way such as a tape or video recording and will be admissible as the child's evidence without the child being required to adopt or otherwise speak to the statement. However, the child witness would still be required to be cross-examined on the statement if the statement was not agreed, and it is questionable what use will be made of this provision when the practical effect is that the child's first exposure to being a witness would be to face cross examination in court on the content of the prior statement.

There can be no question that the 2004 Act has made significant changes to the procedure for the taking of evidence from children in criminal proceedings. Every child cited to give evidence is now entitled to be heard and to be provided, as a right, with the means to give evidence in the least harmful way to the child. While there can be no room for complacency the practice and procedure that now applies to the taking of evidence from a child has improved considerably from earlier practices and that can only be in the best interests of the child and justice.

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## LETHARGY ON THE BENCH

*Nilay B. Patel, Adjunct-in-Law, Swinburne University of Technology. Legal Practitioner, Supreme Court of Victoria; Barrister and Solicitor of the High Courts of New Zealand and Australia*

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It has been true almost everywhere, and for centuries. Plato, in *The Republic*, said that citizens should arrange their lives so that they do not have to come before ‘a judge dozing on the bench’. Yet so many have become casualties of this judicial lapse in many jurisdictions. The latest in a stream of such cases to provide guidance are *Cesan v The Queen* and *Mas Rivadavia v The Queen* ([2008] HCA 52), twin appeals heard together by the High Court of Australia and referred to herein as *Cesan*.

On 28 June 2004, Rafael Cesan and Ruben Mas Rivadavia (‘the Appellants’) were convicted of conspiracy to import narcotic goods into Australia after a 17-day trial by jury in the New South Wales District Court. Before sentencing, Cesan wrote to the trial judge, Dodd DCJ, stating, in part, that ‘I would like to take this opportunity to thank you for what was a very fair trial, one wherein I accept the decision made by my peers and I am today at your mercy, asking for some leniency in my sentencing.’ On 18 March 2005, they were sentenced to 13 years and 6 months and 11 years imprisonment respectively.

The Appellants appealed to the Court of Criminal Appeal of the Supreme Court of New South Wales against their convictions and sentences.

### **In the Court of Criminal Appeal**

The Appellants appealed against their convictions on the grounds that the trial judge ‘was asleep for significant parts of the trial’ and as a result, ‘a miscarriage of justice was occasioned’. It was not in contention, and the medical evidence showed, that at the time of the trial, Dodd DCJ was suffering from severe obstructive sleep apnoea.

Eight affidavits (on which Rivadavia also largely relied) were put before the court deposed by Cesan and his relatives and friends, who were present during the trial and witnessed the extent of the episodes under appeal. For example, Cesan deposed that

Dodd DCJ:

*would slump in his chair and his head would fall forward and it would stay down for some time. He would then suddenly lift his head and appear to wake up before nodding off again. This happened several times for up to five or more minutes at a time.*

And Cesan deposed that while he was giving evidence during the second week of the trial,

*On many occasions, I would look over to the judge and I would notice that he again appeared to be asleep. ... [It] seemed to be for quite long periods of ten, fifteen or even twenty minutes.*

and that:

*I heard a deep rumbling noise... and... realised that it was snoring...It became louder and other people appeared to notice I found it very disruptive and it made it hard to concentrate on the questions...At one point, when the snoring was at its loudest, the prosecutor appeared to stop asking questions.*

Another deponent observed that:

*After Judge Dodd sat down he would cross his arms, he would sit upright in the chair, he would begin to slouch a little bit, his eyes would become closed and he would tilt his head slightly forward and the left side. Sometimes Judge Dodd would jerk awake and his eyes would open suddenly and then he would slowly close them and his head would tilt to the side again. ...*

*I remember he would doze off many times, at least four or five times each morning or afternoon session, during which he would seem to be asleep for at least five minutes, then wake up, adjust himself by sitting up or move in his chair and open his eyes and then he would seem to doze off again.*

This ground of appeal was however dismissed by a majority (Grove and Howie JJ, with Basten JA dissenting).

The dissenting judge, Justice Basten, accepted that Dodd DCJ ‘did not merely appear to sleep, but was in fact asleep’. His Honour accepted that Dodd DCJ slept for various periods of time on various occasions during the trial. He relied on section 80 of the Commonwealth of Australia Constitution (trial by jury) and concluded that any absence or period of sleep that was more than momentary or insignificant would contravene the Constitution and, *ipso facto*, a substantial miscarriage of justice would occur and did so in *Cesan*.

The majority took an approach similar to that of the English Court of Appeal in *R v Betson* ([2004] EWCA Crim 254). That court said:

*‘Because the appearance as well as the actuality of justice being done is important, no judge ought, in any circumstances, to fall asleep during any stage of a criminal trial. It is highly regrettable that this judge did so. But because a judge falls asleep or, for any other reason, allows his or her attention to wander, it does not necessarily follow that the trial is unfair, or that any ensuing conviction is unsafe. It is the effect, not the fact, of such inattention which is crucial. This must, in each case, depend on all the circumstances, including the period of inattention, both absolute and as a proportion of the length of the whole trial; the stage of the trial at which the inattention occurs; and, of primary importance, the impact of that inattention, if any, on the course and conduct of the trial. ...*

*In the present case, the judge, as he frankly and properly admits, was, for a time, asleep during the speeches of counsel for [the defendants]. We are prepared to accept that he was also asleep on a few other occasions, sometimes to the extent that he woke himself by the sound of his snoring. It is however of some significance that, at the trial, no defendant, no counsel in the case (of whom there were a total of 13), and no juror, was sufficiently concerned to raise the matter with the judge, other counsel, or the court usher. It is of greater significance that, before this*

*Court, it has not been shown that, because he slept, the judge missed and failed to sum up to the jury any significant feature of the evidence or speeches.’*

In *Cesan* therefore, the majority were critical of *Cesan*’s affidavit deposing that he was disrupted in his testimony: *Cesan* ‘did not attempt to identify any error which he made in his evidence...nor to identify anything different from what he did say that he would wish to have said, nor anything that he had omitted to say during his evidence.’ The majority took a judge’s physical presence as the legal touchstone and not intermittent inattentiveness. ‘It is not the conduct of the judge...but the *effect* of any conduct which might be shown to have deprived the trial of the quality of fairness.’ Thus, the majority adopted an effects-based approach. The majority also found it significant that, as in *R v Betson*, counsel remained mute about the situation.

The majority did not regard *Cesan*’s presentencing letter as insignificant: it plainly acknowledges his guilt and to quash his conviction after what he had described as a ‘very fair trial’ would seem paradoxical. In contrast, however, Basten JA ruled that the letter was of very little relevance because Dodd DCJ’s conduct had to be assessed objectively; a letter based on ‘unrevealed understandings of the relevant law, is either inadmissible or worthless’.

The Appellants sought and were granted special leave to appeal to the High Court.

### **In the High Court of Australia**

Four grounds of appeal were submitted to the High Court of which two were based, not unexpectedly, on the Constitution. A third ground was based on the District Court Act 1973 (NSW) s 11 which, in brief, states that proceedings shall be heard and disposed of before a judge. But the High Court fast-tracked the Appellants’ submissions to focus on the Criminal Appeal Act 1912 (NSW), s 6(1) which was dispositive of the appeals. It reads:

*The court on any appeal ... against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the*

*judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*

In short, if there is a miscarriage of justice, the appeal must be allowed. But the court has a residual discretion in dismissing the appeal if the miscarriage is not substantial.

The leading and longest judgment was rendered by the new Chief Justice, Robert French. Justices Hayne, Crennan and Kiefel, with whom Gummow and Heydon JJ joined, delivered a joint judgment.

That justice has to be seen to be done formed the backdrop of French's CJ decision; the effect of sleep episodes was not simply a matter of effect:

*The appearance of a court not attending to the evidence and arguments of the parties and control of the conduct of the proceedings is an appearance which would ordinarily suggest to a fair and reasonable observer that the judicial process is not being followed. That is not to say that every minor distraction, inattention, sign of fatigue or even momentary sleepiness constitutes a failure of the judicial function. The courts are human institutions operated by human beings and there must be a margin of appreciation for human limitations. Otherwise the judicial system would be rendered unworkable by the imposition of unachievable standards. Nevertheless, it would be an unnecessarily narrow view of the judicial duty to say that appeal courts are to judge such lapses solely by reference to their effects upon the outcome of the case. ...*

*If, by reason of sleep episodes...the reality or the appearance exists that a trial judge has substantially failed to discharge his or her duty of supervision and control of the trial process in a trial by jury, then enough has been made out to establish a miscarriage of justice.*

Accepting Basten's JA version of the facts, he concluded that:

*In this case there was a miscarriage of justice by failure of the judicial process. It was constituted by the judge's substantial failure to maintain the necessary supervision and control of the trial. Further, his conduct created a distraction during the trial process. In particular it distracted the jury and led at least some of the members of the jury to regard the judge with amusement.*

It was on these facts that the conviction could not be upheld by the proviso in the Criminal Appeal Act s 6(1).

As to counsel's failure to raise an objection during trial, French CJ ruled that, on the evidence, the failure appeared not to have been 'based upon any assessment that the judge's conduct did not matter' but that 'it had been based on the defeatist proposition that nothing could be done' despite Cesan raising the issue with his counsel.

The remaining five Justices arrived at the same result. They identified the repeated distraction of the jury from attending to the evidence as constituting *the* miscarriage of justice. As Hayne, Crennan and Kiefel JJ put it:

*What is important, in these cases, is that the jury was distracted from paying attention to all of the evidence. And it was upon the assessment of all of the evidence led at trial that the jury's verdict had to be founded. The repeated distraction of the jury from attending to the evidence at various stages of the trial, including when one of the accused was giving his evidence, constituted a miscarriage of justice.*

Their Honours recognised that because this was the miscarriage, it was not possible to conclude, on the written record of the trial, that the evidence proved the Appellants guilty beyond reasonable doubt as was required if the proviso were to be applied.

## Commentary

Although numbers of cases where judges were found to have slept during trials and which were subsequently subject of an appeal or complaint are legion and continue on an upward trajectory, there has been little legal academic attention to this growing

phenomenon. There has been great media coverage of these cases, however. Perhaps no other case has received such media attention as *Cesan*. It has been swift, sustained, critical and international. Perhaps the sole scholarly article on sleepy judges has been from two medical practitioners (R Grunstein & D Banerjee, “The Case of ‘Judge Nodd’ and other Sleeping Judges – Media, Society, and Judicial Sleepiness” (2007) 30(5) *Sleep*, 625.) Of the critical media coverage of Dodd DCJ, Grunstein and Banerjee were critical: ‘the media may not see such potential mitigating factors [such as reversibility of the medical condition and Dodd’s DCJ personal unawareness of his condition] and instead pursue the “blame game” taking a punitive approach toward the judge’. They forget that the bench has no immunity when vices abound and criticism cannot be silenced if good behaviour and ethics are jettisoned.

### Raising an Objection

The High Court’s decision in *Cesan* is significant. Much of international case-law has attached a high degree of significance to the aggrieved party, typically the defendant, bringing to the trial judge’s attention episodes of judicial sleepiness. The majority in the NSW Court of Criminal Appeals stated that they ‘did not accept that three counsel would press on, remaining mute about the situation, if something of genuine significance was occurring without then, or even at a later time, drawing his Honour’s attention to what he had apparently missed.’ In contrast, French CJ ascribed no importance to it. The remaining five Justices did regard counsel’s silence as important but it was not ultimately fatal given the sustained period of the sleep.

Counsel must decide whether or not to raise an objection. *Cesan* is not authority for the proposition that counsel need not object at all but can save their objection for appeal. If counsel decides not to object, will he or she be precluded from raising it on appeal? Initially at least, counsel will not know how many periods of sleepiness will occur as the trial proceeds.

If counsel does raise the matter with the trial judge, what is the request to be made? Abandon the trial? If there is a retrial, further costs, re-appearance of witnesses and delays will be incurred. Elect to continue? Should the evidence be given again to the woken judge? What if the judge continues to fall asleep, as

did Dodd DCJ? Does the initial election to continue affect subsequent episodes of sleep? A recent case, *Fordyce v Hammersmith & Fulham Conservative Association*, although in an employment law context, ruled, quite correctly, that it does not.

A number of appellate courts in other jurisdictions appear to require counsel to raise an objection during trial, otherwise an appeal will be dismissed. The appellants in the Canadian case of *Leader Media Productions Ltd* (Ontario CA, 2008) introduced five affidavits showing that the trial judge was unable to follow evidence because he fell asleep repeatedly during the trial. They had made a deliberate tactical decision not to raise the issue during trial. The appeal was dismissed.

There may be various reasons for counsel not raising an objection at trial and those reasons do not appear to be weighed closely by appellate courts. Upon *Cesan* informing his barrister of Dodd’s DCJ somnolence, counsel replied, ‘there is nothing we can do about it’. *Cesan*’s solicitor was reported by his client to have told him that ‘You don’t want to be upsetting the trial judge’. There may even be fears, in some jurisdictions, of an adverse effect on counsel’s career, and some published articles on judicial sleepiness have appeared anonymously.

But whatever the reasons, meritorious or otherwise, for counsel not raising the matter, are appellate courts, in dismissing appeals on that basis alone, not taking further punitive measures against defendants/appellants who may have already suffered a miscarriage of justice? The issue strikes deeper, however, into first principles: the duty of the judge to stay awake and the duty of the State in providing fully conscious judges or to be accountable when failing to supervise them. The body of case law internationally fails to focus on these perpetrators-in-chief but rather victimises non-culpable parties after the fact. The role of defence counsel is not to act as the judge’s personal alarm clock but to represent his or her client zealously and without the distractions of judicial malperformance. That appeal courts resist taking account of such malperformance only aggravates the malady.

While the result in *Cesan* has much to commend it, the High Court should have unanimously forestalled any continuing uncertainty and incoherence in the common law of judicial

lethargy by adopting an authoritative statement that failure to raise, tactically or inadvertently, an objection during trial will not preclude an appeal succeeding in cases where episodes of sleep were of a sustained nature rather than a one-time momentary lapse.

### Is the Judge Really Asleep?

Notwithstanding the ease to which the Appellant in *Cesan* established Dodd's DCJ sleep patterns, appellants must cross the evidentiary hurdle in proving the judge was, in fact, asleep.

At times, the allegation will be denied by the judge. In *Stansbury*, a lay member on the Employment Tribunal said: 'I have never fallen asleep during a hearing although I may on occasion close my eyes to concentrate.' Accordingly, the Court of Appeal could not rule definitively on that allegation but, given that the member also consumed alcohol, Gibson LJ considered that fact to lend plausibility to the allegation and therefore held there was no appearance of a fair hearing.

In *Kudrath* (UK Employment Appeal Tribunal, 1999) the Chairman of the Employment Tribunal had periodically closed his eyes and so was asleep or gave that appearance. In the tonic words of the Appeal Tribunal, 'it is the duty of the tribunal to be alert during the whole of the hearing, and appear to be so'.

Not all appellants have been successful in proving the judge's somnolence, however. In *Lampitok v State of Indiana* (Indiana CA, 2004), defence counsel had to question the seemingly sleeping trial judge: 'Am I boring you today, Your Honor?' to which the judge responded: 'No just resting my glaucoma eyes.' The Court of Appeals held, *inter alia*, that there was no direct evidence that the judge was, in fact, asleep.

The case of Judge Patricia Coffey of the Rockingham County Superior Court in New Hampshire, USA, offers a closer parallel to *Cesan*. The judge was alleged to have fallen asleep on multiple occasions during a criminal trial by jury. As with the defence counsel in *Cesan*, the public defender advised that it was 'neither a cause for alarm nor an uncommon occurrence'. Some members of the jury, again like *Cesan*, also witnessed the lethargic episodes. The judge claimed that she had merely closed her eyes. Although the Judicial

Conduct Committee found no credible evidence that the judge was ever asleep, 'there is an appearance of impropriety that, in order to maintain the integrity of the judicial system, that must be addressed'. Sanctions were limited to medical monitoring.

Judge Hutton of the Gloucester Crown Court proactively embraced the principle of procedural fairness when he abandoned a criminal trial on an allegation that he had fallen asleep, saying: 'If in fact I gave the impression of not listening...it would be unfair to the defendant to allow the case to go on'.

The lesson one learns from these cases and, particularly, from *Cesan*, is that appellants must produce as many affidavits as possible from as many deponents as there were witnesses deposing to the physical and audio-logical distractions of the trial judge.

The consequence of insufficient evidence is not limited to dismissals of appeals. Popplewell J, in an English case, sued for libel over a Reading newspaper report that he was asleep during a trial when, in fact, he was not and he was awarded £7,500 in compensation by an arbitrator. However, this is rare and perhaps the only known case.

### The Medical Dimension

What is obscure in cases of judicial sleepiness is its medical diagnoses. They are not regularly made known through appellate judgments either because no diagnoses have been rendered or they are not affective of the appeal. *Cesan* offers a rare insight of the medical dimension. The High Court accepted medical evidence showing that the Dodd DCJ was suffering from severe obstructive sleep apnoea, the most common of all sleep apnoea. Obstructive sleep apnoea most often means that the airway has collapsed or is blocked during sleep. People with sleep apnoea stop breathing repeatedly during their sleep, sometimes hundreds of times during the night and often for a minute or longer and this may be responsible for job impairment and motor vehicle crashes.

According to the American Sleep Apnea Association, sleep apnoea occurs more often in people who are males, overweight, and over the age of forty. Appellate decisions of, or official complaints against, lethargic judges do not record these tripartite parameters of the

judges in question. It is, however, open to public observation that the majority of judges would satisfy at least the gender and age parameters. This observation will continue to be of increasing ripeness as the retirement age of judges rises, as is the global trend.

The Dodd diagnosis must not be assumed to apply to all sleeping judges; there are others. Narcolepsy, for example, is a chronic neurological disorder caused by the brain's inability to regulate sleep-wake cycles normally. Unlike sleep apnoea, there is no cure for narcolepsy.

### **Conclusion**

The law reports on judicial sleepiness have an inconsistent pattern. In some cases, as in *Cesan*, appearances of justice were the lodestar. In other cases, appellate courts have taken a pedantically legalistic approach. In the

majority of cases, the trial judges have not themselves been called to account. They have invariably resigned or retired from their judgeship and have therefore, put themselves out of reach, as with Dodd DCJ. But these resignations in most cases have not been swift but many years removed from the miscarriage of justice they occasioned. In other cases, resignations have resulted from sustained external pressure to resign. That it is largely a medical condition and not a crime of intent is appreciated. Simultaneously however, the judicial branch is the final arbiter of right and wrong, of freedom and restriction, of liberty and imprisonment. These judges must have a personal sense of responsibility and accountability. If there is no voluntary resignation, removal is justified.

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# HONG KONG – 12 YEARS AFTER THE HANDOVER

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*Dr Karen Brewer, Secretary-General CMJA*

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I was privileged to represent the CMJA at the recent Commonwealth Law Conference (CLC), organised by the Commonwealth Lawyers Association (CLA) and hosted by the Hong Kong Law Society, held in Hong Kong from 5 to 9 April 2009. It was a momentous time in more senses than one as the CLA was born at the last CLC Conference held in Hong Kong in 1983. It was also the first time the CLC had been held in a non-Commonwealth country, China having re-established its sovereignty over the territory in 1997. As I wrote my doctoral thesis for the Université de Paris 1- Panthéon-Sorbonne in 1993 on the ‘Reunification of China and its consequences on the future of Hong Kong and Macao’, it was a very personal journey for me, my first visit in nearly 13 years, and my first since the handover to China on 30 June 1997. I still remember the Handover ceremony. I had been invited by Clifford Chance to their Handover Party in Docklands, the next best thing to being there in person and it was both an emotional and inspiring experience.

Today you can not help but notice the vast development coming in from the airport, an airport that did not exist 13 years ago. It was a bit disappointing not to have the terrifying but exhilarating experience of flying onto a sea-level airstrip at Kai Tak or staring into people’s kitchens as you flew past their windows, but it was impressive coming across the bridge that now links Lantau to the mainland. Although one can only regret the detrimental environmental impact that has no doubt affected the flora and fauna of a relatively untouched tropical island.

The continued economic development of Hong Kong was striking. It seemed that the economic downturn has not yet reached Hong Kong. Buildings had risen up and were continuing to rise up from the ashes of the Asian economic slump in the early part of this century.

This had been facilitated by the maintenance of the pre-1997 liberal attitude to trade and commerce but also ‘buttressed upon Hong Kong’s firm foundation of the rule of law and a most reliable, competent and independent

judiciary’ (Mr Wong Yan Lung SC in his speech on 6 April 2009 at the CLC).

Judicial independence is guaranteed by the Basic Law, the constitutional document governing the Hong Kong Special Administrative Region since 1997. The Basic Law and the Joint Declaration before it, preserves the legal system in Hong Kong for 50 years under the ‘one country, two systems’ concept of government, created particularly for Hong Kong but which formed the basis of the system in Macao and which is still meant to be a model should Taiwan ever rejoin the Mainland.

In order to understand the current governance of Hong Kong, it is important to understand the historical development of the territory before looking at Basic Law and the developments over the past 12 years.

## **Background**

Since the foundation of the Chinese Empire during the Qin dynasty (221-207 BC), the key words in the political arena have always been ‘unification’ and ‘expansion’. Periods of unity succeeded periods of disintegration. During the second part of the 19th Century, relations between China and the ‘foreign devils’ in southern China were organised according to the Cantonese system. This system was very restrictive: certain goods and merchandise were banned and commercial activities were limited to certain seasons. The British East India Company had acquired the monopoly on commerce in Guangzhou, in particular the trading of ‘silver’. Tension was a constant factor in trade negotiations as merchants complained about the rules imposed by the Cantonese authorities, which at times seemed very arbitrary. Also the trade in ‘silver’ was much less lucrative than the trade in opium.

Although the import of opium had been banned by the Chinese government, European merchants continued to import the drug from Goa and Daman in India. Between 1820-1835, opium blighted development in China. This in turn affected the Chinese public administration amongst others as ‘many men were employed

to do little work and had too much time on their hands'. (Liu Ze Xu, Commissioner appointed by the Chinese to fight the traffic of opium). Smuggling increased and the value of silver declined causing a financial crisis. The Emperor, faced with an economic crisis, decided to act. In 1839, the governor of Guangzhou received an imperial order to discontinue the trade in opium and seize the British stocks and merchants were obliged to sign an agreement not to trade in opium under pain of death.

Lord Palmerston, who was the British Foreign Secretary at the time, decided it was time to regularise Sino-British commercial relations, and decreed that the Chinese action was a 'terrorist' action which had the effect of putting British lives to ransom. To resolve the situation, he demanded a commercial treaty which would set out the rules on commercial relations between Britain and China or the cession of a little island where the British could live without being under continual threat. These demands were unacceptable and provoked the First Opium War which lasted two years from 1840-1842. After Captain Charles Elliott occupied Chusan, a treaty was negotiated which ceded the island of Hong Kong to the British. But the two governments rejected the treaty – the Chinese, because they had lost face and Lord Palmerston because the island was mountainous, infertile and was very much the poor alternative to the commercial treaty sought. The hostilities therefore continued until August 1842 when the Treaty of Nankin was signed. This gave the British the island of Hong Kong and the trade treaty they so coveted. A Supplementary Treaty, the Treaty of Humen, ratified in 1843, gave the Chinese access to the island for commercial trade purposes only. The Second Opium War (1856-1858) was the direct result of diverging interpretations of the treaties. The British installed themselves on Kowloon peninsula in order to maintain a better tactical offensive. The Treaty of Peking was signed in 1860 and marked the end of hostilities but also allowed for the cession of Kowloon and Stonecutter Island to the British.

With other European countries exploring opportunities in the Far East, the British were determined to ensure the defence of Hong Kong and asked for the control of neighbouring territories. The British obtained, by

virtue of the convention signed in Peking on 9 June 1898, the lease for 99 years of the New Territories and 235 little islands.

Occupied during the Second World War by Japan, Hong Kong suffered badly and the population was displaced. After the war the population returned from China but was hit by the UN Embargo on trade with China. To resolve the problem, Hong Kong decided to industrialise the territory. From the beginning Hong Kong's industrial revolution was centred around the textile industry and Hong Kong became the 'warehouse' for its neighbours, attracting financial investment. It also developed its infrastructures and public services.

### **Sino-British Joint Declaration**

In the early 80s it became clear that the People's Republic of China wanted its territories back from the British. It considered the treaties signed after the two Opium Wars to be unequal treaties signed under duress by the Chinese Emperor in the 19th century. It would not countenance any attempt to give Hong Kong total independence and Hong Kong was excluded from the list of territories registered with the UN's Special Commission on Decolonisation.

Since 1949, the Chinese Communist Party had had a number of discussions about taking over the territory unilaterally. However, the Chinese authorities were always conscious that any such attempt would scupper its delicate, finely balanced, relations with Taiwan, the bigger prize in their eyes. This was also the reason why they refused to take over the administration of Macao despite a number of offers by the Portuguese government in Lisbon to hand over the territory in the 1970s. Hong Kong, with its highly developed economic and commercial systems which would open the doors of Chinese enterprise to an international market, was also a prize to be safeguarded at all costs.

In the early 80s Margaret Thatcher, then British Prime Minister, opened negotiations with the PRC to seek a diplomatic solution to the thorny issue of the sovereignty of Hong Kong. Although theoretically only the territories leased to the British (the New Territories and 235 islands) were to be handed over in 1997, it was clear to all concerned that this would not be a viable solution as the whole

territory was inter-connected economically. Therefore it was agreed that the whole territory would be handed back. The result of negotiations was the Joint Declaration between the UK and the PRC on Hong Kong, promulgated on 19 December 1984.

The Joint Declaration is an international treaty, deposited with the United Nations and provided for the handover of the sovereignty of all the territory (ceded and leased) to the Chinese whilst providing for the maintenance of the current legal system for 50 years.

It was agreed that Hong Kong would become a Special Administrative Region (HKSAR) of the PRC. The HKSAR was to enjoy substantial autonomy in the administration of its territory and was to have an independent Executive, Legislature and Judiciary. In order to make sure that the people were able to enjoy this autonomy, the separation of powers was to be clearly spelt out in the Basic Law, the constitutional document for Hong Kong. The Joint Declaration confirmed the status quo and recognised all existing laws.

The Chinese and Hong Kong people established a joint committee to develop a constitutional document which would govern the SAR and after numerous consultations within Hong Kong, the Basic Law for the HK SAR was promulgated on 4 April 1990 and came into force on 1 July 1997.

### The Basic Law

The Basic Law enshrines within a legal document the important concepts of 'One Country, Two Systems' promoted by Deng Xiao Ping, 'a high degree of autonomy' and 'Hong Kong People ruling Hong Kong'.

The Basic Law reflected the promises contained in the Joint Declaration. It provided that the laws in force before 1997, including the common law, would be maintained. A number of British laws applicable to Hong Kong before 1997 remained after the handover and have been enacted into local legislation. Chinese laws do not usually apply to Hong Kong and those which do relate to defence and foreign affairs and other matters outside the remit of the SAR.

The HKSAR also maintains its own position in a number of international organisations and is a member of World Trade Organization in its

own right (China joined the WTO in 2001) an associate member of the International Maritime Organization, and participates as a member of the Chinese delegation at other international meetings. It has its own monetary and tax policy and is a free port where mainland China's customs, duties or tariffs do not apply, although the Closer Economic Partnership Arrangement has given Hong Kong businesses and professionals better access to the mainland for manufacturing purposes. The HKSAR can sign bilateral agreements for air services and judicial assistance. It currently has 63 air service agreements with countries in every continent and has a number of agreements with countries in relation to extradition and mutual assistance in criminal matters, many of which are with Commonwealth countries. Hong Kong is a member of the Financial Action Task Force and the Asia Pacific Group combating money-laundering and financing of terrorism.

Article 2 of the Basic Law provides for the HKSAR to have independent executive, legislative and judicial powers.

### Democratic processes

Annex 1 and 2 of the Basic Law provides for the selection method of the Chief Executive and this has been one of the most controversial parts of the Basic Law. The Joint Declaration states:

*The Government of the Hong Kong Special Administrative Region will be composed of local inhabitants. The Chief Executive will be appointed by the Central People's government on the basis of the results of elections or consultations to be held locally.*

The Basic Law does not provide for universal suffrage but a method of selection through electoral colleges which have been seen by many as disenfranchising the majority of the people of Hong Kong as only 800 people are able to vote.

In the Legislative Council (LegCo) elections, most Hong Kong people have one vote in the geographical constituencies, but a small number of people have more than one vote in the functional constituencies.

The functional constituencies and the election of the Chief Executive by 800 people have

been criticized by the UN Human Rights Committee for non-compliance with the International Covenant on Civil and Political Rights.

The interpretation of constitutional instruments is a matter in common law jurisdictions for the courts and in most civil law jurisdictions for specific constitutional tribunals. The Basic Law is an internal law of the PRC and cannot be contrary to the existing PRC Constitution. It is the National People's Congress (NPC) that interprets and amends the Basic Law (Chapter VIII) though the Joint Declaration provided for the Final Court of Appeal of Hong Kong (which came into force on 1 July 1997) to be the final court of the territory.

Since 1999 the Basic Law has been interpreted three times. In June 1999, it overturned the judgment of the Court of Final Appeal (CFA) of the HKSAR and took away the right of abode from children of Hong Kong residents born on the Mainland. In April 2004, the possibility of Hong Kong citizens electing the Chief Executive in 2007, and electing all members of the Legislative Council in 2008, was ruled out. In 2005, Chief Executive Donald Tsang's term of office was limited to the remainder of the term of his predecessor in post although the procedure was not stated in the Basic Law. According to the Democratic Party, these re-interpretations showed that neither the central nor the HKSAR governments were respecting the 'high degree of autonomy' established in the Basic Law.

It should be noted that, in the first case, the referral came not from the Court of Appeal, as it should have done, but from the HKSAR's Chief Executive, contrary to the procedures established in the Basic Law.

Article 17 allows for the NPC to have the right to examine all legislation that is passed in the HKSAR which touches on the relations between the two territories, without specifying what is included in that list (apart from foreign relations and security). All laws promulgated by the LegCo must be registered with the Permanent Committee of the NPC.

In December 2007, the Standing Committee of the NPC deferred once again the direct election of the Chief Executive and provided that:

*The election of the fourth Chief Executive of the Hong Kong Special Administrative*

*Region in the year 2012 shall not be implemented by the method of universal suffrage. The election of the fifth term Legislative Council of the Hong Kong Special Administrative Region in the year 2012 shall not be implemented by the method of electing all the members by universal suffrage. The half-and-half ratio between members returned by functional constituencies and members returned by geographical constituencies through direct elections shall remain unchanged....*

*At an appropriate time prior to the selection of the Chief Executive of the Hong Kong Special Administrative Region by universal suffrage, the Chief Executive shall make a report to the Standing Committee of the National People's Congress as regards the issue of amending the method for selecting the Chief Executive in accordance with the relevant provisions of the Hong Kong Basic Law and 'The Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China'; a determination thereon shall be made by the Standing Committee of the National People's Congress. The bills on the amendments to the method for selecting the Chief Executive and the proposed amendments to such bills shall be introduced by the Government of the Hong Kong Special Administrative Region to the Legislative Council; such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive and they shall be reported to the Standing Committee of the National People's Congress for approval.*

*At an appropriate time prior to the election of all the members of the Legislative Council of the Hong Kong Special Administrative Region by universal suffrage, the Chief Executive shall make a report to the Standing Committee of the National People's Congress as regards the issue of amending the method for forming the Legislative Council and the issue of whether any corresponding amendment should be*

*made to the procedures for voting on bills and motions in the Legislative Council; a determination thereon shall be made by the Standing Committee of the National People's Congress. The bills on the amendment to the method for forming the Legislative Council and its procedures for voting on bills and motions and the proposed amendments to such bills shall be introduced by the Government of the Hong Kong Special Administrative Region to the Legislative Council; such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive and they shall be reported to the Standing Committee of the National People's Congress for the record.*

*If no amendment is made to the method for selecting the Chief Executive, the method for forming the Legislative Council or its procedures for voting on bills and motions in accordance with the legal procedures, the method for selecting the Chief Executive used for the preceding term shall continue to apply, and the method for forming the Legislative Council and the procedures for voting on bills and motions used for the preceding term shall continue to apply.*

Paragraph 12 of the Report of the HKSAR to the United Nations Human Rights Council (April 2006) states that 'the NPCSC decided that the election of the Chief Executive may be implemented by universal suffrage in 2017, and that after the Chief Executive is elected by universal suffrage, the election of the LegCo of the HKSAR may be implemented by the method of electing all the members by universal suffrage.' However, as we can see, there is no set timetable and the current Chief Executive has indicated that the priority is overcoming the economic difficulties that Hong Kong may face.

The Basic Law provides for an independent Legislative Council or LegCo. However, the Chief Executive does not report to and is not accountable to the LegCo but to the Central government in Beijing despite the Joint Declaration providing for this. The LegCo thus has little power. It legislates but the ultimate authority for approval of laws remains in the

hands of the Chief Executive (Article 48-49) who can, if he believes the said law to be incompatible with the interests of the Region, send it back to the LegCo for re-examination. If they return it for signature he must sign it or dissolve the LegCo. In addition, the passage of motions, bills or amendments to government bills introduced by individual members of the LegCo requires a simple majority vote of each of the two groups of members present, that is those representing respectively the functional constituencies and the geographical constituencies (Annex II to the Basic Law). In contrast the passage of bills introduced by the government only requires a simple majority vote of the members of the LegCo present.

In addition, Article 74 of the Basic Law prevents the members of the Legislative Council from taking policy initiatives. The article stipulates that the members are required to get the consent of the Chief Executive before introducing member's bills which relate to public expenditure, the political structure or the operation of the government.

The Chief Executive has an Executive Council which forms the Cabinet. Its members are, however, not chosen only from within the Legislative Council but also from a list of 'eminent persons permanently residing in Hong Kong'. They have no real executive authority as this is provided for under Chapter IV, Section 2 and report to the Chief Executive who has substantial powers.

It is to the people of Hong Kong's credit that democracy continues to progress. Since 1997 the political arena has seen the creation of a number of parties to increase democracy in the HKSAR and galvanise action in relation to legislative bills which might curtail citizens' rights or affect freedom of movement, assembly or speech. Beijing attempted to introduce a national security law in 2006 that would have limited freedom of speech. This was rejected, after the Hong Kong people took to the streets. The recent promulgation in Macao of its national security law, heavily influenced by the Central government, which is deemed vague and draconian, has led some people to think that there will be another attempt to re-introduce the national security law in Hong Kong. The fact that a number of Hong Kong citizens have been refused entry to Macao recently under the pretext of national

security, has led to official protests from the HKSAR to the authorities in Macao.

Article 23 of the Basic Law does provide that:

*The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.*

However, this should not jeopardise the rights of citizens which is of continued concern to human rights organisations. Despite the fact that Hong Kong's Bill of Rights was enacted in 1991, long before the Handover, in their report on the 10th Anniversary of the Handover, Amnesty International deplored the excessive force used by the police force when handling demonstrations and urged the authorities to set up an independent Human Rights Commission, as provided for in the Basic Law as well as '... ensure that all legislation in Hong Kong, including any new legislation proposed under Article 23 of the Basic Law, conforms to guarantees of freedom of expression enshrined in Article 39 of the Basic Law and Article 19 of the ICCPR'. In addition, Amnesty International called for increased protection of minorities, refugees and women, amongst other issues.

## The Judiciary

As we are well aware, the independence and integrity of the judiciary is, as the Senior Officials of Commonwealth Law Ministries declared in 2004, 'the right of every citizen.'

Judicial independence is guaranteed in both the Joint Declaration and the Basic Law. Cross-fertilisation with other common law jurisdictions continues to occur. Chief Justice Andrew Li, speaking at the Opening Ceremony of the CLC, stated:

*For us in Hong Kong, the significance of comparative jurisprudence is regarded as so important to the continuation of the common law that our Basic Law contains an express provision that our courts 'may refer to precedents of other common law jurisdictions' (Article 84)....*

*Whilst there is diversity in legal developments in common law jurisdictions, the same fundamental values underlie all common law systems. These values are based on the cardinal importance of the rule of law, with an independent Judiciary and an independent legal profession, and on the fundamental respect for human rights and the dignity of the individual...'*

The Basic Law provides for the continued use of foreign judges from common law jurisdictions. Currently the Court of Appeal has 19 non-permanent foreign judges on its bench and the cross fertilisation of the common law continues to thrive with decisions of the Court of Appeal of Hong Kong being cited in other common law jurisdictions and vice versa.

The judiciary has continued to act in a fair and independent manner. For example, in August 2002, 16 *Falun Gong* members were convicted of obstruction during a demonstration. It was claimed that the trial had been politically motivated. However, in November 2004, an appeal court reversed the convictions for 'public obstruction' and in April 2005, the Hong Kong Court of Final Appeal overturned all remaining convictions against eight remaining *Falun Gong* practitioners for obstructing and assaulting police. The Court judgment stated that the police had not paid enough attention to freedom of association, assembly, procession and demonstration which were guaranteed in Article 27 of the Basic Law.

Chief Justice Li in his Speech at the Opening of the Legal Year in January 2009 stated:

*Judicial independence is absolutely necessary to enable judges to perform their constitutional duty of adjudicating disputes, whether between citizens or between citizen and government, impartially without fear or favour. And in discharging their duty, judges must perform in accordance with high professional standards. This is essential for the maintenance of public confidence in the administration of justice.*

However, it should be noted that the judiciary is competent to hear cases that do not concern acts of state, foreign affairs and security (Article 19 of the Basic Law).

The fact that unfamiliar concepts, due in part to the language used, have been introduced

into Hong Kong has been of interest for a number of years. We know that the common law is a living law, adapting to circumstances but it is essentially a law based on the English language. Although the Joint Declaration was written in both Mandarin and English, the only legal version of the Basic Law is the Mandarin version. English is still an official language of the HKSAR. Today all laws must be enacted in both languages and all laws in force prior to the Handover were translated into Chinese. Since 1974, the lower tribunals have been able to have hearings in Chinese although in the Court of Appeal and Supreme Court, English remains the official language. In his interview in the South China Morning Post (14 April 2009), Dr Peter Slinn observed that the 'increasing use of written Chinese in court judgments might make it difficult for other common law courts to adopt them and in the long term, this might affect cross fertilisation between Hong Kong and other common law jurisdictions.'

## Conclusion

I started out writing this piece with confidence about the future of Hong Kong, having listened to the various presentations made at the CLC in Hong Kong which were very encouraging of developments in Hong Kong. My subsequent visit to China and meetings with a number of PRC lawyers and the vast changes I observed since my last visit only strengthened this view. Having studied the evolution of Chinese law, especially during the last century, I was struck by the differences in practice there.

During my last visits to Beijing and Shanghai in 1994, I felt the 'strong arm' of the Chinese authorities as I walked the streets but walking around Beijing and Shanghai today felt no different to walking around London or New York.

The legal and institutional developments in the last 20 years have been noteworthy in China. Hong Kong has been a model for many of these developments, and the common law has played a part in the Chinese legal system, with a number of common law principles being adopted, especially in the corporate and commercial fields. The fact that China has ratified the International Convention on Political and Civil Rights and the International Convention on Social, Economic and Cultural

Rights can only be a positive step even if the implementation still leaves a lot to be desired. For example, the fact that private ownership of property has been introduced is an advance no one would have predicted 20 years ago. The introduction of the principle of an independent legal profession is a concept that has been taken from common law jurisdictions, especially Hong Kong. The Lawyers' Law of 1996 introduced the concept of an independent legal profession and lawyers were recognised for the first time as 'providing legal services for the public' and law offices are now 'organisations in which lawyers set up practice'. Prior to this, lawyers were 'state employees' working in government departments.

Although the judiciary in China is not comparable to what the Commonwealth would expect from an independent judiciary, progress is being made, due to the exposure China has had to other legal systems, especially that of Hong Kong, and the education and training of judicial officers has increased with a requirement that they take a national exam and already have some legal training although corruption continues to be a blight on the system.

The history of China reveals that the principal objective of the Chinese civilisation is to seek harmony. But harmony at all costs cannot be implemented in a country as diverse as China.

In 1993, I said that it was important that China learnt from its actions elsewhere so that it did not make the same mistakes in Hong Kong and Macao. Many may say that it has not learnt much when one hears about the plight of the people of Tibet and recent crack-downs in mainland China in the run up to the 20th Anniversary of events in Tiananmen Square on the 3rd and 4th of June.

We are all aware of the increased concern of governments worldwide that they must protect national security but it would be a great pity that a concept so unique as the system of 'one country, two systems' might disappear prematurely in order to resolve illusory national security concerns.

The last 12 years have shown how the importance of a vibrant human rights environment, the rule of law, government transparency and accountability and the free flow of information

are all essential criteria to safeguarding the stability and prosperity for the people of Hong Kong.

China still sees Hong Kong as an example of how it would run Taiwan under 'one country, two systems' and therefore it has to be wary of behaving in a manner that would alarm Taiwan, similarly it does not want to adversely affect the Hong Kong economy or alienate the Hong Kong people by eroding their rights.

In 1993, I said that, all else failing, we should perhaps turn to Chinese astrology to predict

the future of the territory. Hong Kong was born in the year of the Tiger. 1997 marked the year of the Ox as does 1949 (the Year of the Liberation of China). The Ox and The Tiger are incompatible signs in the Chinese zodiac. Those born in the year of the Tiger should never challenge the authority of a person born in the year of the Ox as compromise is not possible. Let us hope however, that the Tiger and the Ox can still resolve their differences to make the system of 'one country, two systems' work for the next 40 years and beyond.

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## WOMEN, HIV/AIDS AND HUMAN RIGHTS

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*Baroness Kennedy of The Shaws QC. A presentation at a seminar arranged jointly by CMJA, the Royal Commonwealth Society and Sophia, the UK Chapter of the Global Coalition on Women and AIDS.*

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This morning I opened up the paper and saw the headline ‘Sharp rise in heterosexual HIV cases’. What the piece was saying was that the number of people infected with HIV acquired through heterosexual contact in the UK has almost doubled in the last four years. Figures issued yesterday show that there were 960 new diagnoses in 2007, compared with 540 in 2003.

I wanted to approach the issue from a different angle. It is a staggering fact that 65% of all the people around the world with HIV are Commonwealth citizens. That is largely because, of course, the virus has spread particularly wildly in Africa and Asia. But the statistic is particularly high for women. 72% of all women with HIV are from the Commonwealth. We must try to seek solutions together because contagious viruses and diseases do not know any borders. Like birds of passage, they travel across communities, across society, across classes and across the genders.

Many of the issues are the same wherever we live, and many of those affecting women and girls have insufficient visibility. What we now know is that the spread of HIV to women is currently increasing more rapidly than it is to men. 60% of all transmissions worldwide are to women. 75% of all young people with HIV are young women. Why this should be? Why is it that women are becoming infected?

### Women and criminal justice

I want refer to a bit of work I did in the early 1990s. It was not related to HIV/AIDS. I wrote a book about women in the criminal justice system and I called it ‘*Eve Was Framed*’. The book was a critique of the failures to provide justice for women within our courts because the courts failed to understand the reality of women’s lives. The book’s starting point was the way in which black-letter law had been created by men with men in mind. There was no conspiracy by men in long wigs in smoke-filled rooms to do down the female gender. It

was just the reality of our world that law was created by judges, through judgments in the court and our system of common law, shared all around the Commonwealth. It involves the creation of precedent, and it was men who were in the business of making those precedents, making those decisions in the higher courts, and they do it here and they do it elsewhere in the Commonwealth too.

The other mechanism for the creation of law is of course legislation. The absence until very recently of women in significant numbers in our parliaments has meant that women’s voices were rarely heard in the creation of law in statute form.

The third way in which law is made is the contribution that is made by the academy, by the universities wherein legal thinking is done, and which is often drawn upon by judges when considering their judgments. When the Law Commission is considering its advice to Parliament on the creation of new law, and again at professorial level where reputation meant that you would be listened to, there was a significant absence of women. And so the judiciary, parliament and the professorial ranks were very much male dominated and so the legal subject, as an actor, was always configured as male.

Until very recently, the *man* on the Clapham omnibus was the person whose views were the test of reasonableness in the courts. My argument, which was then deemed to be incredibly radical but now has entered the mainstream, was that a female perspective was largely missing. Even where we had the trickle of women into senior positions, the hegemony of law meant that they very often approached the issues in very much the same way as their male colleagues. This was because their fewness in number meant that their thinking and way of seeing had often been to adopt the ideas and perspectives of their male colleagues. As a result, we saw the creation of a law which often failed to reflect the reality of women’s

lives. An example is the business of domestic violence where there was failure to understand why it was that women might stay within abusive relationships.

As a result of law reflecting and mirroring our society, myths and stereotypes and deeply entrenched ideas about what constituted good womanhood blighted decision-making in the courts. Women who committed crimes were often judged not only to have broken the law but also society's rules, unspoken rules about what is expected of good women. Women as victims of crime too were subjected to those judgments. They were blamed for what was happening to them – 'Why didn't you say 'no' more clearly?' was the cross-examination in rape cases. Why were you wearing a mini-skirt? Why did you go out late at night? Why were you there at that club in the first place? If he hit you, it would be asked in domestic violence cases, why didn't you leave? It was as though fault lay with the women for their own situation.

Much of this understanding about law's failure has now entered the mainstream. When in 2003 I revisited the book in order to update I found that quite a lot had happened. We have seen quite a number of women going into the judiciary, women going into Parliament, we have better training of judges, better protection of victims in the courts, and so on. But while things had happened, not enough had actually really changed. The myths and stereotypes which operated were still operating in insidious ways, to the detriment of women. The unequal status of women is still a handicap, which is one of the reasons why we have seen the doubling of women in prison in the last 15 years.

### **Inequality and HIV/AIDS**

Now, you might be asking, what has all this to do with HIV and AIDS? I offer it as a background to that subject, because the HIV/AIDS issue is effused in just the same way with double standards, with mythology, with discrimination. Inequality is the main reason why women are being increasingly infected with HIV/AIDS.

HIV has often been associated with forms of behaviour that may be considered socially and morally unacceptable: the issues of sex workers, sex outside of marriage, sex with

multiple partners, sex between men, the injecting of drugs. This single fact, fuelled with high levels of ignorance, denial, fear and intolerance, maintain the social stigma which is attached to HIV infection even still. People living with the virus are frequently subject to discrimination. Many have been thrown out of jobs and homes, many have been rejected by family and friends, and some have been killed because of their HIV status. And the psychological as well as the physiological toll is often unbearable. The British Red Cross did a survey about attitudes amongst young people aged between 14 and 25, and they found that 1 in 7 said that they would not remain friends with a person diagnosed as HIV. Also, 1 in 5 said that they would not care for a family member who was suffering from HIV. That tells us something about the levels of ignorance.

The people most at risk of infection are of course those people who have known discrimination and prejudice for centuries: un-empowered women who wouldn't dare to ask their husbands to wear a condom. Homosexuals and bisexuals who in 41 former British colonies are still pariahs conducting secret and risk-filled liaisons, marrying because it's the requirement in terms of social standing and of their family. They have great risks to take, risks that they pass on to their partners – men and women if they're bisexual or if they're having to live a double life. Sex workers are always a despised social group and are forced to satisfy often violent and demanding punters. Drug addicts may be so anxious for the next fix that desperation can wipe out any caution.

90% of British people do not understand how HIV is transmitted, according to research. Even those who think they are reasonably well-informed will not really understand. A friend who has worked on HIV/AIDS issues in an American women's prison described how back in the early 1990s. HIV prisoners were treated like pariahs within the prison system, with demands from other inmates that they be removed from communal facilities. That they had to keep and wash their own cutlery, and plates, that they be excluded from the toilets and shower rooms. It was only when some the more informed prisoners started education programmes within the prison for the other inmates that a support network was set up within the prison and sanity returned. In British prisons, of which I have a lot of

experience, I can tell you the issue is dealt with by just maintaining secrecy, but women prisoners live in constant fear of their status being discovered. That is because of the fear that they will be isolated, by other prisoners and indeed by prison officers.

Why are the number of women with HIV figures rising and why do I see that inequality is a central issue for them? Even now, women think that they are not at risk if they do not fall into the classic categories of sex-worker, drug-user or person who has multiple sexual partners. If they are not in one of those categories, they think that this is not going to happen to them; they imagine that it is only the other kind of woman who gets infected. Women themselves have absorbed judgmental stereotypes. And women themselves are often very hard on other women, assuming that those who have acquired HIV status must have behaved in ways that brought that punishment upon them. Women are the ones who are blamed, and like Eve in the title of my book. The woman is seen as the cause of heterosexual male infection. Either because a promiscuous woman caused the infection, or because – and I've heard this said – a wife must have been failing to satisfy her husband, for her to have driven him into the arms of others.

### **Condemnation**

The same belief system pervades criminal trials and often that it would be women on juries, either in rape cases or domestic violence cases, who would be the toughest judges of their own gender. In fact, often the woman becoming infected has only had one sexual partner or has been faithful for years to her husband, but he has not reciprocated with his own fidelity. Because the man has had unprotected sex with someone else, unbeknownst to the woman, she is unlikely even to consider the use of a condom. And of course it can be many years before a diagnosis is made. The husband may feel that the sudden use of a condom, if he were to ask for it, is going to alert his wife to his unfaithfulness. So whatever his anxieties about having exposed himself to risk, he will run the additional risk of saying nothing to his wife. Negotiating those sensitive issues around sex and sexual activity is hard in the most equal of relationships, but particularly hard where the status of women is low. Then it becomes almost impossible. Women do not feel

that they can ask and do not feel that they can insist upon the protection of a prophylactic. And to introduce blame and moral opprobrium and to introduce the criminal law into this area only exacerbates the problems.

But this, of course, is precisely what happens. Condemnation is everywhere. I know that it has become unpopular to give any mention nowadays to the word patriarchy, but I think it is important that we remember it: patriarchy gave us a way of understanding the way in which our societies had all developed. It is a system of power relations and a system of power relations by which it was possible for men to dominate women; history has shown that patriarchy is the most basic form of oppression within human society. Modern societies are trying to eliminate the discrimination that exists against women but we still have some way to go.

Women are still the main carers and homemakers around the world and are often financially dependent. And as a result, they are usually at the bottom of the queue in the family's priorities in accessing, for example, antiretroviral drugs where there is a requirement to pay. Then, of course, the male breadwinner will lay a prior claim, as of course will the children in the family because that is what she would choose. So, often women miss out on medication and as a result many are dying. They are not active in the public domain in the way that men are and their voices are not heard as clearly in making their claim on resources or accessing support. Help is often sought too late because of their sense of isolation and the way in which family structures operate to maintain that silence and because of the stigma that surrounds this issue.

### **Lack of education**

Around the world, 62 million girls of school age do not attend school and all the research shows that girls who have little education are much more vulnerable to HIV. It is important for us to know that as soon as women become empowered through education, they are less susceptible to the social pressures that lead to infection.

I have just returned from Ethiopia where I was involved with work on women's mortality and one of the central problems there, and in other parts of the world, is the continuance of child

marriage. Underage marriage is supposed to be unlawful in Ethiopia and other countries, but girls as young as 11 and 12 are being married by the village priests, by the imam, by others, to boys and men. Boys who are 17 or 18, men who are much older and who have often already experienced sex with sex workers or with other infected persons.

The girls that I was seeing in Ethiopia had often undergone female circumcision, also something that is apparently outlawed but which continues apace. The rationale behind female circumcision is to ensure that women remain virgins. What we know, with the continuation of child marriage, is that upon marriage the girls are passed to the family of the man and, of course, sex is very painful if you have been infibulated. It often feels like a very brutal experience to these women, involving penetration of the vagina which has already been stitched. An immature vagina is very susceptible to tears and infection. And so it is that HIV readily spreads. Soon, of course, the child bride is pregnant and the child body of these girls is often unready for birth, and long labours lead to fistula, infant death, haemorrhaging, serious damage to the women and often female mortality. And it's no wonder that female mortality is so high and it is no wonder that marital sex is often so wretched an experience. Rather than being an expression of intimacy, for many of the girls it is about endurance.

The majority of women who have become involved in sex work here as elsewhere do so because life has offered no better way of surviving. In many parts of the world, the story was always about women taking to prostitution because they'd been rejected by their families and by their communities because they had failed social norms. They were suffering from poverty or that they had failed to provide for their husbands and children in ways which were considered to be the right way. They had failed to be satisfactory daughters because they had brought dishonour on their families by becoming pregnant outside marriage or because they were considered to be promiscuous. If they were not compliant wives, if they failed to produce children, breaking the rules or the expectations in some way would often lead to women being rejected. Women who were raped would often be rejected by their very own families. That whole business of

honour and appropriateness has blighted women's lives everywhere, and it's very important to remember that every sex worker who has HIV has been infected by somebody else, and usually by clients who refuse to have protected sex.

### **Criminalisation**

When governments are faced with public panics and their citizens are overcome with fear, they often reach for legislation. They see it as a panacea, but much of the resulting legislation is of a highly questionable nature. Around the world there has been an increasing trend towards the criminalisation of the transmission of HIV. Since exposure of HIV may lead to AIDS, the claim is that it is therefore life-threatening, and it is a legitimate purpose of law to endeavour to protect individuals, communities and the nation. But of course, what we all know, and people who are best advisors on all of this, people who are themselves HIV, people who work in organisations with people who are HIV in status, will tell you. that in fact it is counter-productive. What it does is make people fearful of coming forward for diagnosis, for testing, and in fact is more likely to drive this underground.

In this country, the law has been used 14 times to prosecute wilful transmission of disease. In the criminal law, there has to be a mental element. There has to be intention to commit the crime, but added to the notion of intention is that of recklessness. The notion of reckless transmission is what has led to most of these convictions. Of the 14 cases, it's interesting that the majority of those cases involve heterosexual sex; only 2 homosexual men have been prosecuted. Of the 14, only 2 women have been prosecuted, but of the remainder, 6 were foreign men, and the majority of those, refugee, asylum-seeking men.

Are there occasions on which it would be appropriate to prosecute? Well we have law on the statute books already which can deal with that. Section 20 of the Offences against the Person Act 1861 has been used. There could be occasions on which it would be appropriate because someone had intentionally gone out wanting to infect people. But that's not the stories that you see in the cases when you examine them. What you do see is hideous discrimination and ignorance present in the courtroom, so that even our lawyers and

judges just do not adequately understand the nature of HIV.

Another element has emerged, in the prosecution of these cases, the way in which the state, on the basis that it is concerned with public policy, has been prepared to interfere with privacy and interfere with epidemiological studies. I was the Chair of the Human Genetics Commission for 8 years, and one of the cases that particularly concerned us was that in Scotland an HIV piece of research was done in one of the Scottish prisons. Everyone was given anonymity and injecting drug-users participated. Many of the men in the prison took part in it; they were themselves given information if they wanted it, about the result of their tests, but they were guaranteed anonymity. That anonymity was in fact, not respected when a criminal complaint was made, and the Crown, wanting to determine whether he had been tested at a particular time, and would have known, de-encrypted this epidemiological study. The consequences of that for research on all manner of things to do with health is very serious and certainly has meant that men in prison are now very reluctant to take part in any health survey and research because they do not believe that their privacy will be respected. I think that we have not thought through the long term consequences of going down this criminalisation route.

But it's not just in the criminal courts that we see hostile attitudes. Colleagues of mine involved in asylum cases say that a diagnosis of HIV status can become a particular stumbling block when they are presenting cases. The culture of disbelief that exists within the Immigration Service is further inflated when HIV becomes an element. There is often an unspoken blaming of the victim, even where she has been subjected to rape and is seeking sanction after very serious persecution. The immediate suspicion is that the claim for asylum based on persecution is bogus, that it is manufactured to secure Western treatment, using antiretrovirals that are not available at home.

### **Human rights**

In reality, the most effective law that we can use to combat the spread of HIV is Human Rights law. What is paramount is that we protect the lives of those living with HIV/AIDS from discrimination, and discrimination is still

rife. It is always important to remind ourselves of why human rights came into existence. The first wave of human rights was back in the eighteenth century and became the thinking and the ideology behind the American and French Revolutions, but the second wave of rights came after the second World War and it is important to remind ourselves why. It was because the Holocaust and the shock of that attempt to exterminate people forced a re-think of law and forced us to accept that sometimes persecution does not come from the state alone. It can come from your next-door neighbour, and lawyers and judges can play their part in that persecution. As indeed they did in Germany, claiming that all they were doing was administering the law.

And so it was felt that some kind of new order had to be created, and the star in the creation of all that was one of my heroines, Eleanor Roosevelt, who held the first drafting meeting in a flat in Washington Square in New York in February 1947. That meeting was very interesting because it was a very eclectic gathering of people. There was a Stalinist from Soviet Russia, there was a Confucian Chinese representative of China, there was a Lebanese Christian, there was a Muslim, there was an academic lawyer from Canada, and there was a Brazilian Catholic. There was a spread of people with different belief systems and what they found was that you can create a template of values against which every legal system can be tested. They looked for what values are shared by everybody, whatever their religion or non-religion, whatever their world view. What was accepted was that everybody knows what it is to be persecuted, everybody knows what it is to have their life threatened and put into danger, everybody knows what it feels like to be tortured. Everybody knows what it's like to be discriminated against and to know that you are not equal. Everybody knows what it can be like to be denied a proper family life, to be denied the things we have written into the Universal Declaration of Human Rights.

So, the way in which we should be approaching all of this is always through that prism of human rights. When the question is asked 'Should HIV women be entitled to fertility treatment?' the answer is Yes. 'Should they be able to hold down jobs in nurseries and schools and in the health service?' and the answer is Yes. 'Should they be entitled to

asylum if they have been persecuted?’ and the answer is Yes. It may be that one of the reasons they were being persecuted was because they were HIV.

The best vaccine for all of this is knowledge and the best way to prevent the transmission of HIV is behaviour modification and it has to be built on knowing more about how this can happen, to create a much higher level of awareness amongst the public without inducing panic. We all have to become advocates. We all have to become spokesper-

sons about this, and we all have to also know that inequalities, those ugly things about feeling alienated from the other, are the things that feed into the stigma.

When women are educated and empowered and independent, they are able to take control of their lives, and much more able to say ‘No’. They are much more able to leave abusive relationships and they are much more able to say ‘Only with a condom’. It is about fundamental Human Rights.

## DOROTHY WINTON TRAVEL BURSARIES FUND

### WE NEED YOUR DONATIONS!

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 Fund was used to assist participation of three magistrates from Malawi, Uganda and the Solomon Islands at the CMJA’s 14th Triennial Conference and will be used to assist participation of judicial officers who would not otherwise have the opportunity to benefit from the training opportunity offered by the educational programme of the Triennial Conferences of the Association.

**We WELCOME ALL CONTRIBUTIONS to the Bursary fund. Contributions should be** (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  
58-59 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 (e.g. on the back of the cheque), we can send you the form to fill in for gift aid purposes – a simple declaration and signature.

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# THE TURKS AND CAICOS ISLANDS

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*A CMJA briefing ahead of the Triennial Conference*

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As its recently-launched Government website proclaims, the Turks and Caicos Islands

*are known for the world's most beautiful beaches, pristine coral reefs, diving, fishing, offshore investments, luxury condominiums and villa vacation rentals. The Islands are protected by a government dedicated to preserving the islands' natural beauty. Come see why we call ourselves 'beautiful by nature'.*

Members of the CMJA have a chance to see the beauty of the islands for themselves, as well as enjoying a full and interesting programme, during the triennial conference to be held in Providenciales in the Caicos Islands. There are 200 miles of white beaches if delegates are tempted to stray from the conference sessions.

The islands form one of the relatively few remaining overseas dependent territories of the United Kingdom. They lie close to the Bahamas, with the Turks to the East of the larger Caicos Islands. The Turks are said to take their name from the red flowers of a type of indigenous cactus which, to 17th-century Spanish sailors, resembled the headgear of Turkish men. They comprise Grand Turk (with the seat of government, Cockburn Town) with some 5,000 people and the small Salt Cay. Most of the population live in the Caicos Islands, especially Providenciales which has some 22,000 people and is now the most developed in terms of hotels and tourist facilities. Three other islands, the North, Middle, and South Caicos are inhabited, as are a few cays developed as tourist resorts. The name Caicos is derived from a Spanish word for cay or small island.

There are not only fine beaches but also extensive and important wetland sites and those on three of the Caicos Islands are designated under the international Ramsar Convention on Wetlands of International Importance, especially as Waterfowl Habitat. Over 200 species of birds are found in the Islands including some rare or endangered species of egret and the West Indian whistling duck. The rare rock iguana can be found on some of the

smaller islands. Over 30 protected areas have been designated to conserve the delicate ecosystems and wildlife habitats of the creeks, sand flats, lagoons, and marshy wetlands.

The Islands' economy (they use the US dollar as its currency and the vast majority of trade is with the US) rests largely on tourism, with most tourists coming from the US and Canada, and financial services; together they account for over half the GDP. The Islands retain some bank secrecy laws which encourage offshore banking activities. Agriculture produces some maize, beans, cassava and citrus fruits. Lobsters are caught, and many exported. The Islands boast the world's only conch farm. Most food is imported.

The National Museum has some relics of the Lucayans, who were inhabitants of the islands for some 750 years until the 16th century. European explorers visited the Islands in that century and the National Museum displays relics of a shipwreck dated 1505, said to be the oldest known shipwreck in the Western Hemisphere.

A group of salt collectors from Bermuda arrived on Grand Turk in 1678. They successfully defended their settlement against a Bahamian annexation attempt in 1700, a Spanish invasion in 1710, and a French invasion in 1763. The French succeeded with their second attempt, in 1764, and exiled the Bermudians to Haiti. By the beginning of the nineteenth century, however, the British had regained control and made the Turks and Caicos part of the Bahamas. Many on the islands, especially Grand Turk, claim descent from the 192 survivors of a group of Africans bound for slavery in North America until their Spanish ship, the *Trouvadore*, was wrecked in 1841. As slavery had been outlawed in British possessions, those who survived were free. Attempts have been made in recent years to find the remains of the ship.

The Turks and Caicos Islands became a separate colony in 1848 but 25 years later became part of Jamaica. In 1959 the islands again became a distinct unit, but without its

own Governor until 1973; the Governors of Jamaica and later of the Bahamas acted until each of those states became independent. Cabinet government was introduced in 1976 and the current Constitution dates from 2006. It contains a bill of rights, guaranteeing fundamental freedoms and provides for a Cabinet, headed by a Premier, and a House of Assembly of a Speaker, fifteen elected and four appointed members, and the Attorney General. The Governor, currently His Excellency Gordon Weatherall CBE who was sworn into office in August 2008, retains responsibility for defence, external affairs, international and offshore financial relations and internal security. The Islands became an Associate Member State of the Caribbean Community (CARICOM) in 1991.

Any conversations with local lawyers will inevitably bring some reference to the recent judicial enquiry into allegations of corruption and misuse of public funds, an enquiry which prompted the United Kingdom to give the Governor power to dissolve the Cabinet and House of Assembly for a period. Fortunately tourists, and conference delegates, can enjoy the tranquillity and beauty of the islands untroubled by local politics.

The legal system of the Islands includes magistrates' courts and a Supreme Court, headed by Chief Justice Gordon Ward who previously

served as Chief Justice of Tonga and as president of the Court of Appeal of Fiji. The puisne judge is Richard Williams, formerly Chief Magistrate. Both are members of the CMJA and Richard Williams is the Chairman of our Local Organising Committee for the CMJA Conference. Criminal trials in the Supreme Court are before a seven-person jury. There is a Court of Appeal from which appeals lie to the Judicial Committee of the Privy Council. Only two cases have reached the Privy Council in the past decade, although one of the cases went there twice (on the merits and later on an issue as to costs). A seven-volume set of the Revised Laws was published in 1990.

Many small Caribbean states have moved from dependency to fully sovereign status. Independence does require resources and a reasonable size of population; the Turks and Caicos must be close to the minimum viable size. It may come as a surprise to some that incorporation as part of Canada (perhaps as a district within the province of Nova Scotia) has also been seen as a distinct possibility. It was raised by a Canadian Prime Minister in 1917, and the idea has surfaced in both Canada and the Islands from time to time. Independence was much discussed in the 1980s but never attracted majority support; to some politicians it remains a long-term goal.

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## THE KENYAN HUMAN RIGHTS TRIBUNAL

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*Abdulkadir Noormohamed, Senior Legal Counsel, Kenya National Commission on Human Rights. A paper from the Commonwealth Law Conference, Hong Kong, reproduced with the kind permission of the CLA.*

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The Kenya National Commission on Human Rights ('the Commission') was created through an Act of Parliament, the Kenya National Commission on Human Rights Act 2002 ('the 2002 Act'), with the general purposes of promoting and protecting human rights in Kenya as envisaged in the Paris Principles for the Promotion and Protection of Human Rights (The Paris Principles) of 1991. The creation of the Commission had been some years in the making prior to 2002, through active advocacy of human rights' civil society organisations in Kenya and the pre-2003 official Opposition, and had been preceded by another national body, the Standing Committee on Human Rights which had no statutory basis.

Section 16 of the 2002 Act gives the Commission the mandate, *inter alia*, to investigate, either through a complaint or on its own motion, the violation of human rights in Kenya. Section 19 of the Act further gives the Commission the powers of a court to issue summonses for the appearance of any person before the Commission to respond to alleged human rights violations or provide any information or document the Commission may need to determine whether a violation did or did not occur. The same section gives the Commission the power to order the release of any person held in custody unlawfully, order compensation for victims of human rights violations or any other remedy that may be available to the victim. The 2002 Act also enables any person not satisfied with the Commission's orders, the right to appeal to the High Court of Kenya.

In September 2005, the Kenya National Commission on Human Rights Complaints Procedure Regulations 2005 were gazetted. They lay down the precise procedure under which complaints of human rights violations may be investigated and forwarded for hearing before a panel of Commissioners, to be known formerly as the Complaints Hearing Panel, which functions for all intents and purposes as human rights tribunal of first instance. The Regulations gave such a panel the power to take

evidence orally or in writing from complainants and respondents, to inquire further into the allegations brought before it, and to reach conclusions on whether or not a violation had taken place, and thereafter to make appropriate orders in respect to the same. The Regulations allowed the Complaints Hearing Panel to take evidence without necessarily adhering strictly to the letter of Evidence Act.

The Regulations also laid down the procedure in which the orders of the Complaints Hearing Panel could be filed in the High Court of Kenya, and on approval and attain the status and validity of a High Court order.

This mandate for investigating human rights violations and hearing evidence, and thereafter providing an appropriate redress, is a fundamental component for National Human Rights Institutions, and indeed their effectiveness would be lacking without it. An Institution ought to have this capacity to hear complaints and to make various legal options available to the complainant, including ordering compensation as envisaged in the Paris Principles of 1991 that gave NHRIs their quasi-judicial competence. The General Assembly Resolution of 20 December 1993 that adopted the Principles states:

*A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the NHRIs, the functions entrusted to them may be based on the following principles:*

(a) Seeking an amicable settlement through conciliation or, within *the limits prescribed by the law, through binding decisions* or, where necessary, on the basis of confidentiality;

(b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;

(c) *Hearing any complaints or petitions* or transmitting them to any other competent authority within the limits prescribed by the law;

(d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights. (all emphasis added)

### **The Commission's Complaints Hearing Panel**

After the passing and enactment of the Complaints Procedure Regulations in 2005, the Commission appointed its first Complaints Hearing Panel in July 2006.

Rule 25 of the Regulations gives the Chairperson of the Commission the power to establish a Complaints Hearing Panel for each case that is forwarded for hearing. The Chairperson has in practice appointed three commissioners for each case, though the Regulations do not specify an exact number of commissioners who must sit as part of a Complaints Hearing Panel.

The Regulations also stress that the Complaints Hearing Panel will decide on its own the method it deems best for hearing a case and will try as far as possible to concentrate on the substance of the case before it, while avoiding legal technicalities and other formalities. The parties can appear in person or through legal representation, and the Panel will hear evidence orally or through a written affidavit. The Panel may also hear hearsay evidence and will reach its own conclusion or whether or not such evidence will be admissible in a particular case. This is to by-pass the legal obstacle on hearsay evidence as in many human rights cases, as a witness in support of a petition may not have been present at the time of the violation.

The relaxation of legal rules for the Complaints Hearing Panel is intentional, so as to make the process less formal and conducive to

fair adjudication. It is also to make the environment 'friendlier' to the parties to the case, who may feel less threatened than in a court room with its strict rules and stringent procedures.

### **How Cases are Brought to the Complaints Hearing Panel**

Among the Commission's six programmes are the Complaints and Investigations programme and the Redress programme. The Complaints and Investigations team are tasked with receiving petitions on alleged human rights violations through walk-in petitioners, written mail, e-mail, telephone or on their own volition. Once such petitions are analysed, and where there is a possibility of a violation, the Complaints and Investigations team proceeds to investigate the case, gathering statements and collecting evidence in relation to the allegations in the petition.

At the end of the investigation process, the team prepares an Investigation Report, with recommendations on the appropriate way forward. Where it is recommended that the best method for dealing with a case is through the Complaints Hearing Panel, the file is forwarded to the Redress programme for action.

The Redress programme analyses the report and the facts of the case, together with the evidence available, to assess whether the prerequisites for successful litigation are present. This may include all relevant statements, the availability and physical location of witnesses and other 'gaps' that may hinder the process if not addressed at this point. Where all these are present, the Redress programme advises the Chairperson, who also considers the facts of the case and appoints the Complaints Hearing Panel in accordance with the Regulations.

The Panel, usually of three commissioners, then meets with the Redress programme to discuss the best ways of proceeding with the case. The petitioner and respondent are served with notices requiring them to enter appearances, and are then summoned to appear before the panel for a pre-hearing sitting, where all parties may discuss the file and chart the process for the case. A date is then set for the hearing, and the parties appear on the set date before the Complaints Hearing Panel and

present their case, witnesses and evidence. At the close of the hearing, the panel sets a date for the ruling, which must not be more than thirty days later.

When the ruling is delivered, and orders are made in favour of the petitioner, the petitioner must extract the order and have it filed in the High Court for validation and enforcement. Any party not satisfied with the ruling of the Complaints Hearing Panel has twenty one days within which to file an appeal in the High Court.

In order to make the process more accessible to all citizens, there are no charges or costs for bringing petitions to the Commission or for having them heard by the Complaints Hearing Panel. The Panel may also decide, at the pre-hearing sitting, that it may be easier for them to sit for the hearing at the town or city most convenient for both parties, if in the Panel's opinion, such method is more reasonable. (The hearings are ordinarily held at the Commission's offices in Nairobi).

Despite not being bound by strict legal procedure and rules, the Complaints Hearing Panel observes at all times the rules of natural justice and fairness, and can, where necessary, seek to rely on a legal requirement, if such requirement is seen as vital for a fair hearing. The Panel ensures at all times that due process is followed so that all parties have all the opportunity to present their case and defence without hindrance.

### Challenges faced by the Complaints Hearing Panel

Unlike other human rights tribunals in Africa such as those in Uganda and Ghana, the process of referring cases to the Commission's Complaints Hearing Panel is still fairly novel, and on a case to case basis the Commission is learning how to handle and refine the process. Further, unlike its counterparts in the other two countries, the Commission has met with obstacles from both the office of the Attorney General and the Judiciary in its attempt to enforce human rights through the redress mechanism.

The first and biggest challenge faced by the Commission, and by the Complaints and Investigations and Redress programmes in particular, has been lack of co-operation from government departments, especially the Police Force. In fact, this has been a major obstacle

which had it not been present, would have speeded up greatly the resolution of human rights cases by the Complaints Hearing Panel.

As it commonly happens in many jurisdictions, most complaints of human rights violations are against the police, government and administrative authorities. Despite the Act giving the Commission powers to summon information and documents pertaining to an alleged violation, these authorities have continuously obstructed the process by refusing to co-operate and provide any information that would shed light on the existence of a human rights abuse.

Both the police and government agencies have ignored the Commission's summonses and in many instances cases before the Complaints Hearing Panel have had to proceed without the benefit of their side of the story. In all cases where the police or government agencies are involved, the respondents, being government agencies, have either failed to appear, or if they do appear merely raise technical objections to the proceedings and thereafter ignore the proceedings. In all these cases, the Complaints Hearing Panel goes out of its way to ensure that the respondents have an opportunity to appear and present their defence, before deciding to proceed without them.

In the case of *Peter Makori v. The AG and 10 Others* (KNCHR/CHP/1/2006), the petitioner had alleged that he had been framed with murder charges and held in custody for one year before being released. He alleged that he was tortured while in custody and underwent great psychological stress and trauma. The petitioner also alleged that he had been a victim of continuous harassment by the police and the local administration for almost ten years. During the proceedings held in July 2006, the respondents failed to appear and the case proceeded without them. The Complaints Hearing Panel found in favour of the petitioner and ordered compensation for him of about KSh 5 Million (approximately US\$ 62,500).

In April 2008, almost two years later, the Attorney General's office filed a constitutional petition in the High Court seeking orders that the Complaints Hearing Panel did not have the constitutional authority to hear human rights cases, and that the powers in the 2002 Act be quashed as being in contravention of the Constitution. The application was never prosecuted in court.

In the case of *Medo Misama v The AG and Registrar of Societies* (KNCHR/CHP/8/2006), the petitioner challenged the Registrar of Societies' decision to refuse to register his political party without giving solid reasons for doing so. In this case the respondents appeared in the proceedings and raised technical objections that were overruled. The advocate for the Attorney General cross-examined the petitioner and thereafter left the proceedings without participating further or presenting any evidence for the respondents. In a ruling delivered in August 2007, the Complaints Hearing Panel found that the petitioner's rights had been violated and ordered that his party be registered accordingly. The petitioner presented the Complaints Hearing Panel's ruling to the High court in accordance with the statutory procedure. The High Court upheld the Panel's ruling and ordered that the Order be filed and registered in the High Court and served upon the respondents. Despite this, the Registrar of Societies has still not complied with the order.

In the case of *Peter Mungai v The AG and Officer Commanding Naivasha Station* (KNCHR/CHP/6/2006), the petitioner was an adult of unsound mind who alleged that he had been detained without charge in a police cell in Naivasha, and that the police had unleashed a dog on him as a result of which he sustained dog bite injuries. He also alleged that the police released him from detention without regard to his mental status or his need for medical treatment from the dog bite injuries. In this case the Complaints and Investigations team were unable to get the statements of the police officers, or even peruse the Police station's occurrence book to determine whether the petitioner had been detained. Due to his mental status much of the evidence adduced was through the petitioner's mother, hospital documents and other witnesses. The police failed to comply with a summons issued to them to appear and present the occurrence book, making it difficult for the Complaints Hearing Panel to make a conclusive ruling. The Commission has since filed Judicial Review proceedings against the police to compel them to comply with the summons.

In the case of *Erastus Waiyaki v the Kenya Commercial Bank* (KNCHR/CHP/2/2006), the petitioner alleged that he had been dismissed from his employment without the proper

procedures having been followed, while his employers (the bank) claimed they had done so on the basis of his mental status. In the course of the hearing, the bank filed a petition in the High Court seeking orders that the hearing be quashed, for example, on the basis that the Panel had been improperly constituted. The Attorney General, then applied to be joined in this application as an Interested Party seeking the same orders he had prayed for in his earlier constitutional petition, that is that the Commission's powers to hear human rights cases be quashed from the Act and that human rights be left to the preserve of the High Court of Kenya. The ruling was delivered on 19 December 2008, holding against the Commission, in which the High Court opined that it had exclusive jurisdiction on human rights cases, despite the fact that the words exclusive jurisdiction do not appear anywhere in either Kenya's constitution or any other legislation insofar as human rights and the High Court are concerned. The Commission has filed an appeal against the said ruling which should be heard sometime in 2009.

This kind of obstacles have hindered the intended swift operation of the complaints hearing process, and have presented challenges to the Commission. Attempts by the Commission to address the challenges formed by the apathy of the Police Force towards the Commission have not been successful. Despite numerous human rights education training sessions that the Commission has facilitated for the police, the police still do not recognise the powers and mandate of the Commission, or warm to the idea that human rights principles override all other traditional methods of policing. Considering that most petitions brought to the Commission are against the police themselves, getting them to cooperate has been an exhausting challenge. The Commission is however adamant that this position will eventually change for the better and is persisting in its efforts to get the police to comply with the orders of the Complaints Hearing Panel. A successful conclusion of the appeal in the Court of Appeal will be a great leap towards this end.

### **Assisting Individuals Seeking Redress**

In order to make the process of redress through the Complaints Hearing Panel accessible to all individuals and to make the

enforcement of human rights and access to justice available to all, the Commission does not charge any petitioner fees for filing a petition, investigations or forwarding the case to the Panel. The Complaints Hearing Panel also has the power to consider having its hearings in towns and cities close to the parties, if the issue of transport costs will impede the parties from appearing before the panel in Nairobi.

The Commission does not however provide legal representation for the parties to a case as this would affect the panel's neutrality in the matter. It does however encourage lawyers to provide *pro bono* services for individuals who may need it. However the fact that the process is stripped of most of its legalities makes it easier for individuals to present their own cases without having to follow technical processes.

However, once the Complaints Hearing Panel has delivered its ruling, it cannot partake in the process any further. It is up to the petitioner to extract his or her own order and have it filed in the High Court. The Commission will however provide the party with all advice and information on how to go about this process.

### **Public Interest Litigation**

The Commission can, in accordance with s25(a)(ii) and (b) of the 2002 Act, institute cases in the High Court of Kenya on alleged violation of constitutional human rights on behalf of a party or for broad public interest. Rule 43 of the Regulations also empowers the Commission to appear in any judicial proceedings as *amicus curiae* for the purpose of advocating the human rights interests of the concerned proceedings. Given its limited capacity, the Commission can only take up cases that are either of broad public interest or that would have a significant impact on the legal discourse of human rights in Kenya. The case should also have a strategic goal such as setting up legal precedents, highlight a

discriminatory position in the law or one that would lend weight to legal reforms.

The Commission in January 2009, filed to appear as *amicus curiae* in the case of *Richard Muasya v. The AG and 3 Others*, a constitutional petition by an intersexual person claiming *inter alia* that the Constitution of Kenya does not recognise his unique sexuality status and that there are no legal provisions that would recognise the gender rights of intersexual persons. The Commission intends to advise the High Court of Kenya on the practice in other jurisdictions on how to provide redress to intersexual persons and grant them legal recognition and respect for their human rights, including providing them access to medical procedures, education and employment.

### **Conclusion**

As stated earlier, despite facing challenges and obstacles, the quasi-judicial powers are an essential part of a Human Rights Institution's functions. By having the quasi-judicial authority and jurisdiction over human rights cases, the Complaints Hearing Panel plays a complementary role to the High Court's powers over such matters. The right of appeal to the High Court acts as a check and balance to ensure that the Panel does not overstep its mandate. The Judiciary in Kenya, or to be more particular, the Constitutional Bench of the Judiciary has not been co-operative and has misinterpreted the law to usurp all human rights enforcement authority to itself.

Our lessons from other NHRIs in Africa have been that challenges and obstacles are always present, especially in the initial stages where state institutions that had gone unchecked for decades would naturally be reluctant to account to newly set up NHRIs. It is our ardent hope that an enlightened Judiciary in Kenya will support the Commission, and chart the way for the development of human rights case law in our part of the Commonwealth.

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# THE COURTS AS GUARDIANS OF HUMAN RIGHTS: TERRORISM AND HUMAN RIGHTS

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*Lady Justice Arden DBE, Court of Appeal of England and Wales. A paper from the CMJA Toronto conference.*

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Terrorism threatens many countries but in recent years a new and more terrible form of terrorism has emerged. It is the terrorism of ideological fundamentalists who believe that it is right to kill large numbers of innocent people to draw attention to their cause. In many cases the terrorism is inspired from abroad. It is often assumed to come from Muslim countries but recently it has emerged in the United Kingdom, USA and Denmark that the terrorists are (as it is said) 'home-grown', that is, they are people who wish to terrorise their own fellow citizens in their own home country.

The threat to society of terrorism must not be underestimated. Nor should it be assumed that it, or the resulting legal challenges, will be confined to those countries which are involved in the Iraq war or in Afghanistan. Denmark is thought to have been the target of a recent plot because it was one of the countries where the recent publication took place of the cartoons of Mohammed which caused offence to so many Muslims. South Africa is one of the countries that has had to deal with legal issues arising from rendition of terrorist suspects to the USA or other countries.

Modern terrorism does not observe state borders. Because international travel and communications are now so easy and because money can be swiftly be moved around the world, terrorism nowadays may involve links with other groups abroad. So there is a need for international co-operation and there is a vast amount of intelligence which is shared between different governments in an attempt to stop terrorist activity before it occurs. For instance in the middle of August 2006 the United Kingdom authorities arrested some 24 people and announced that they had prevented a plot to take explosives on to planes and blow up several aeroplanes from London as they arrived in cities in the USA. The method which it was alleged that the terrorists were to use was a very simple one involving the mixing of

chemicals on board the planes. The information behind that plot came from Pakistan where the authorities had arrested a terrorist suspect and had interrogated him. In the course of that interrogation he informed them of the plot and of the names of the persons involved. The United Kingdom authorities may already have had these individuals under surveillance but they had not arrested them because they had not collected enough evidence. The information forced their hands.

What about the role of the courts? The traditional role of the courts is as guardians of human and constitutional rights. The executive and the legislature on the other hand have a duty to protect their citizens from harm and therefore seek to discharge their duties by bringing in counter-terrorist legislation which involves severe restrictions: who can blame them? They are in general better placed than any court to determine what the threat to national security is and where and when it is likely to come. So inevitably terrorism puts the courts into a position where from time to time they have to decide that counter-terrorist legislation is not lawful because it interferes with human rights. This was the case for instance in the well known Belmarsh case (*A v Secretary of State for the Home Department* [2005] 2 AC 68) when the House of Lords in the United Kingdom held that the legislation for executive detention of foreign terrorist suspects was incompatible with the European Convention on Human Rights. It was a landmark decision that might well not have been possible before the Human Rights Act 1998. The case dealt a body blow to the government's counter-terrorist legislation but it did not bring the house down. Parliament instead passed much more legislation, including legislation for control orders which provide not for the detention of suspects but for restrictions on their movements.

The politicians like to blame the judges and they say that they are impeding the war on

terrorism and that ‘they [the judges] just don’t get it’. There is no constitutional crisis in the United Kingdom but there is certainly tension here. However the judges cannot descend into the political arena. We have to stand firm. We must not be provoked into reaching short-term expedient decisions. The short answer to the politicians is that the courts are only doing their job of upholding the law.

There are many cases and many issues but rather than give you a review of what the courts have decided I thought I would simply take a couple of issues and state the problem.

### **Issue 1 – deportation and torture etc**

Suppose that a state takes the view that a foreign national within its jurisdiction is a suspected terrorist. Can it simply deport him back to his own country? The answer which the United Kingdom (following the Strasbourg court) and the Constitutional Court of South Africa have given is that such deportation violates the suspect’s rights if there is a real risk that he would be unlawfully killed or tortured or subjected to inhuman or degrading treatment in the receiving country. I should make it clear that there is an absolute ban on torture both in international law (see the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984) and in the European Convention on Human Rights. This is so even if national security interests of the returning country would indicate that he should be returned. Even people who are suspected of being or are known to be wicked have rights. I should say that the British government is trying to persuade the Strasbourg Court, the court charged by international treaty with the ultimate power to interpret the Convention, to modify its stance on this point and the Supreme Court of Canada has left open the question whether it is right to take such an absolute view.

The issue which I raise is the very general one. Should a state be able to deport a person who is a danger to national security even if there is a risk that on return to his home country the authorities will torture or kill him? Put another way, should terrorist suspects have the same rights as other persons or should there be circumstances in which his rights can be balanced against those of other citizens? What should the role of the courts be in this

situation? Should they modify their approach because there is a real threat to national security or should they pretend that such a threat does not exist? Do people, who may be very bad people, have the same rights as other people?

### **Issue 2 – intelligence obtained from another country that may have been obtained by torture**

I have referred to the sharing of intelligence. I have also referred to the absolute nature of the ban on torture under international law. Why is this? Evidence obtained by torture is often unreliable but in addition it is contrary to the laws of civilised nations to allow torture. Torture involves an attack on the integrity of an individual who is defenceless at that point in time and poses no threat. The common law of England has always prohibited it. You will recall that the Israeli Supreme Court of Israel (*Public Committee against Torture v Israel* H.C. 5100/94, 53(4) P.O. 817, 845) held that it was not open to the Israeli secret services to use torture: the court said that it was one of the methods which it was not open to a democracy to use in the fight against terrorism. That court left open the ‘ticking bomb’ paradigm where a person has information about a bomb which it ticking and when will kill many innocent people. In such a situation the intelligence service might have a defence of necessity if it used unlawful coercive interrogation methods. However the use of torture would be illegal under international law. The situation which the Israeli courts left open has never had to be considered by a court and is, I suggest, likely to be a very remote case.

Not all states observe the ban on torture. There have been suggestions that the information which the United Kingdom authorities obtained recently from Pakistan was obtained by torture from a person under interrogation there. The United Kingdom authorities obviously could not ignore that information. The UN Convention on Torture provides that evidence which is established to have been obtained by torture is not admissible in a court of law.

Even before the events of August 2007, the English courts had to consider what this prohibition meant. The House of Lords held (*A v Secretary of State for the Home Department* (No. 2) [2005] UKHL 71) that it meant that

the executive could use the information for the purpose of making decisions, for example about who to detain, even if there was a suspicion that it had been obtained by torture, but that if it had been obtained by torture it could not be adduced in a court of law. But as the House recognised there is a large grey area between knowing that evidence has been obtained by torture and knowing that there is a risk that it has been obtained by torture. Moreover, there are circumstances in which evidence can be led in courts of law without its being shown to the terrorist suspect. This can occur under English law if the Home Secretary makes a control order (that is an order restricting his movements or for example his ability to use the internet). In these cases, the rules provide that the suspect can have a special advocate who can look at the material and make submissions about it in a closed session (to which the public are not admitted) but once the advocate has looked at the material he is not allowed to communicate with the suspect. This a very unusual situation for a lawyer to be in, but the practice has been endorsed by the Strasbourg court and it does serve to protect the suspect as far as can be done consistent with national security.

The House had to consider the burden of proof. The House of Lords held by a majority that the evidence would be admissible even if there was a suspicion that it had been obtained by torture unless the suspect proved on a balance of probabilities that it had been obtained by torture. The minority thought that once plausible grounds were raised that the evidence had been obtained by torture, the

court hearing the case could not take the information into account unless it was satisfied that there was no real risk that the information had been obtained by torture. So by a bare majority the House took the view that it was up to the suspect to establish that the information had been obtained by torture despite the obvious difficulties for him in doing this (particularly if the evidence is led in a closed session from which he is excluded). Here there is a conflict of interest between what the suspect can reasonably be expected to prove and the position of the state which receives foreign intelligence. The state may well not know whether the information was obtained by torture and certainly it will not want to ask the state which provided the information. If it did so it might not get any more information.

This situation again illustrates the dilemma with which courts are faced. They must safeguard the rights of the individual and the integrity of the judicial process and our democratic way of life. They must do this in a way that does not unduly compromise national security and the question I have to ask is whether in the two situations I have mentioned – deportation to a receiving state where there is a risk of torture or death, and the admission of evidence suspected to have been obtained from another country by torture – they have done this satisfactorily. The pressures on the court are very strong in this situation to let the executive or legislature have the powers they need but the courts should not, I suggest, take any short-term view of the situation. It is often said that cases decided in times of national emergency last long after the emergency has gone.

# LAW REPORT

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## MIKE CAMPBELL (PVT) LTD. AND OTHERS v THE REPUBLIC OF ZIMBABWE

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(SADC (T) Case No. 2/2007)

IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC) TRIBUNAL  
WINDHOEK, NAMIBIA

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*Before Justice Pillay, President; Justice Mtambo, Justice Mondlane, Dr Kambovo, Dr Tshosa*

JUSTICE MONDLANE dealt with the procedural history of the case. Mike Campbell (Pvt) Limited and William Michael Campbell filed an application with the Tribunal challenging the acquisition by the Respondent of agricultural land known as Mount Carmell in the District of Chegutu in the Republic of Zimbabwe. Subsequently, 77 other persons applied to intervene in the proceedings.

The Applicants were, in essence, challenging the compulsory acquisition of their agricultural lands by the Respondent. The acquisitions were carried out under the land reform programme undertaken by the Respondent. The case concerned only acquisitions carried out under section 16B of the Constitution of Zimbabwe (Amendment No. 17, 2005), hereinafter referred to as Amendment 17.

Section 16B of Amendment 17 provides that land identified as agricultural land required for resettlement purposes or identified by the responsible Minister for the purposes of that section for whatever purposes was acquired by and vested in the State with full title therein with effect from the appointed day; that no compensation shall be payable for certain land except for any improvements effected on such land before it was acquired; that no person having any right or interest in the land may apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge, but could challenge the amount of compensation payable for any

improvements effected on the land before it was acquired.

The Applicants argued that the Respondent acted in breach of its obligations under the Treaty by enacting and implementing Amendment 17; that all the lands belonging to the Applicants which had been compulsory acquired by the Respondent under Amendment 17 were unlawfully acquired since the Minister who carried out the compulsory acquisition failed to establish that he applied reasonable and objective criteria in order to satisfy himself that the lands to be acquired were reasonably necessary for resettlement purposes in conformity with the land reform programme; that the Applicants were denied access to the courts to challenge the legality of the compulsory acquisition of their lands; that the Applicants had suffered racial discrimination since they were the only ones whose lands have been compulsory acquired under Amendment 17, and that the Applicants were denied compensation in respect of the lands compulsorily acquired from them.

It was argued by the Respondent: that the Tribunal had no jurisdiction to entertain the application under the Treaty; that the premises upon which acquisition of lands was started was on a willing buyer willing seller basis and that the land was to be purchased from white farmers who, by virtue of colonial history, were in possession of most of the land suitable for agricultural purposes; that the Respondent continued to acquire land mainly from whites who own large tracts of land suitable for agricultural resettlement and this policy could not be attributed to racism but to circumstances brought about by colonial history; that

the Respondent had also acquired land from some of the few black Zimbabweans who possessed large tracts of land; that the Applicants' farms were considered for allocation after they had been acquired as part of the land needed for resettlement; that the increase in the demand for land resulted in the portions left with the applicants being needed for resettlement; that the Applicants would receive compensation under Amendment 17; that the compulsory acquisition of lands belonging to Applicants by the Respondent in the context must be seen as a means of correcting colonially inherited land ownership inequities; and that the Applicants had not been denied access to the courts but, on the contrary, could, if they wish to, seek judicial review.

The Tribunal identified as matters for determination:

- whether or not the Tribunal had jurisdiction to entertain the application;
- whether or not the Applicants had been denied access to the courts in Zimbabwe;
- whether or not the Applicants had been discriminated against on the basis of race, and
- whether or not compensation was payable for the lands compulsorily acquired from the Applicants by the Respondent.

### **Jurisdiction**

Under Article 15 (1) of the governing Protocol, the Tribunal had jurisdiction to adjudicate upon 'disputes between States, and between natural and legal persons and States'. In terms of Article 15 (2), no person might bring an action against a State before, or without first, exhausting all available remedies or unless is unable to proceed under the domestic jurisdiction of such State. The first and the second Applicants first commenced proceedings in the Supreme Court of Zimbabwe, the final court in that country, challenging the acquisition of their agricultural lands by the Respondent. However it was on 11 October 2007, before the Supreme Court of Zimbabwe had delivered its judgment, that the first and second Applicants filed an application before the Tribunal.

The concept of exhaustion of local remedies is not unique to the Protocol. It is also found in other regional international conventions

including the European Convention on Human Rights and the African Charter on Human and Peoples' Rights. This means that individuals should go through the courts system starting with the court of first instance to the highest court of appeal to get a remedy. The rationale for exhaustion of local remedies is to enable local courts to deal first with the matter because they are well placed to deal with the legal issues involving national law. It also ensures that the international tribunal does not deal with cases which could easily have been disposed of by national courts.

However, where the municipal law did not offer any remedy or the remedy that is offered is ineffective, the individual was not required to exhaust the local remedies. The Tribunal stressed the fact that Amendment 17 has ousted the jurisdiction of the courts of law in Zimbabwe from any case related to acquisition of agricultural land and that, therefore, the first and second Applicants were unable to institute proceedings under the domestic jurisdiction. This position was subsequently confirmed by the decision of the Supreme Court given on February 22, 2008 in *Mike Campbell (Pty) Ltd v Minister of National Security Responsible for Land, Land Reform and Resettlement* (SC 49/07).

That court dismissed the Applicants' claims in their entirety, saying, among other things, that the question of what protection an individual should be afforded in the Constitution in the use and enjoyment of private property was a question of a political and legislative character, and that as to what property should be acquired and in what manner was not a judicial question. The Court went further and said that, by the clear and unambiguous language of the Constitution, the Legislature, in the proper exercise of its powers, had lawfully ousted the jurisdiction of the courts of law from any of the cases in which a challenge to the acquisition of agricultural land might be sought. The Court further stated that the Legislature had unquestionably enacted that such an acquisition could not be challenged in any court of law. The Supreme Court, therefore, concluded that there could not be any clearer language by which the jurisdiction of the courts has been ousted.

The Respondent argued that the Treaty only sets out the principles and objectives of SADC.

It does not set out the standards against which actions of Member States can be assessed. There should first be a Protocol on human rights and agrarian reform in order to give effect to the principles set out in the Treaty. In the absence of such standards, against which actions of Member States could be measured, the Tribunal had no jurisdiction to rule on the validity or otherwise of the land reform programme carried out in Zimbabwe.

The Tribunal first referred to Article 21(b) of the Treaty which, in addition to enjoining the Tribunal to develop its own jurisprudence, also instructs the Tribunal to do so ‘having regard to applicable treaties, general principles and rules of public international law’ which are sources of law for the Tribunal. The Tribunal did not consider that there should first be a Protocol on human rights in order to give effect to the principles set out in the Treaty, in the light of the express provision of Article 4(c) of the Treaty which requires Member States to act in accordance with human rights, democracy and the rule of law. The Tribunal had jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law, which were the very issues raised in the present application. The Respondent could not rely on its national law, namely, Amendment 17 to avoid its legal obligations under the Treaty.

### Access to Justice

The next issue to be decided was whether or not the Applicants had been denied access to the courts and whether they have been deprived of a fair hearing by Amendment 17.

It was settled law that the concept of the rule of law embraces at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation. Article 4(c) of the Treaty obliges Member States of SADC to respect principles of “human rights, democracy and the rule of law” and to undertake under Article 6 (1) of the Treaty “to refrain from taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty”. Consequently, Member States of SADC, including the Respondent, are under a legal obligation to respect, protect and promote those twin fundamental rights.

The Tribunal referred to two decisions of the European Court of Human Rights, *Golder v UK* (1975) 1 EHRR 524, and *Philis v. Greece* (1991) and to the opinion of the Inter-American Court of Human Rights, in its *Advisory Opinion OC-9/87 of 6 October, 1987, Judicial Guarantees in States of Emergency (Articles 27 (2), 25 and 8 of the American Convention on Human Rights*, where the Court stated:

*According to this principle, the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective.*

The right of access to the courts was also enshrined in international human rights treaties including the African Charter on Human and Peoples’ Rights (Art 7(1)(a)). The Tribunal referred to case-law including the decision of the Constitutional Court of South Africa in *Zondi v MEC for Traditional and Local Government Affairs and Others* (2005 (3) SA 589 (CC)). In that case, Ngcobo J said:

*The right of access to courts is an aspect of the rule of law. And the rule of law is one of the foundational values on which our constitutional democracy has been established. In a constitutional democracy founded on the rule of law, disputes between the state and its subjects, and amongst its subjects themselves, should be adjudicated upon in accordance with law. The more potentially divisive the conflict is, the more important that it be adjudicated upon in court.*

Any ouster clause in terms such as ‘the decision of the Minister shall not be subject to appeal or review in any court’ prohibited the court from re-examining the decision of the Minister if the decision reached by him was one which he had

jurisdiction to make. Any decision affecting the legal rights of individuals arrived at by a procedure which offended against natural justice was outside the jurisdiction of the decision-making authority so that, if the Minister did not comply with the rules of natural justice, his decision was *ultra vires* or without jurisdiction and the ouster clause did not prevent the Court from enquiring whether his decision was valid or not. The Tribunal cited *Attorney-General of the Commonwealth of the Bahamas v Ryan* ((1980) A.C. 718) where Lord Diplock said:

*It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority.*

Amendment 17 quite clearly took away the constitutional right to the protection of law and to a fair hearing in relation to land acquired under it. The Supreme Court of Zimbabwe had explicitly acknowledged this in its judgment. Although there was a remedy in respect of the payment of certain compensation, judicial review did not lie at all in respect of land acquired under some provisions of the Amendment. The Applicants had been expressly denied the opportunity of going to court and seeking redress for the deprivation of their property, giving their version of events and making representations.

The Tribunal held that the Applicants had established that they had been deprived of their agricultural lands without having had the right of access to the courts and the right to a fair hearing, which are essential elements of the rule of law, and the Respondent had acted in breach of Article 4 (c) of the Treaty.

### **Racial discrimination**

The other issue raised by the Applicants was that of racial discrimination. They contended that the land reform programme was based on racial discrimination in that it targeted white Zimbabwean farmers only. The Applicants further argued that Amendment 17 was intended to facilitate or implement the land reform policy of the Government of Zimbabwe based on racial discrimination. Even if Amendment 17 made no reference to the race and colour of the owners of the land acquired, that did not mean that the legislative aim was

not based on considerations of race or colour since only white owned farms were targeted by the Amendment.

The Respondent, for its part, refuted the allegations by the Applicants that the land reform programme was targeted at white farmers only. It argued instead that the programme was for the benefit of people who were disadvantaged under colonialism and it ass within this context that the Applicants' farms were identified for acquisition by the Respondent. The farms acquired were suitable for agricultural purposes and happened to be largely owned by the white Zimbabweans. In implementing the land reform programme, therefore, it was inevitable that the people who were likely to be affected would be white farmers. Such expropriation of land under the Programme could not be attributed to racism but circumstances brought about by colonial history. In any case, according to the Respondent, not only lands belonging to white Zimbabweans had been targeted for expropriation but also those of the few black Zimbabweans who possessed large tracts of land. Moreover, some white farmers had been issued with offer letters and 99-year leases in respect of agricultural lands. The Respondent had, therefore, not discriminated against white Zimbabwean farmers and had not acted in breach of Article 6 (2) of the Treaty.

The Tribunal noted that discrimination of whatever nature is outlawed or prohibited in international law. The SADC Treaty also prohibits discrimination.

It was clear that the Amendment affected all agricultural lands or farms occupied and owned by the Applicants and all the Applicants were white farmers. Could it then be said that, because all the farms affected by the Amendment belonged to white farmers, the Amendment and the land reform programme were racially discriminatory? The Tribunal noted that there was no explicit mention of race, ethnicity or people of a particular origin in Amendment 17 so as to make it racially discriminatory. But since the effects of the implementation of Amendment 17 would be felt by the Zimbabwean white farmers only, the Tribunal found that Amendment 17 constituted indirect discrimination or *de facto* or substantive inequality.

In examining the effects of Amendment 17 on the applicants, it was clear to the Tribunal that

those effects had had an unjustifiable and disproportionate impact upon a group of individuals distinguished by race such as the Applicants. The Tribunal found that the differentiation of treatment meted out to the Applicants also constituted discrimination as the criteria for such differentiation were not reasonable and objective but arbitrary and are based primarily on considerations of race.

It, therefore, held that, implementing Amendment 17, the Respondent had discriminated against the Applicants on the basis of race and thereby violated its obligation under Article 6 (2) of the Treaty. The Tribunal emphasised that if: (a) the criteria adopted by the Respondent in relation to the land reform programme had not been arbitrary but reasonable and objective; (b) fair compensation was paid in respect of the expropriated lands, and (c) the lands expropriated were indeed distributed to poor, landless and other disadvantaged and marginalized individuals or groups, rendering the purpose of the programme legitimate, the differential treatment afforded to the Applicants would not constitute racial discrimination.

### **Compensation**

The Applicants also raised the issue of compensation. The Respondent did not dispute the fact that the Applicants were entitled to compensation. It, however, argued that the independence agreement reached in 1978 in London provided that payment of compensation for expropriated land for resettlement purposes would be paid by the former colonial power, Britain. Compensation would normally be payable under international law

by the expropriating state. However the Amendment excluded all compensation. The Tribunal could not understand the rationale behind excluding compensation, given the clear legal position in international law. It was the right of the Applicants under international law to be paid, and the correlative duty of the Respondent to pay, fair compensation.

**JUSTICE TSHOSA** dissented on the issue of racial discrimination. In his view, the fact that the agricultural lands of the applicants had been, and were being affected, by the implementation by Amendment 17 was not because they were of white origin. The Amendment 17 affected their land because the agricultural land that was required for resettlement purposes, and which was the subject of the Amendment was in their hands. Thus, the target of Amendment 17 was agricultural land and not people of a particular racial group. This meant that in implementing the Amendment it was always going to affect those in possession of the land be they of white, black or other racial background. This did not amount to racial discrimination whether directly or indirectly. Further, white Zimbabwean farmers were not the only ones who were affected by the Amendment so as to make it racially discriminatory. The Amendment was of a general application. It applied to all Zimbabweans who were in occupation of the land that was required for resettlement purposes irrespective of their racial origins.

**THE PRESIDENT** dissented on an issue as to costs.

# BOOK REVIEWS

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*Bringing Justice Home: The Road to Final Appellate and Regional Court Establishment.* Cheryl Thompson-Barrow (Commonwealth Secretariat), 2008; £15. 71pp

This short but very useful book examines the gradual but accelerating replacement of the jurisdiction of the Judicial Committee of the Privy Council to hear appeals from the courts of independent Commonwealth countries and also the growth of regional courts as third-instance courts or as part of a programme of regional economic integration. The material in the study draws on an imaginative series of activities arranged by the author during her time in the Legal and Constitutional Affairs Division of the Commonwealth Secretariat. They included meetings of judges and court registrars from well-established and newer courts and study visits to international bodies such as the International Court of Justice in The Hague and the Court of Justice of the Common Market of Eastern and Southern Africa.

Ms Thompson-Barrow traces the history of the Judicial Committee as an appellate body, either in its own name (for Commonwealth countries which do not retain Her Majesty as Head of State) or as a body advising Her Majesty in Council. Once very extensive, the jurisdiction now applies only to the remaining overseas dependent territories of the United Kingdom, the Crown dependencies (the Isle of Man and the Channel Islands), ten countries in the Caribbean, four in the Pacific (Kiribati, Tuvalu and the two states associated with New Zealand, Cook Islands and Niue), Mauritius and Brunei. It is not correct to say that governors-general are 'titular heads of state', and the appeals from the Isle of Man are not limited to 'staff matters'. The latter error is a misunderstanding of the historic name of the Manx Court of Appeal, the Staff of Government Division of the High Court, which has a general appellate jurisdiction.

Accounts are given of the abolition of appeals from Canada, Australia and most recently New Zealand. Some twenty pages are devoted to the Caribbean Court of Justice. Inevitably it is almost impossible to assess the results achieved by recently-established courts; the simple listing

of cases before the New Zealand Supreme Court serves little purpose. The summary of the Caribbean Court of Justice's decision in *Thomas v The State* (2006) speaks of a 'misdirection of the Judge of the Court of Appeal to the jury'. There are no jury trials in the Guyana Court of Appeal; the appeal concerned misdirection at the original trial, wrongly regarded by the Court of Appeal as not so substantial as to warrant the conviction being overturned.

Perhaps the most interesting part of the book is that setting out recommendations for good practice. Some are clearly directed at the new tier of highest-level courts, such as those advocating ad hoc appointments of judges from other similar courts and the right to issue a dissenting judgment. Others, about court security, judicial remuneration and judgment-writing courses are less closely targeted. The recommendation that regional courts should have 'research departments' may surprise some who suppose that appellate advocates have the prime responsibility for placing the relevant law before the court. In fact many judges, including the Law Lords, have personal research assistants, a practice which could usefully be the subject of a special study.

The bibliography consists in large part of papers presented to the various Commonwealth Secretariat meetings and it is not stated if these are public documents.

*David McClean*

*Human Rights in the South Pacific: Challenges and Changes,* Sue Farran, Routledge-Cavendish, 2009, ISBN 10: 1-84472-109-4, xxii-337pp.

This useful study by a former Associate Professor of Law at the University of the South Pacific, Vanuatu, provides a helpful introduction to key human rights issues in relation to the scattered island states of the South West Pacific which have inherited the common law tradition from the days of British colonial rule. The perspective, writes Ms Farran, is 'unavoidably and unashamedly that of a white, female, non-Pacific islander'.

She will judge the success of the book by the extent to which it helps to 'mainstream Pacific concerns in the international community'. She does provide a broad introduction to the politico-socio-economic background for those unfamiliar with the region and exposes to the readership the perhaps unexpected human rights problems which have plagued the region's development. The chapters on 'rights and the laws that give effect to them' and 'theories and approaches to human rights' seem to be directed at readers with an interest in the region but with little background in rights theory and practice: they will not excite established members of the human rights community.

Her review of international human rights instruments does not refer to the Harare Declaration and other Commonwealth declarations, despite the Commonwealth's heavy involvement in Fiji, the Solomons and elsewhere. The substantive chapters focus on fundamental rights and questions of property (a subject on which Ms Farran has already published), of custom and equality (of particular significance given the often hierarchical nature of Pacific communities) and of freedom from discrimination. In attempting a wide-ranging review of World Trade rules,

development and environmental issues, the author perhaps casts her net rather too widely. She concludes by addressing rights advocacy, enforcement and methods of taking rights forward through human rights commissions, the Commonwealth and United Nations agencies. She canvasses the idea of a Human Rights Commission for the region. Again, given the Commonwealth dimension, it is surprising that she attempts no appraisal of the role of the Commonwealth Ministerial Action Group (CMAG) in dealing with the human rights violations consequent upon the latest military coup in Fiji. She concludes by identifying a need to identify commonalities between Pacific values and those found in international human rights instruments.

Ms Farran's informative volume will assist those who feel the need to be better educated about the Pacific region and its people and the particular challenges which the region offers to the familiar human rights discourse. Judges confronted with human rights cases in the region and elsewhere will be assisted by this book in achieving a perspective on the interface between human rights and traditional values and customs.

*Peter Slinn*

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