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**COMMONWEALTH  
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The material in this issue of the *Journal* examines a range of important (and sometimes controversial) issues.

Much of the discussion at the CMJA triennial conference concerned the rights of children, particularly as expressed in the United Nations Convention on the Rights of the Child. In his keynote address, Sir Mark Potter, President of the Family Division of the High Court in England, said:

*The promotion of the concept of a body of children's rights as an international standard to be observed by governments represents for the judiciary a real opportunity and, in my view imposes on us all a duty, to manifest our independence, first by interpreting the laws which we apply; second, by devising procedures; and third, by exercising the areas of discretion we enjoy, in a manner independent of any prevalent cultural, social, as well as political, pressures which operate in a manner contrary to the rights and guiding principles set out in the Convention.*

*I will recognise that in some countries of the Commonwealth this represents a greater problem than others, and that to adopt a judicial approach in accordance with the principles of the Convention may for instance involve a clash between the civil and religious courts or, at the very least, the making of unpopular decisions likely to be fixed upon and criticised in the local or national press. However, these are the hazards of our profession, and the unavoidable incident of our judicial oath to do justice between those who come before us, including of course the very children who have no independent right of action and whose security and safety are at the mercy of the adults in their lives.*

Justice Virginia Schuler's paper looks at one aspect; the devising of procedures to deal properly with child witnesses and child victims.

Freedom of religion is another fundamental human right. Christopher Rogers examines how it is implemented in the laws of Commonwealth countries. He points out that an area which often gives rise to tensions between religion and law is in respect of marriage and gender relations, particularly women's rights and sexuality. The issue of the law's treatment of homosexuality is an obvious example, and Michael Kirby's paper sets out not only a detailed review of the legal provisions but also a very personal view. It is a piece of advocacy and the reader's judgment may accept or reject his arguments. There is a great division of opinion on the subject within the Commonwealth, so it had better be repeated that publication of an article does not indicate any endorsement by the CMJA or the editorial board of the views that may be expressed.

Democracy is another fundamental tenet, but sadly it and such Commonwealth principles as the separation of powers are not always and everywhere fully observed. Justice Olateru-Olagbegi gives an account of the difficult role of the Nigerian judiciary in respect of elections in his country and Karen Brewer examines the position in Swaziland, dealing not only with the general constitutional position but also with the Rule of Law Crisis in that country between 2001-2004. The *Journal* seldom prints addresses given at the start of a legal year, but Chief Justice Ivor Archie gives eloquent voice to a concern about executive control of courts administration which is relevant to many countries other than his own.

The cases noted in our Law Reports section deal with different aspects of judicial independence: security of tenure, especially of magistrates (*Panday v Judicial and Legal Service Commission*), judicial discipline (the sorry situation shown in the *Hlophe* cases in South Africa), and contempt of court by the Press (*Re Application by the Attorney General of Fiji*).

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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# INDEPENDENCE FROM THE EXECUTIVE OF COURTS ADMINISTRATION

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*An edited extract from the address of the Hon. Ivor Archie, Chief Justice of Trinidad and Tobago at the opening of the law term in September 2009.*

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Today I want to talk about Constitutional Reform. That discourse is both necessary and in keeping with this year's theme of "Access to Justice", which is a concept that goes beyond the mere provision of a forum for the settlement for disputes and is really the nucleus around which any just and humane first world society is fashioned. Last year, when I spoke about the issue of constitutional reform, I sought to flag certain key concerns but at the time and, in the absence of the current published draft constitution, my remarks were somewhat devoid of context. I did express approval of the fact that the executive had undertaken to put the proposed draft constitution into the public domain for consultation and debate.

That has since been done and I thought it prudent, given the nature of exercise the nation is supposed to be embarking upon, to wait a while and listen to what the people were saying. So far, the response has been muted. The judiciary is working on a full written commentary but there are some aspects of the draft constitution that I wish to address as sources of concern, mindful of the fact that it is said to be a work in progress.

First, however, I would like to provide some context for my remarks in the hope that the intent will not be misunderstood. The proposed constitution represents something far more fundamental than an amendment or revision of the existing constitutional arrangements. It is a complete rewrite of the social contract that is to govern the way in which our institutions function and interrelate. Presumably it is premised on the assumption that there are several aspects of the existing constitutional arrangements that are not working satisfactorily.

Presumably also, the proposed arrangements have specific objectives in mind and are perceived to be superior in achieving those objectives. The discussion would have been better informed if both the shortcomings and the objectives had been articulated in writing with some specificity along with the draft.

Be that as it may, I trust that as a nation, we are moving forward on the basis of certain fundamental principles to which we all adhere. These include the paramountcy of the rule of law, the separation of powers and the independence of the judiciary. I make this assumption because I have listened very carefully to what the Honourable Prime Minister has said during the current series of public meetings and he has articulated those principles as the basis for constitutional reform, including the importance of institutional independence as well as individual judicial independence in the adjudication of matters before the courts. What I have to say, therefore, is by way of reinforcement of those principles but in the context of the draft that has been put out for public comment. It is a critique of the draft only, and not of any person. Permit me now to explore for a moment the relationship between those concepts.

In our nation's Constitution, we have asserted our belief in

*'a democratic society in which all persons may, to the extent of their capacity, play some part in the institutions of the national life and thus develop and maintain due respect for lawfully constituted authority;'*

Governments have no other justification for their existence! The Americans put it so eloquently in their Declaration of Independence, where we find these words:

*'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.... That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, ...'*

Thus the extent to which our national institutions facilitate the development of the type of society just described is the only true measure of their legitimacy. It is the standard of accountability to which all citizens are entitled to hold their leaders and state organs. And ultimately, every organ of the state, including the judiciary is accountable to the citizens and to no one else, in respect of those areas for which it is responsible.

The rule of Law is unsustainable without scrupulous adherence to the principle of separation of powers. It is for good reason that we refer to the separation of powers and not the separation of responsibilities. The separation of powers is not a provision of the Constitution. It is the philosophy underlying the Constitution and the framework upon which government is structured so as to harness individual human nature (in the sense of providing both focus and restraint) to serve society at large.

In that context, Judicial Independence is a device, a set of structural arrangements, to get something done, to implement the Separation of Powers. George Washington, after the Constitutional debates in America said ‘the true administration of justice is the firmest pillar of good government’. He understood that courts are important, not simply because they are a major forum to resolve disputes – other mechanisms are available to resolve disputes – courts are important because they are expected to resolve disputes impartially, fairly and according to law. The American founding fathers held the common conviction that the Separation of Powers was an essential barrier to tyranny, to holding government in check and the prevention of arbitrary policymaking. But Judicial Independence is not achieved simply by a provision written in the Constitution. As Madison said ‘while these paper provisions are necessary the security of real separation of power consists in giving those who administer each department the necessary means to resist encroachment of the others’.

The ‘necessary means’ that are woven into the fabric of our Constitution and that are also meant to be observed as a matter of convention are called ‘checks and balances’. In the case of the judiciary, independent Court Administration is one of the necessary checks.

Separation of Powers is merely a concept without effective checks and balances. There must be checks and balances on each branch of the government– including the judiciary. The Judicial Branch of government is an equal – not superior—branch of government. The Judicial arm of the state embraces the principle of Separation of Powers based on appropriate checks and balances which in our case include: Open courts; Public fact-finding; Transparent proceedings; Automatic review by the appellate process; Reasons for decisions – public pronouncements and written opinions; Submission to Finance and Audit Laws; the Public Accounts Committee and so Accountability to Parliament; Annual Report and so Accountability to the Public; Adversarial fora; Media scrutiny; and Independent Constitutional Commissions.

Our philosophy is incorporated in our Judiciary’s vision statement of which this may be a convenient time to remind you. It is:

*‘.. to provide an accountable court system in which timeliness and efficiency are the hallmarks, while still protecting integrity, equality and accessibility and attracting public trust and confidence’.*

We accept our responsibility and are putting our house in order. At the last meeting of judges held in July we adopted a 120-day time limit for the delivery of reserved judgments. The code of judicial conduct is now substantially complete and will be formally adopted and circulated for public information before the end of the year. This is the standard to which we will publicly agree to hold ourselves accountable and which you are entitled to expect and demand of us.

But we need independent and effective court administration to make the Separation of Powers and Judicial Independence a reality. Effective Court Administration provides the judiciary with the necessary device to protect Judicial Independence.

Effective and independent court administration promotes public accountability and public trust and confidence. Promoting the courts’ accountability in the proper sense (effective administration) helps to ‘repel [the] improper threats to independence’ that concerned the American Founding Fathers. It is my hope that as we contemplate constitutional reform, it will

be clearly understood that the only way forward is to devise mechanisms that promote institutional strengthening in those areas for which each institution is responsible, and therefore accountable. It goes without saying that there can be no effective and accountable discharge of responsibility without the power to control the relevant processes and the deployment of the available resources that fuel them. And what is the judiciary's responsibility? The current Lord Chief Justice of England, Lord Judge has put it this way:

*'In a democratic country, all power, however exercised in the community, must be founded on the rule of law. Therefore each and every exercise of political power must be accountable not only to the electorate at the ballot box, when elections take place, but also and at all times to the rule of law. Independent professions protect it. Independent press and media protect it. Ultimately, however, it is the judges who are guardians of the rule of law. That is their prime responsibility. They have a particular responsibility to protect the constitutional rights of each citizen, as well as the integrity of the constitution by which those rights exist.'*

It is against that background and understanding that I must confess to some concern when I read some of the provisions of the draft constitution that refer to the judiciary. They do not meet the objectives that have been otherwise publicly articulated and, in fact would, if passed, take us in the opposite direction. In my respectful view they stem from a fundamental misunderstanding of our role and function and have disturbing implications for judicial independence. I refer in particular to clauses 121 to 125, 136 and 142. The misunderstanding lies in the assumption of a false dichotomy between the judiciary's judicial and administrative functions and the assumption that one can be independently exercised without the other. The danger lies in the potential to gradually and systematically strip the judiciary of its independence and the citizens of their protection through ordinary or subordinate legislation requiring no special majority.

The point is best illustrated by the posing of a rhetorical question. If you were one of the parties to a lawsuit, would you feel comfort-

able in knowing that the party on the opposite side could have access to the judge's chambers, could control the filing of documents and the keeping of all the records in the matter, the selection of the judge who would handle the matter, the scheduling of courtrooms and other resources, the composition of the judge's support team including his or her research assistant, all the information, technology and security associated with the matter and the court, the judge's leave and travel approval, training, reading material and personnel records?

You might with some justification entertain great apprehension that the scales could be tilted against you. Well all of those things are part of what Court Administration is about and that is the challenge to which the current draft would expose us. That fact is that in every criminal matter before the courts and in a large percentage of the civil matters, the executive arm of the state is on one side and individual and otherwise powerless citizens are on the opposite side. How, pray tell, can a constitution meaningfully provide for the judiciary to be independent only in the exercise of its judicial functions? And what is one to make of clause 136 which provides that the Chief Justice shall be responsible for the general administration and business of the Supreme Court (no mention here of the magistracy) and yet provide in a later subsection that the Minister of Justice shall have control of administrative matters relating to the judiciary as may be prescribed? Prescribed how, where and by whom? How is the Chief Justice to be responsible, and therefore accountable, for that which he does not control? The matter is not helped by the reference to consultation. Anyone who understands constitutional language knows that he who merely has to be consulted can be safely ignored.

The Permanent Secretary for the Judiciary who will be appointed by the executive President and responsible for the day to day administration of the Judiciary will report to the Minister of Justice and not to the Chief Justice. Outside of the construction of buildings, which is the only pertinent example cited thus far, it is difficult to think of any other aspect of Court Administration that could be safely devolved from the judiciary without impinging on its independence. Constitutions are not necessarily places for attempting to place exhaustive

lists. As we have seen, Court Administration evolves. Must we amend the Constitution every time there is a change? It would be a lot simpler to acknowledge explicitly in the Constitution the principle of independence of the judiciary in its administrative and adjudicative functions if we agree on it.

But it does not end there. Perhaps the most worrisome clause is clause 125, which gives Parliament the power to confer on any court any part of the jurisdiction and powers conferred on the High Court by the Constitution or any other law. It requires no special majority, nor does it require that the new court or courts enjoy the constitutional protections designed to ensure the independence of the Supreme Court. Arguably, the most important power of the Supreme Court inherent in the separation of powers and recognized both at common law and by statute, is the power of judicial review of executive action. It is the only protection that citizens have against arbitrary or unlawful state action. In some instances, it is the backstop to the Service Commissions and will assume even more significance if the independence of the Service Commissions is weakened. If the draft constitution is adopted in its current form, that power can be simply and unceremoniously stripped away.

Under the draft, the Chief Justice and the members of the Judicial and Legal Service Commission are all appointed by the Executive President. Given our political realities and the way in which its composition would be determined, the fact that the House of Representatives must approve these appointments hardly provides a convincing check, or at least one that is likely to foster public confidence in the independence of the judiciary. In fact, the Chief Justice will cease to be a member of the Judicial and Legal Service Commission altogether.

Service Commissions were originally created for the express purpose of insulating certain public offices from political interference. Their composition and the process for the appointment of members are critical in ensuring the fulfilment of that purpose. The nation has to decide whether we still want that. If there is some aspect of that that is no longer working then we can only have a meaningful debate and consultation if we identify it with clarity

and then articulate exactly what we want to achieve and why we think it will be better. I am afraid that the explanatory notes to the draft Constitution fall far short of that!

I fear that whoever produced this draft may not have served us as well as they might have, but the judiciary remains open to consultation on the best way forward. May I reiterate, however, that the process of developing a new Constitution is not merely a matter for negotiation between the judiciary and the executive. Every citizen has a stake. Of course there will be some individuals, groups or organisations that will be better equipped to contribute to the debate and I hope that they will shoulder that responsibility.

At the end of the day, whatever form the constitution eventually takes, there has to be ongoing consultation and collaboration between the judicial and executive arms of the state if the country is to be run properly, but neither should attempt to set internal policy for or administer the other. As a concrete example of how that collaboration might work, I could take the example of information technology. As we move towards making e-government a reality, it is obvious that policy decisions will have to be taken on an IT platform that would best provide a seamless service and allow the various arms of government to communicate and share information. Collaboration will be necessary and it makes sense to share a basic framework. However, when it comes to what information is to be collected within the judiciary and how it is to be collated stored and who will have access to what, that must remain the province of the judiciary.

The judiciary is a necessary component of the system of justice but it is not an arm of the executive. Policy decisions taken in either sphere will of course have implications for the functioning of the other and a healthy working relationship is necessary for the efficient functioning of the whole justice system.

I have been encouraged by the cordiality and cooperation that has been the hallmark of relationships between the Judiciary and the Ministries of Finance, Public Administration, National Security and the office of the Attorney General in recent times. I am therefore not sure what it is that is not working that we are trying to fix. If a Justice Ministry were to provide a focal point for communication

with the judiciary that would channel all of those inputs, then there should be no difficulty, that is a matter for the executive. What it cannot and should not do if we are to remain true to the principle of separation of powers, is to remove the proper and independent administration of the judiciary from the judiciary. As our American friends sometime say 'if it aint broke, don't fix it!'

What is troublesome about the current draft constitution is that, in this regard, it represents a reversal of the progress we have been making over the past two decades and a departure from internationally accepted norms including the Latimer House principles to which this nation has publicly subscribed.

I sincerely hope that nothing that I have said will be construed as a personal criticism of anyone, including whoever authored the current draft. However, given our propensity in this society to flavour commentary with speculation about motive and intention there is something I feel I must say. We have an unfortunate tendency to shoot the messenger instead of analyzing the message so let me be as frank as those who know me would expect. One day, whether through choice, death, illness or mere effluxion of time, I will demit office. Only God knows when and He is in control of that. It will be a relief as I crave a simple life. Power, pomp, status and flashing lights hold no allure for me and the burdens of office are onerous. My singular interest lies in the opportunity to make a difference and to contribute to the national good.

The office of Chief Justice carries with it the responsibility to speak out on occasion in order to contribute balance and mature perspective to debate on matters of national interest particularly when they impact upon the judiciary and the administration of justice generally. This is one such occasion. We are talking about our constitution! It is supposed to be a distillation of all the values we hold dear, an expression of our hopes and aspirations for the society we want to create for the future. It therefore behoves us all to think very carefully about this exercise and voice our opinions. We should not abdicate that duty by leaving the 'heavy-lifting' to others. Any constitution that is finally adopted must be the product of our collective thought and deliberation and more importantly an expression of our collective will. Our thoughts may be garnered by consultation but only if there is active participation from all sectors of our society.

In the end, we will have to consider what is the best mechanism in our democratic society for determining the will of the people. There is a view that it is best expressed directly in a vote. It ensures that the final product corresponds to our expressed views. That which we specifically accept and adopt we are far more likely to respect and honour. May I respectfully suggest that serious consideration be given to that.

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# ELECTION PETITIONS: CHALLENGES FACING THE NIGERIAN JUDICIARY

*The Hon. Justice A. Olateru-Olagbegi, Judge of Lagos State High Court and National Election Petition Tribunal Judge. A paper from the CMJA Triennial Conference in September 2009.*

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Nigeria attained Independence from the United Kingdom on 1st October 1960. Between 1966 and 1993 Nigeria experienced 8 military *coup d'états* of which 4 were successful whilst 4 failed. It is a commonly held view that the alleged rigging of Parliamentary elections in Western Nigeria was the proximate cause of the first military intervention on 15 January 1966. On 29 May 2009, Nigeria quietly celebrated 10 years of un-interrupted civil rule. It was the longest period of un-interrupted civilian rule since the country attained independence.

The Federal Republic of Nigeria is a Federation consisting of 36 states and the Federal Capital territory, Abuja. The country is governed by a written constitution, the present one being the Constitution of the Federal Republic of Nigeria 1999, hereinafter referred to simpliciter as 'the Constitution'. It came into force on 29 May 1999. Although a constitutional review exercise is presently going on at the nation's National Assembly, many believe that the end product will not be radically different from the present one.

The Constitution is modelled after the United States of America's Presidential system. It honours the doctrine of separation of powers as between the executive, the legislature and the judiciary as first propounded by Montesquieu.

By sections 6(1), (2), (3) and (6) of the Constitution, the judicial powers of the Federation in civil and criminal matters are vested in the superior courts of record consisting of the Supreme Court of Nigeria as the apex court, the Court of Appeal, State High Courts, High Court of the Federal Capital territory, the Sharia Court of Appeal of the Federal Capital territory and of the States; and the Customary Court of Appeal of the Federal Capital territory and of the States. Under the Constitution, the independence of the judiciary is taken as 'given'.

Section 17(1) of the Constitution provides that the state social order is founded on ideals of Freedom, Equality and Justice whilst s 17(2)(e) provides that the *independence impartiality and integrity of courts of law and easy accessibility thereto shall be secured and maintained.* (My emphasis)

## Jurisdiction in election matters

In respect of elections for the office of President and Vice President of the Federal Republic of Nigeria, the Court of Appeal has exclusive original jurisdiction whilst appeals therefrom lie to the apex court, the Supreme Court of Nigeria (ss 233(2)(e) and 239(1) of the Constitution). In respect of elections for the office of Governor of a State, the Senate, House of Representatives and State House of Assembly, appeals lie from the Election Tribunals to the Court of Appeal as the final court (s 246). In respect of these offices, original jurisdiction lies with (1) the National Assembly Election Tribunals and (2) Governorship and Legislative House Election Tribunals as appropriate. These tribunals are composed of a Chairman and four members. The Chairman is a Judge of the High Court whilst the Members are appointed from among Judges of a High Court, Kadis of a Sharia Court of Appeal, Judges of a Customary Court of Appeal or other members of the judiciary not below the rank of a Chief Magistrate.

A major characteristic of elections in Nigeria is that their outcome is invariably followed by bitter disputes and rejection of the announced result by the losers. The only exception to this being the Presidential election of 1993 which was generally acclaimed as the freest and fairest election in Nigerian election history. The late M.K.O Abiola was acclaimed to be the winner. Sadly, the election was annulled by the military authorities under General Ibrahim Babangida. The annulment was quickly followed by the promulgation of Decree No. 35 of 1993 which ousted the jurisdiction of the courts to entertain any suit challenging the annulment.

## Conduct and resolution of election disputes

The conduct and resolution of election disputes in Nigeria is regulated by statute, the current one being the Electoral Act (No 2 of 2006) as amended. The focus of this paper is not the interpretation of that Act but the practical difficulties lie in the way of adjudication in election matters in Nigeria generally and the threat to judicial independence to which they give rise. In doing so, it is necessary to discuss briefly the statutorily recognised grounds upon which an election petition may be founded.

The grounds recognized for bringing election dispute in s 145(1) of the Act are:

- (a) That the person whose election is questioned was at the time of the election not qualified to contest the election;
- (b) That the election was invalid by reason of corrupt practices or non-compliance with the provisions of the Act;
- (c) That the Respondent was not duly elected by majority of lawful votes cast at the election; or
- (d) That the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.

It is necessary to record the challenges that exist to dispute resolution in Nigeria generally, that is in everyday civil and criminal matters as opposed to adjudication in election disputes.

In this regard, perhaps a good starting point is the account of a former Judge in the former South Eastern State of Nigeria who was removed from office for allegedly giving judgments which did not favour his State Government. He is the Hon. Justice P. O. E. Bassey who was called to the Bar in Lincoln's Inn in 1958. He was appointed a Judge of South Eastern State (later Cross River State) in 1968 but was retired in 1972 in very controversial circumstances.

In his book, *The Nigerian Judiciary*, Justice Bassey identified the following as threats to the very foundation of the judiciary:

*Disobedience of court orders by the Government.* He argues that the carrying out of orders which courts make is what gives judges the respect and authorities they possess; the judiciary is weakened by disobedience of court orders.

*Judicial corruption.* He distinguishes between two types of corrupt judges: (i) judges who accept money to give justice to the highest bidder (these are in the minority) and (ii) judges who in cases against the Government give judgments in favour of the Government regardless of the merits. He reckons that the greatest danger lies in this category, and identifies reasons why judges behave in this way:

- (a) Fear of reprisals by which the Government can find a retrospective excuse to cause the judge's downfall. The author considered himself to have fallen victim of such government reprisals when in the case of *Ogon v Commissioner of Police* he held that the detention of the applicant, as ordered by the State Government was illegal.
- (b) Fear that the Government will bear a grudge against the judge and get rid of him, as he said happened in the former Midwest Region of Nigeria to a Judge under military rule.
- (c) To secure favours. A judge may compromise himself in order to gain promotion or secure such amenities as accommodation, furnitures or motor vehicles.

*Intervention by influential people with the judges in cases before law courts.* He recalled a situation in the eighties where the Hon. Justice Atanda Fatai-Williams, then Chief Justice of Nigeria, revealed plans by some politicians to influence the court in respect of election matters before it. The Chief Justice was quoted in the front page of the *Tribune* newspaper dated 6 October 1983 as saying 'In the last few days all sorts of persons have tried to dictate to me who should sit on the appeals against the decisions of election tribunals' and warned that the courts must not be polluted by politician's pressures.

*Sacking of Judges.* The learned author argues that if judges cannot be freed from the threat of sacking, very few can be expected to dispense justice without fear or favour, the more so as they would have no job to go back to. (Under s 292(2) of the Constitution, a person who has held office as a Judicial Officer may not on ceasing to be a Judicial Officer for any reason whatsoever thereafter appear or act as a Legal Practitioner before any court of law or tribunal in Nigeria.)

*Appointment of judges.* The system of appointment has opened the door to politicians to impose half-baked candidates of ill-repute on the Judiciary as judges. The author observed that such appointees can hardly decide any issues in a manner contrary to the interest of their sponsors.

*Failure of the Nigerian Police to give effect to court orders.* The author recalled the outcry of the Hon. Justice Aguda, then Chief Judge of Ondo State, when the Police refused to enforce his order to arrest one Chief Adegborioye an electoral Commissioner in September 1977.

### **The current Nigerian Judiciary**

The Hon. Justice Bassey retired from the bench in 1972. His book was published in 2000, that is, about 9 years ago. I wish to look at the matters identified by Bassey J. at the time and consider them against current realities.

*Disobedience of court judgments and orders.* In very sharp contrast to the situation in the past, particularly under the military régimes of old, there has been, except in a few isolated cases, a remarkable level of compliance with and obedience by the Government of judgments and orders of the courts.

This testimonial is evidenced by the response of the President of the Federal Republic of Nigeria, Alhaji Umaru Musa Yar'Adua, to the decisions of the courts and tribunals which were unfavourable to the candidates of his ruling party. Elections were conducted in Nigeria on 27 April 2007 to fill the following offices: President of the Federal Republic of Nigeria; members of the National Assembly (Senate and House of Representatives) and members of the States House of Assembly. The results of the elections were predictably followed by an avalanche of petitions challenging the results and asking for their avoidance. In 3 of the 36 States of the Federation (Ondo, Edo and Rivers) not only were the election of the incumbents nullified for various reasons, but the petitioners were proclaimed as duly elected and installed in office. In all the 3 cases, the Governors removed belonged to the party of the Government in power at the centre but they all complied with the courts' orders.

*Appointment, discipline and removal of judges.* The National Judicial Council is the body that is constitutionally charged with the

appointment, discipline and removal of judges. The council is headed by the Chief Justice of Nigeria. In the States of the Federation, the Governors still have some measure of influence in the appointment of Judges, through their Attorneys-General and members of the State Judicial Council charged with making recommendation to the National Judicial Council. It is thus possible for nominees for appointment as judges to be politically motivated but all nominees are subject to ratification by the National Judicial Council which is known to have in the past rejected nominations where it was of the view that the nominees did not meet the criteria set down for appointment.

Where a Judge makes a genuine mistake in a decision, he is corrected by an appellate court. Where however the decision of a Judge is adjudged to be founded on fraud or corruption, it is classified as an act of misconduct and may earn a dismissal.

### **Peculiarities of election matters in Nigeria**

Although in all Commonwealth countries it is settled that election matters are *sui generis*, in Nigeria election proceedings are special proceedings for which special provisions are made under the Constitution (see *Oyekan v Akinjide* 1965 NMLR 381 383 and *Abubakar v Inec* (2004) 1 NWLR (PT 854) 207). However in addition to this consideration, election disputes in Nigeria are *sui generis* for a totally different reason. They generate a lot of interest and passion. One reason is the Presidential system of Government under which 'the winner takes all'; the high stakes of power, authority, money, position and patronage make winning an election a 'must'.

In the past, suspicions of election-rigging attracted instantaneous 'justice' in the form of murders of the suspects, arson, looting and the commission of all sorts of criminal acts. Sometimes, members of the same family found themselves on opposite sides of the political divide and embarked on mutual brutal destruction. The aftermath of the 1983 elections was characterized with mind-boggling tales of killings and other forms of brutality which contributed in no small measure to another military take-over soon afterwards.

Over the years however there has been a noticeable reduction if not total elimination of

killings and criminal conduct as a 'remedy' for alleged rigging of elections. This has been a result of increased political awareness; remorse, following the brutalities of past years; and most importantly a surge of trust and confidence in the ability of the Judiciary to right perceived wrongs in the conduct of elections.

### *Delay in election petitions*

Election petitions take a long time to determine. They therefore remain in the public domain for a long time during which in the process of reporting, facts and fiction contend for recognition in the minds of the public. In *Buhari v Obasanjo* ((2005)13 NWLR (PT.941) SC.1 AT 294 D-F), Pat Acholonu JSC observed that 'A situation where an election petition lasted more than 2 years for a 4-year presidential system leaves very much to be desired...'

As a way of avoiding the situation where a person is removed from office in the mid-term of his tenure on the ground that he was after all not duly elected in the first place, it has been suggested that a clause should be inserted in the Electoral Act limiting the period taken to conclude election petitions to ensure that no elected person assumes office until the conclusion of all the petitions in respect of that office. In the case of *Yusufu v Obasanjo* ((2003) 16NWLR (PT.847) 554) a similar clause in a repealed Electoral Act was adjudged as being unconstitutional in that it constituted a breach of the right to fair hearing of the citizen.

Early in his tenure, the present President set up a committee to review and propose amendments to the current Electoral Act. The committee was headed by the Hon. Justice Muhammadu Lawal Uwais, a former Chief Justice of Nigeria. The committee has submitted its reports to the Federal Government which has published its White Paper on it and indeed forwarded a bill reflecting the Government's thinking to the National Assembly. One of its recommendations is that elections be held about one year before the commencement of the term of office contested for. This is to give ample time for the tribunals and courts to conclude hearing of all petitions.

### *The massive magnitude of the work load*

Usually there is an avalanche of petitions; In some parts of the country it was party policy

that all their candidates who were defeated at the polls must file petitions to challenge the results irrespective of whether or not the elections were perceived as free and fair. The tribunals first had to try a matter before deciding whether it had merit or not. This ate up valuable time that could have been devoted to genuine cases.

There are usually a large number of witnesses and documents in particular cases. At one election petition tribunal where the present writer served as a Tribunal Judge, they sometimes had about 100 witnesses to contend with at a time. We had long sittings; on one day we sat for about 10 hours, 9 a.m. to 7 p.m. breaking for 1 hour for lunch.

However this was as nothing compared with the volume of parties, witnesses and documents in a presidential election petition. Belgore JSC (as he then was, sitting in the Supreme Court) in the already-cited case of *Buhari v Obasanjo* put the matter thus:

*The election tribunals were no doubt confronted with a very difficult task. ... It may be mentioned for posterity that the trial took 15 months with 139 witnesses by the petitioners, 100 for the 1st and 2nd respondents and 116 for the 5th and 6th to 268th respondents, - 355 witnesses and 268 respondents in all.*

### *Sensational and inaccurate newspaper coverage*

Nigeria boasts of a virile and fearless press. Many will say that this attribute came to play positively in resisting the excesses of past military regimes in Nigeria and accelerating transition from military to civil rule in 1999. However the press coverage of proceedings of election matters is sometimes sensational and slanted to suit the political leanings of their proprietors amounting sometimes to misrepresentation.

The danger is that such misrepresentation is capable of leading to a faulty prediction and expectation of the outcome of an election petition on the part of the public. When the outcome is at variance with popularly-held but misconceived opinion, the public loses confidence in the ability of the Judiciary to dispense justice 'to all manner of men without fear or favour affection or ill will'. If however the outcome of an election petition happens

perchance to be in congruence with the expectation of the public, they sing ‘Hosannah’ and the Judiciary is praised to high heavens in the tabloids. At other times however they cry ‘crucify them’.

By their training, judges are of course expected to be courageous, fearless, focused and unperturbed by public criticisms and concerned only with the facts before them and the applicable law. There is no doubt however that a Judiciary which totally loses the confidence of the ‘consuming’ public will lose respect and be an object of ridicule. As Pat Acholonu JSC said in *Buhari v Obasanjo*, ‘the beauty of law in a civilized society is that it owes its respect and due observance to the society’. I am in humble agreement with his Lordship; the fear however is that in craving that respect, the Judiciary may inadvertently play to the gallery and ‘miss the ball’.

The common law rule is that all matters pending before a court or other tribunal are *sub judice*. The press is at liberty to cover the proceedings but they most do so responsibly and ensure that such reports are as factual as can be whilst their comments are to be fair. The courts have an inherent jurisdiction to preserve its integrity. The Judiciary itself must therefore give effect to the *sub judice* rule and not hesitate to punish any infraction in contempt proceedings. No court is better placed to do that than the apex court, the Supreme Court of Nigeria. Once the signal is thus sent from the Supreme Court, the lower courts will be emboldened to follow suit and hopefully, press pranks will be minimized.

### *Abusive comments, even by lawyers*

Whilst journalists may be forgiven for serving sensational or inaccurate reports to their readers, what is there to say about Legal Practitioners who grant press and television interviews that are highly prejudicial to pending matters or insulting to the judges?

The settled practice is that the decisions of all courts may be commented upon or criticised constructively by lawyers and academics but such comments should preferably be made in law magazines and periodicals. Potentially, such publications extend the frontiers of knowledge, assist in law reform and are to be encouraged. However, self-serving press interviews or comments freely granted by lawyers with an axe to grind in the particular matters

constitute, in my view, a disservice to the legal profession. The practice exposes the judiciary to ridicule and is unbefitting of an officer in the temple of justice as all lawyers are.

### *Petitions, wild allegations and rumour-mongering*

Yet more evils that members of the Nigerian Judiciary have to contend with in recent times are rumour-mongering, unsubstantiated allegations of corruption, and the maligning of the character of judges. A lawyer once accused a Justice of the Supreme Court of corruption in open court. He had no proof. Following disciplinary hearings, the barrister involved had his name struck off the roll.

Some time ago, the President of the Court of Appeal, the Hon. Justice Abdullahi, in a press interview had to answer questions as to why it took so long to constitute an election panel of judges to hear pending appeals. He stated that many judges did not want to sit on the panels for fear of being maligned and accused of all sorts of imaginary offences. This is a most disturbing trend.

The unfortunate thing is that by its very nature, a rumour-mill is cheap to produce. It requires only one infantile mind to voice an untruth to another. In a credulous environment such as is to be found following elections in Nigeria, the rumour spreads like wildfire with devastating potential for loss of confidence in the Judiciary.

### *Hearsay*

A related challenge arising from rumour mongering is that its authors mistake rumours for facts. In *The Resolution of Election Disputes*, Barry H Weinberg expressed this view on the issue of proof:

*‘Some people who are caught up in an election believe that their conclusions are based on facts, when they are not based on facts at all. Instead, their view of their situation leads them to believe that inferences they make in their own favour are tantamount to facts. But inferences are only inferences and must be recognised for what they are, especially if you are a Claimant attempting to win a lawsuit challenging an election...’.*

As the Evidence Act excludes the oral testimony of a witness except that which was

personally witnessed by the maker, many litigants feel that they have not received 'justice' when they lose cases on account of their being not proved.

Indeed, some lawyers have proposed that the burden of proof in election matters should be reversed so that the burden of proving that the declared winner at an election was duly elected should be on the winner and not on the petitioner. Their reasoning is that it is very difficult to prove an allegation of fraud or other criminal acts in an election petition as the burden required, being one of proof beyond reasonable doubt, is almost impossible to discharge. The difficulty was acknowledged by Acholonu JSC in *Buhari v Obasanjo* in these words:

*'The very big obstacle that anyone who seeks to have the election of the president or governor overturned is the very large number of witnesses he must call due to the size of the respective constituency. In a country like our own, he may have to call about 250,000 to 300,000 witnesses.'*

### *Infrequency of prosecutions*

The Electoral Act identifies certain acts of electoral misconduct, e.g. forgery, impersonation, thuggery and bribery, and makes them punishable on conviction with fines and or a custodial sentence. Although on several petitions, elections were nullified on grounds of one form of electoral misconduct or another, it is strange that there are hardly any records of successful prosecution and conviction of offenders. Many argue that there is indeed nothing wrong with our Electoral Act *per se* and that what is lacking is enforcement of its provisions.

### **Conclusions**

The present 'first past the post' electoral system permits a candidate to take all the 'rewards' with what is actually a minority vote. This can easily be the case where there are many

candidates who each secure fewer votes than the winner. A system which also incorporates an element of proportional representation is considered more equitable.

The Electoral Act needs to be amended to ensure that elections are more transparently conducted. Continuous political education of the masses will ensure that many more people appreciate the value of their votes and recognise the foolishness of selling such votes.

The Police should be educated on their constitutional role of investigating criminal electoral offences, detecting and prosecuting offenders.

The press too must recognise the 'power of the pen'. Whilst they should be fearless and courageous in performing their roles, they should be very fair and exhibit a high sense of responsibility.

Lawyers are officers in the temple of justice. They should recognise that their first duty is to assist the courts in the ascertainment of the truth; not to play the scripts of vested political interests by running down the courts, intimidating judges, or maligning the character of judicial officers following any unfavourable decision.

As for the judiciary, the common consensus is that the Election Petition Tribunals and Appellate courts have, particularly since the general election of 2007, restored the confidence of the generality of the people in their ability to dispense justice 'to all manner of men without fear or favour, affection or ill will'. The judiciary itself recognises that the preservation of peace and order in the Nigerian society, now more than ever before, rest on an incorruptible, fearless, diligent and competent judiciary. The Chief Justice of Nigeria, the Hon Justice Legbo Kutigi said in June 2009, 'Events of our time have made it imperative for the people of Nigeria to depend on the judiciary for their practice of democracy.'

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# THE PROTECTION OF RELIGIOUS FREEDOM IN THE COMMONWEALTH

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This article offers an overview of the legal protection afforded to religious liberty across a selection of nations of the Commonwealth, considering cases in which there has been tension between religion and the law. It will make reference to the United Kingdom, India, Nigeria, New Zealand, Australia, Canada, Guyana, Trinidad and Tobago, and Jamaica as representative of the religious traditions and continents represented in the Commonwealth. They are a selection of States regulating religion across several different continents and diverse societies with differing historical and political traditions.

The role of the State in regulating religion is in itself an interesting concept, implying the rule of religion by a superior state body which is sovereign over all, but neutral between them. It may imply that religions or religious groups need in some ways to be controlled and have their practices restrained by the State. This model has been adopted by a number of States, but is classically expressed in the United States’ constitution’s approach to regulating religion, although ironically the US is one of the most religious societies on earth both in professed religious adherence and in religious observance. Within the Commonwealth there are different models of relationship between the State and religious groups which are often the product of historical compromises and political developments.

The article examines how the right to freedom of religion is protected in the Constitutions of the Commonwealth, and how in practice religious freedom is respected by the State and between members of civil society. Religion and religious groups often play a key role in defining cultural practices, and in some instances political and civil relationships. Indeed, historically, and also contemporaneously in many States both within and outside the Commonwealth, religion may have played an essential role in defining the law, and in creating a national identity. A brief survey will be undertaken of the religious traditions of the

States identified above. To achieve this reliance will be made on the United Nations’ jurisprudence on freedom of religion, the reports of the Special Rapporteur on freedom of religion and belief, and the US State Department which in its ‘International Religious Freedom Report 2008’ undertakes an extensive survey of the observance of religious belief through its embassies and consulates around the world.

## **The Commonwealth religious context**

As one would expect with an international organisation of 53 states incorporating a third of the world’s population, the Commonwealth has a very varied religious composition. This is true not just across the member states, but also increasingly within them. Indeed it is a consequence of the migration across the nations of the Commonwealth throughout its history. It is certainly a reason why the United Kingdom has increased in its religious diversity, and thereby become a multi-cultural society since 1945, and the same trends can be detected in other nations such as Australia and Canada.

Some nations in the Commonwealth have always been pluralist in their religious make-up. India being the best example as the birthplace of a number of the world’s major religions, Hinduism, Buddhism and Sikhism, and incorporating very large populations of other religions who for historical reasons have migrated to the sub-continent, most significantly Islam. The vast majority of the population of India is, however, Hindu, stated to be 80.5% of the population in the 2001 Government census. It is often in relation to disputes surrounding the pre-eminence of Hinduism that legal questions about the freedom accorded religion in India are raised. As will be seen below India has a complicated federal system of laws which relate to the person and religion as well as a central constitution which affirms that the Indian State is secular in nature. The Special Rapporteur of the United Nations commended this provision in her 2008 report on India.

In more recently pluralist nations such as the United Kingdom, religious freedom, for the most part, has been successfully protected, as is recognised by both the Special Rapporteur and the US State Department in their reports. This is despite the fact that the religious diversity of the UK has increased tremendously in the half century since 1945, as has the growth in the numbers of those who profess no religion or adhere to humanist beliefs. Christianity remains the major religion with 72% of the population stating they are Christian but 15% now state they hold no religious belief, and there are sizeable numbers of Muslims, Hindus, Jews, Sikhs and other faith groups. As is commented on by the Special Rapporteur and the State Department amongst others, the confessional aspect of religion in the census, by which I mean adherence or claimed allegiance to a religious tradition, is not reflected necessarily in attendance at religious services, in the practical expression of that belief. The State Department Report recorded 4 million Christians attending services on a regular basis, 6.6% of the population of the United Kingdom. Peter Cumper has argued that this trend in the United Kingdom is in marked contrast to other western states such as the US and Ireland.

In Australia very recent migration of work-seekers has had a significant impact on the religious demography of the country. A once primarily Christian country, the census in 1911 reporting 96% identifying themselves as Christian, has become one where only 64% identified with this religion. Within these wider trends there was growth in some religious adherence, particularly Pentecostal and charismatic religious groups, which grew by 12.9% in the period from 2001 to 2006. Similar trends can be discovered in Australia's near neighbour, New Zealand, where only 56% of the population identified themselves as Christian in 2006, a fall of 5% from five years before. Also, a very large proportion of the population identified themselves as having no religious affiliation, 34.7%. This trend can be contrasted with that in Canada where the Christian population remains very strong with 77.1% of those in the 2001 census belonging to Christian denominations, or claiming Christianity as their religion.

On the continent of Africa, Islam and Christianity, both missionary religions, have

radically altered the religious composition of many states in the last century, and they often come into conflict with one another on particular issues. This is especially the case regarding control of the State and central government, many of the African nations of course being amalgams of disparate ethnic and religious groups, for example in Nigeria where there is a predominantly Muslim north and Christian south. In Nigeria the two religions are used to polarise approaches to social and political problems, obvious examples being the position of women and homosexuals. The missionary fervour of the two religions has attracted criticism as undermining the position of traditional African religions. It was noted by the US State Department, however, that a considerable number of Africans continue to practise their indigenous religions alongside practising Islam or Christianity. Nor is Africa the only continent represented in the Commonwealth which has significant minority groups practising traditional religions, Canada has the indigenous Indians, Australia the Aborigines, and New Zealand the Maori.

### **Constitutional protections of the freedom of religion in the Commonwealth**

Before considering specific cases concerning freedom of thought, conscience and religion from the Commonwealth, consideration is required of the constitutional provisions. In the development of written constitutions since the nineteenth century religious freedom has always been a substantive right, and in the twentieth century national provisions have been supplemented by international treaties and covenants in this area.

Constitutional protections can be found in the vast majority of the Constitutions in the Commonwealth. This is true in states which do not have a formal codified Constitution, as it is in States with new Constitutions drafted since independence. In the former category are the United Kingdom and New Zealand both of which have statutory provisions, in the Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990. These are not entrenched provisions, however, and they were specifically enacted in this form to preserve the supremacy of Parliament to enact provisions overriding the right to freedom of religion. The latter category consists of most of the other States covered by this article.

Both types of provision have a common source in international law in the Universal Declaration of Human Rights ('Universal Declaration') 1948 and the Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention') 1950. Many of the nations of the Commonwealth are signatories to the main provisions enacted by international agreements passed since this time, most notably the International Covenant on Civil and Political Rights ('ICCPR'). Some States may also be signatories to other international agreements and organisations which promote freedom of religion. The Commonwealth members in the European Union provide one example: the Union proclaimed its Charter of Fundamental Rights in 2000, a provision which protects the right to freedom of religion under Article 10. The main characteristic of the drafting of these provisions may be said to be the conferral of a substantive right with the qualification of the right through various derogations available to the State. These provisions can be seen across many different states and continents represented in the Commonwealth.

The Human Rights Act 1998 incorporated the European Convention into United Kingdom domestic law, and came into force on 2 October 2000. Under Article 9 of the European Convention a person is entitled to freedom of thought, conscience and religion including the right to change his religion or belief, and freedom either alone or in community with others, and in public or private to manifest his religion or belief in worship, teaching, practice and observance. The provision goes on to state that the freedom shall only be subject to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public order, health or morals, or for the protection of the rights and freedoms of others. The Act raised many concerns at the time it was being passed through Parliament from those who believed that it would be used against religious bodies in some aspects of their teaching, some key areas being in relation to equality and sexuality. Consequently, Section 13 was incorporated requiring the courts to pay particular attention to the rights to freedom of religion, and of freedom of speech, when interpreting the Convention rights.

The New Zealand Bill of Rights Act 1990 protects freedom of religion under s.13

providing that 'everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and hold opinions without interference'. There are clear echoes here of the Universal Declaration and the European Convention. Section 14 of the Act deals with the right to freedom of expression, specifically providing for the right 'to seek, receive and impart information and opinions of any kind in any form'. Finally s.15 provides the individual with the right to manifest that person's religion or belief in worship, observance, practice or teaching, either individually or in community with others, and either in public or private.'

The introduction of a Bill of Rights polarised opinion, and in consideration before the select committee it was argued that it would only protect individual rights and not the rights of groups or associations, a similar argument to that raised above in the United Kingdom, and one which particularly worried the Churches. The proponents of the Bill answered this by arguing that it would protect the interests of minorities and disadvantaged groups, which would not otherwise receive protection from the democratic and electoral system, and would also further the State's compliance with international obligations such as those under the ICCPR.

The Indian Constitution has provision comparable to those in the United Kingdom and New Zealand. Its Article 25 reads:

*'Subject to public order, morality and health and to the other Fundamental Rights, all persons are equally entitled to freedom of conscience and freely to profess, practise and propagate religion. But this does not affect any law regulating any economic, financial, political or other secular activity associated with religious practice or providing for social welfare or reform or the throwing open of public Hindu religious institutions to all classes of Hindus.'*

This is a very similar framework to that contained in the European Convention, albeit that in this provision special mention is made of the Hindu caste system in order to make explicit that this is not subject to the constitutional provision. There are other minor differences in the exact wording, but substantially the provisions protect the same rights.

Under the Indian Constitution religion need not be theistic. In the United Kingdom case of *R v Registrar-General ex parte Segerdal*, belief in a deity was held to be a fundamental requirement of the legal definition of religion by Lord Denning. In obiter comments he did concede that there may be religious groups which fall within the definition of religion, even though not theistic, and he cited the example of Buddhism. It is probable that this provision was included in the Indian constitution precisely because of the significance of Buddhism in the subcontinent. In India deciding what constitutes an essential part of a religion must be ascertained from the religion's own doctrine. The Constitution makes detailed provision in respect of State funding for educational establishments which offer religious instruction.

As in India in Australia there is a clear separation of Churches/official religions and the State. Section 116 provides that:

*'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.'*

In *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943), a law suppressing the Jehovah's Witnesses as a subversive organisation prejudicing the defence of the Commonwealth and the prosecution of the war was upheld as not infringing this constitutional protection. It is to be presumed that this was because of fears related to national security during the Second World War and that such a decision would be much less likely today.

The proclamation of the West Indian Bills of Rights followed the independence movement and the creation of Constitutions across the West Indies beginning in 1961 with the Guyana Constitution, followed by those of Jamaica, and Trinidad and Tobago in 1962. These States took as their model, with one exception, the European Convention. The pattern was set in the Jamaican chapter on Fundamental Rights which derived from the Nigerian independence Constitution and that in turn from the European Convention. It can clearly be seen here the degree to which there

is a shared heritage of civil and political rights across the member states of the Commonwealth, being derived ultimately from the Universal Declaration and the European Convention.

### **A comparison of freedom to manifest religious belief across the Commonwealth**

Having considered the religious context of some of the States of the Commonwealth, and looked at the constitutional protections which those States share, the final part of this article will briefly consider some specific instances and cases where there has been a claim that the right to freedom of religion has been infringed either by the State or by others. It is important to differentiate between the infringement of a right by the State in its legislative capacity or as the Executive, and the State's obligations as well to support and encourage freedom of religion within its territory, and in some cases to restrain other citizens from infringing the rights of others. Obviously what follows is not exhaustive, but draws on various sources including the jurisprudence of the United Nations where challenges have been made under the ICCPR.

Conflict between the State and religion can happen in a variety of contexts precisely because religion plays such an important role in many aspects of many people's lives. Amongst other matters it touches upon birth, adolescence, education, politics, patterns of Church/Religion-State relationships, dress, diet, sexuality, marriage, ethics, criminal law and death, and of course teaches about the purpose and meaning of life, and what happens after death. In some instances the conflict between the two can be extreme, and legislators must be aware of the potential impact of their policies on religious faith groups. It may well be in some instances impossible to reconcile the two, but an assumption behind the guarantees reviewed above of the protection of freedom of religion, and of the democratic process, is that respect will be given to religious sensibilities.

This is not to argue that religions should have a privileged position, but that the interest of associations and collective groups, of which religious faith groups form a vital part, should also be regarded alongside those of the individual. Isolated individuals with no

network of social or community support are the most vulnerable to abuse of his or her rights by a State body. It is a fundamental principle of a democratic system, not just that there should be rights granted to individuals, but that there should be strong associations in civil society which can offer an alternative to the power and influence of the State.

An area which often gives rise to tensions between religion and law is in respect of marriage and gender relations, particularly women's rights and sexuality. Across the Commonwealth attitudes to these issues differ and are certainly influenced by the cultural and religious background of the State in question. Sometimes it may be difficult for us to make the imaginative leap into traditions which are so contrary to our own. A good example of this for westerners is in relation to the practice of polygamy. In the case of *State of Bombay v Narasu* (1952) it was argued that a provision imposing monogamy on Hindus was a breach of Article 25 of the Constitution. It was maintained that polygamy was a tenet of a Hindu's religion necessary for his salvation. The court held that such interference would be justifiable on the grounds of social welfare and the protection of the rights of others. This was despite the fact that Muslims were able to practise polygamy under the relevant laws of the federal state.

In relation to homosexual conduct, the States of the Commonwealth differ significantly, some still having criminal sanctions for homosexual behaviour, whilst others confer civil rights to marry or enter into a civil partnership. Often these laws can be traced to Judeo-Christian and Islamic origins based on the prohibitions on homosexuality found in the Old Testament. Sometimes in those States where civil rights have been granted this has led to conflict between the State and Churches and other Faith groups. In the United Kingdom civil legislation allowing gay couples to jointly adopt children resulted in the Roman Catholic Church closing its adoption agencies. It should be remembered that within religious organisations there is debate as to the correct teaching on sexuality, and the promotion of tolerance and inclusivity. Sometimes this results in tensions within the organisation itself as is the case in the Anglican Communion. In the United States, the Episcopal Church has quite radical provisions endorsing equality for all

regardless of their sexual orientation in Canon I.17.5. This Church also ordained the first openly gay bishop, and comparable developments can be seen in the Canadian Church where same-sex blessings have been carried out. An interesting point to note is that religions can afford internal protection to human rights in their own law.

Education is another area in which religion can be brought into conflict with the secular law and which raises questions about the privileges some religions receive in relation to educational provision. For example, in Canada Ontario Roman Catholic schools receive state support, but other religious groups do not. This provoked litigation before the Human Rights Committee of the United Nations in the case of *Tadman v Canada*. The authors were representatives of various religions and humanists seeking removal of the public funding for Roman Catholic schools. The Committee held that their rights under the ICCPR had not been infringed as they failed to demonstrate how they were disadvantaged or adversely affected by the public funding of the Roman Catholic schools. In Australia there was controversy in 2006 over the appointment of ministers by the government as part of a school chaplaincy programme. Opponents of the reform argued that it would infringe section 116 of the Commonwealth constitution and amount to a *de facto* establishment of religion. In other states such as the United Kingdom the provision of faith schools funded by the State is relatively uncontroversial.

*Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* is a leading case concerning religion in the United Kingdom, although it did not specifically deal with Article 9 arguments under the European Convention. One of the points argued before the Court of Appeal and the House of Lords was whether a Parochial Church Council ('PCC') is a public authority under the Human Rights Act 1998, and consequently obliged to act compatibly with the rights protected. It also raised issues about the nature of the Church of England's establishment, the Church's reliance on the European Convention as against the State, and the infringement of the right to peaceful enjoyment of property. The House of Lords decided that a PCC was not a public authority as it did not fulfil a governmental function. It may be argued that

the position taken by the Law Lords in this case reflects changing attitudes towards the public and private regulation of religion. Establishment continues to raise some objections as was expressed to the Special Rapporteur to the United Kingdom when she visited in 2007, an objection recorded by the Sikhs being that the King or Queen was chosen on the basis of upholding the Protestant Reformed religion.

If we take the example of regulation of offence to religious belief, we find that there are similar provisions in many of the States of the Commonwealth. Chapter 5 of the Indian Penal Code 1860 provides that no man may insult the religion of another in the interest of public order as a matter of government policy. In England and Wales the law of blasphemy protected the doctrines of the Church of England, and Christianity in general in so far as the teaching of that religion coincided with Anglican doctrine, until it was repealed by the Criminal Justice and Immigration Act 2008, s.79(1). The provisions of the law of blasphemy had been subject to intense scrutiny for some years since the last prosecution in 1979. They had been criticised by the Special Rapporteur in her report referred to above. There have been provisions introduced to protect religious groups from hatred such as the Racial and Religious Hatred Act 2006 coming into force on 1 October 2007.

## Conclusions

This article has aimed to give an overview of the religious diversity in the Commonwealth, the context in which the protection of religious freedom operates in certain States, the formal provisions in the constitution, some specific instances of the protection of religious freedom and cases where religion and law have come into conflict. To do justice to an organisation with such diverse member States, as well as the religious traditions represented in quite a short piece is very difficult. However in general it can be concluded that across the States examined there is a high degree of protection of religious rights and freedom to manifest these in practice. There are clear links between the legislative provisions enacted by the different States examined and a high level of co-operation with international bodies protecting this specific right.

The arguments of militant atheists such as Professor Dawkins notwithstanding religion, not least in the western world through the development of the canon law, has played a fundamental part in building and maintaining civil society. This is not to deny that there have been periods in history in all parts of the Commonwealth where religion has had a negative impact, both wittingly and as a justification for political ends in creating conflict. It has been an argument of this article, however, that the maintenance of strong religious traditions is in part a contribution to the maintenance of a strong, democratic society, in which respect is given to believers of all persuasions.

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# HOMOSEXUAL LAW REFORM: AN ONGOING BLIND SPOT OF THE COMMONWEALTH OF NATIONS

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*The Hon. Michael Kirby AC CMG, formerly a Justice of the High Court of Australia 1996-2009; Laureate of the UNESCO Prize for Human Rights Education; former President of International Commission of Jurists. A paper from the Commonwealth Law Conference, Hong Kong.*

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I will state my basic proposition at the outset. In forty-one of the fifty-three countries of the Commonwealth of Nations, the criminal code punishes adult, private, consensual homosexual acts. It does so as a legacy of one of three very similar criminal codes (of Macauley, Stephen and Griffith), imposed on colonial people by the Imperial rulers of the British Crown.

Such laws are wrong:

*Wrong in legal principle because they exceed the proper ambit and function of the criminal law in a modern society;*

*Wrong because they oppress a minority in the community and target them for an attribute of their nature that they do not choose and cannot change. In this respect they are like other laws of colonial times that disadvantaged people on the ground of their race or sex;*

*Wrong because they fly in the face of modern scientific knowledge about the incidence and variety of human sexuality; and*

*Wrong because they put a cohort of citizens into a position of stigma and shame that makes it hard to reach them with vital messages about safe sexual conduct, essential in the age of HIV/AIDS.*

Commonwealth lawyers, who are necessarily involved in the administration and enforcement of such laws, have a personal, professional and moral obligation to lift their voices in this conference and at home, to ensure that, belatedly, action is taken to lift the blindfold and to co-operate in replacing these criminal laws. They are a legal legacy that has long since passed its use-by date. In the new Commonwealth, they were imposed without any participation of the people governed by them. They have been uniformly repealed or

removed in the older members of the Commonwealth, from whose culture they were exported to the new. On this subject, lawyers, as guardians of justice, should be silent no longer. Commonwealth lawyers, who combined to end racial discrimination, to reduce gender discrimination and to tackle other human rights issues, should now combine to remove this remaining unlovely legacy of the Empire.

Having stated these propositions, it is proper for me to acknowledge the sensitivity that must be displayed in approaching this topic:

## **Diverse Commonwealth**

First, I must do so with appropriate respect for the diversity and cultural variety of the Commonwealth of Nations, the looseness of its institutional arrangements and the multiplicity of the viewpoints that exist in its fifty-three member states. The new United Nations High Commissioner for Human Rights, Ms Navanethem Pillay, a Commonwealth citizen herself and a former judge, in her first exposition of her global mandate, invoked the words of her fellow South African national, Nelson Mandela, who, she declared, ‘has taught me that keeping an open mind towards other people’s experiences and points of view – no matter how different from one’s own – and open[ing] channels of communication may serve the interests of justice better than strategies that leave no room for negotiation’. This is good advice for all proponents of human rights. It comes naturally to lawyers because we are used to hearing the other side.

## **Natural Respect**

Secondly, the days are long gone where speakers with a white face can lay down the law to others in the Commonwealth and expect that what they say will be accepted

without question. The independent dignity of each member state of the Commonwealth must be respected. Each one of us loves our native land. None of us likes to come to an international meeting and hear our country and its laws criticised. Where this is done, the criticism must be proffered with respectful tones. They must acknowledge the national institutions and the differing viewpoints of each land, whilst offering ideas based on suggested propositions about universal human rights, informed by modern scientific knowledge;

### National Failings

Thirdly, as an Australian, I must acknowledge that my own country, in the past, and sometimes even today, is not a perfect example of respect for fundamental human rights. The injustices towards the Aboriginal people were partly corrected by the work of lawyers and by a decision of the High Court of Australia in the *Mabo* case ((1992) 175 CLR 1 (AusHC)). This recognised native title, and was influenced by universal principles of human rights. White Australia was enshrined into our laws up to the 1960s. In part, it was the influence of the Commonwealth itself that helped us to see the injustices and wrongfulness of those laws and to repeal them. Women suffered many disadvantages under Australian law, and some remain. The same is true of applicants for refugee status. The laws against homosexuals were slowly removed in Australia between 1972 and 1996. As recently as last December, it took a raft of federal laws, enacted by the Australian Parliament, to remove the financial inequality of homosexual citizens under federal statutes. So we took our time over these subjects and in many ways we have been followers, not leaders, in the initiatives started by others.

### Journey of Discovery

Fourthly, I must state that my own journey in addressing these remarks has been a somewhat slow and cautious one. Like every law student of my age, I learned of the sodomy laws in the first year of my university course. Because of my own sexual orientation, I listened quietly to the lecturer at that point because I knew that these were laws that targeted me, personally. They made me a second-class citizen. When, years later, after the Tasmanian Parliament declined to repeal those laws in the last Australian jurisdiction that kept them in place,

I cautioned the reformers against their proposal to take Australia to the United Nations Human Rights Committee. There was no way, I declared, that that Committee, speaking for the whole world, would uphold a complaint against Australia for a breach of the *International Covenant on Civil and Political Rights* (ICCPR). I suggested that the complainants were not being actually being prosecuted. They lacked standing. There was no justiciable question. The issue was controversial. Leave it alone, I said. Fortunately, this advice was politely ignored and in *Toonen v. Australia* (1994) the Human Rights Committee of the United Nations upheld the complaint. Most members of the Committee did so on the basis of an unwarranted intrusion of the criminal laws into the privacy guaranteed by the ICCPR to private sexual activity. One member of the Committee added a justification based on notions of sex discrimination and unequal treatment in the law. Likewise, when in 1998, the New Zealand Court of Appeal in *Quilter v. Attorney-General* ([1998] 1 NZLR 523) rejected the complaint that the lack of provision for same sex domestic unions raised an issue of unjust discrimination under the Bill of Rights Act of that country, I rejected the dissenting opinion of Justice Ted Thomas. And this was despite the fact that I was myself in such a union that had then lasted 30 years and is still going strong now at 40 years. We all know that lawyers are sometimes blind to injustice. All of us know that enlightenment is a life-long journey. When someone with special reasons to be enlightened is blind to perceptions of injustice and inequality, one can scarcely blame others for failing at first to see the need for change.

In Australia, the big changes that came about in our laws on Aboriginals (including the National Apology given to the Aboriginal people by all sides of politics in Australia in 2008), came about because people with power had come to know Aboriginals and to see the world through their eyes. Likewise, 150 years of fear of Asian and African immigrants began to fall away when we came to know them with all the strengths and faults of any other people, now seen as neighbours and friends. Similarly, with women, with Protestants and Catholics, and most recently with Islamic, Hindu and other citizens of Australia. Likewise, with gay

citizens. It is so much harder to hate and fear people whom you know.

One can go on pretending. But there have always been homosexual judges, lawyers, clerks and officials. The pretence begins to melt away only when it becomes safe to do so. Part of the process of challenging stereotypes of changing attitude comes about when people like me stand before people like you and tell it as it is. Not aggressively or rudely. But respectfully and truthfully. And in the knowledge that most intelligent people, informed of the facts and of the science, will come on that journey of enlightenment. They will conclude that the time has come to bring an end to the oppression and injustice and irrationality that is involved in punishing homosexual people for private, adult, consensual conduct, that is important to their identity and fulfilment as human beings.

Those in the Commonwealth who have suffered oppression for their race or skin colour; those who have suffered injustice because of their faith; those who have been oppressed because of slavery, poverty or racial intolerance, should be foremost in demanding a change to the Imperial laws that continue to bring stigma and danger to homosexual citizens of the Commonwealth.

How easy it would be for me to move around in the honour of three decades of judicial office. Decorated, elevated, respected. The closet (as the Americans call it) is generally such a safe little place. But it is fundamentally dishonourable. And it is part of the conspiracy of irrationality, that should have no part in a learned profession that is committed to justice, fundamental rights, courage, truth and honesty. It was my 40-year partner, Johan (from The Netherlands, a non-Commonwealth country that since 1803 had not criminalised homosexuals) who insisted that we stand up and do so for younger people in Australia. Today I do so for younger, and not so young, people throughout the Commonwealth of Nations whose voice I am to the judges and lawyers here assembled in Hong Kong.

### **But is there a problem?**

With the economic meltdown, the burden of poverty, the variety of excuses and the failure to enforce some of these laws, can we conclude this is just not a priority? That it is an

awkward subject for some? That many would prefer not to think about it and to turn a blind eye to it? Sadly, it is a big problem. And I mean no disrespect to anybody's nation by giving some examples. I have already accepted that my own nation, in this and other respects, has much to learn from others. So, most countries of the Commonwealth have, I suggest, something to learn from me on this subject.

The statistics published by the South and Southeast Asia Resource Centre on Sexuality tell a story:

*In 2008, no less than 86 member states of the United Nations (UN) still criminalize consensual same sex acts among adults. Of these, nearly 50% (as many as 41) are in the Commonwealth. Within the Commonwealth, 41 out of 53 countries make it 77%. This percentage is much lower within the UN – 86 out of 192 countries makes it 45%. It is even lower in the non-Commonwealth UN, 32%. These statistics show that sodomy laws exist in the larger part of the Commonwealth (77%) than the non-Commonwealth (32%).*

Sadly, in most parts of the Commonwealth, the laws are no dead-letter having a no official backing. Far from being unenforced and no more than an embarrassing legal relic, the criminal laws are used in many lands to sustain prosecutions, police harassment and official denigration and stigmatisation.

In Zimbabwe (presently suspended from the Commonwealth), President Robert Mugabe voiced many attacks on homosexual citizens in the early 1990s, describing them as 'un-African' and 'worse than dogs and pigs'. Reportedly, he told crowds: 'We are against this homosexuality and we as chiefs in Zimbabwe should fight against such Western practices and respect our culture'. At the same time, President Daniel arap Moi of Kenya claimed that homosexuality was 'against African tradition and biblical teachings. We will not shy away from warning Kenyans against the danger of this scourge'.

In Zambia, a government spokesman proclaimed in 1998 that it was 'un-African and an abomination to society which will cause moral decay'. The Vice-President of Zambia at the time warned that 'if anyone promotes gay

rights after this statement the law will take its course. We need to protect public morality'. The previous President of Nigeria, H.E. Olusegun Obasanjo in 2004, declared that 'homosexual practice is clearly un-biblical, unnatural, and definitely un-African'. Taking up the theme, the Nigerian media called for the placement of 'barricades against this invading army of cultural and moral renegades before they overwhelm us'.

Reportedly in the northern Nigerian states of Kano and Zamfara, the criminal laws provide for punishment of 100 lashes for unmarried offenders, and death by stoning for married ones. Lesbian acts get by with up to 50 lashes and six months imprisonment. According to the report of the United Nations Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions, he found in the Kano prison a man awaiting death by stoning for homosexual acts, after a neighbour had reported him to the local Hispah committee – young men patrolling the streets to suppress 'immorality'. In September 2006, a Nigerian representative dismissed criticism that execution for homosexual offences was excessive. Reportedly, he said: 'What may be seen by some as a disproportional penalty in such serious offences and odious conduct, may be seen by others as appropriate and just punishment'. A national newspaper declared that legislation to 'put a check on homosexuality' was 'progressive'. New laws have been proposed and passed.

In Uganda, an influential pastor, well-known for his campaigns against the use of condoms in response to the HIV/AIDS epidemic, urged that 'homosexuals should absolutely not be included in Uganda's HIV/AIDS framework. It is a crime and when you are trying to stamp out a crime you don't include it in your programs'. He named 'homosexual promoters' on his website, thereby making them a target for violent attacks. In 2007, hundreds marched to threaten punishment for homosexual people calling them 'criminal' and 'against the law of nature'. Government ministers reportedly demanded tougher anti-gay measures, one of them declaring that 'Satan is having an upper hand in our country'. The President of Uganda, H.E. Yoweri Museveni, instructed the criminal investigation department to 'look for homosexuals, lock them up, and charge them'. Reportedly, police responded, rejecting the

request 'let us live in peace'. Mr Buturo, now the Ethics and Integrity Minister, told the BBC that the relevant agencies should 'take appropriate action because homosexuality is an offense under the laws of Uganda ... The penal code in no uncertain terms punishes homosexuality and other unnatural offenses'. Reportedly, tabloid media have jumped on the bandwagon, publishing names of allegedly gay men. Even the Queen, Head of the Commonwealth, was drawn into this campaign when she visited Uganda for a CHOGM meeting. The crowd was demonstrating, presumably, against the British government's initiatives. It met her, protesting against tolerance of gays. As if she could properly do anything to tighten the noose.

In India, although s.377 of the Indian Penal Code repeats the colonial offence, it is usually invoked only for non-consensual sexual conduct or acts against under-aged persons. Yet its presence of this overreaching law is occasionally the basis of reportedly oppressive police intervention against homosexual people and organisations. In 2001, police in Lucknow raided the office of Naz Foundation International and Bharosa Trust, bringing charges under s377 on the basis of criminal conspiracy and the sale of 'obscene materials'. Reportedly, these were standard information for men having sex with men, to help protect them from acquiring the AIDS virus. Responding to an enquiry by a Swedish delegate about the retention of s377, an Indian official told a United Nations body that the provision had been imposed on India undemocratically by the British colonial government and reflected 'the British Judeo-Christian values of the time'. In the Delhi High Court, a case stands for judgment in a constitutional challenge to the validity of s.377 under the human rights provisions of the independence Constitution of India. Interestingly, the Delhi High Court had originally rejected the challenge on the basis that the petitioner had no standing and that the issue was not justiciable. The Supreme Court of India ordered the matter back to that court for determination on the constitutional merits. Conflicting submissions have, reportedly, been advanced before the Court by the Union Ministers for home affairs and health.

In Malaysia, s.377 of that country's penal code was invoked in the prosecution of the former

Deputy Prime Minister, Anwar Ibrahim. The potential for such laws to be misused is clear. The need for protection of the young and of all persons against unconsensual sexual acts by anyone is equally clear. But the risk of pandering to vigilante attitudes is now a real and present danger in most parts of the Commonwealth.

Recently, the former United Nations AIDS ambassador, Stephen Lewis, urged change of the law in Jamaica. But the Prime Minister, the Hon. Bruce Golding, declared that there was no intention of liberalising the ‘buggery laws’. Mr. Lewis reported investigations, in the AIDS context, of many instances of sheer violence against people in Kingston who were, or were thought to be, homosexual. The popular culture of violent rap music, targeted at gay people, has few effective antidotes in the Caribbean Commonwealth.

In Sri Lanka, which likewise inherited a variation of s.377, the law was changed in 1995, but only to extend the offence from men to women as well. A leader of a gay support group reportedly left the country because of death threats. Tabloid media in Colombo in 2000 published a letter urging that lesbians be raped ‘so that those wanton and misguided wretches may get a taste of the zest and relish of the real thing’. The Press Council rejected a complaint about this publication. Instead, it imposed a fine on the complainant for daring to complain.

In Singapore, despite a recommendation of an independent committee of the Law Society, urging repeal of the local equivalent of s.377, only one reform has succeeded. When the courts held that heterosexual couples in consensual adult sex, would be criminally liable for ‘unnatural’ acts of oral intercourse, they were excused by an amending law. But the legislature declined to reform the law with respect to homosexual people in Singapore. The leading opponent of reform, an associate professor of law (who had been a strong critic of the Malaysian enforcement of religious principles concerning apostasy) spoke in the Singapore Parliament against ‘the sexual libertine ethos of the wild, wild West’. Although herself a proponent of American fundamentalist Christian minority beliefs in Singapore, she declared that ‘religious views are part of our common morality’ and that ‘diversity is

not a licence for perversity’. She did not, apparently, see the inconsistency of these propositions with her stance on apostasy. The amendment Bill was defeated in Singapore. Homosexuals were stereotyped as examples of the ‘wild, wild West’ and ‘the sexual libertine ethos’, even though they might only have been seeking the lawfulness of a loving, intimate, personal relationship for themselves.

### Science, progress, religion and universal rights

There are, of course, other voices within the Commonwealth of Nations and the world. It could scarcely be otherwise be given the enormous changes that have occurred in the past fifty years, relevant to our approach to this area of the law:

First, there is a growing appreciation of the science of sexual diversity. Beginning with the early writings of Havelock Ellis and Freud and encouraged by the studies of Alfred Kinsey in the United States and his successors, it became widely known, after 1946, that sexual variation was not uncommon. Both in men and women, there is a small but stable proportion of people who are exclusively sexually attracted to their own gender lifelong. In the case of men, this is approximately 4% or 5% of the population, and women somewhat smaller. The growing power of these scientific investigations led to the decision of the American Psychiatric Association, in 1973, to delete homosexuality from the list of ‘psychiatric disorders’ and to amend the *Diagnostic and Statistical Manual* accordingly. The exact cause or causes of homosexuality have not yet been established in a way that is universally accepted. Some researchers suggest that sexual orientation is probably genetic in origin. Others suggest hormonal changes in pregnancy or early development as causes. But virtually all agree that the sexual imprint exists from the earliest time and cannot be turned on and off according to whim. Any attempt by the law to do so is bound to fail.

Secondly, the notion that s.377 of the *Penal Code* and equivalent provisions are written in stone, expressing universal human values, can no longer be accepted by informed people. Most of the world, in the civil law countries, long since threw off any such laws – at least two hundred years ago. Many of those laws derived from provisions enacted under

xenophobic pressures to blame minority sexuality in medieval times upon the French or other foreign influences or to promote Henry VIII's campaign to take over the monasteries. None of the laws imposed on the British colonies was the product of demands by the local people. These were the concepts of the Imperial power. As the Indian official correctly stated, they reflected the notions of the Judeo-Christian ethics of Victorian Britain. Usually, or often, there was no equivalent preceding law and certainly none with the highly punitive consequences of the Penal Code. So these laws are not of great antiquity. Historically, they are relics of a bygone empire, long since repudiated (in 1969) by the Imperial country itself.

Thirdly, in case it is said that the laws reflect universal morality and religious rules in the ancient scriptures, it is important to understand that, as with legal texts, such scriptures are hotly contested within religious circles. Amongst Protestant Christians, there are strong views suggesting that there has been a misunderstanding about the instructions in the *Leviticus* Holiness Code. And in the Roman Catholic denomination of Christianity, there are similar discordant voices. Moreover, as recently as December 2008, the Vatican, expressing the views of the Pope, declared specifically that 'the Holy See continues to advocate that every sign of unjust discrimination towards homosexual persons should be avoided and urges States to do away with criminal penalties against them'.

Fourthly, exactly coinciding with these scientific, social and religious developments, has been the growth of the universal principles of human rights as the foundation of the United Nations Organisation itself and as an important background for the Commonwealth of Nations. Human Rights Commissioner Pillay, supporting the call for a universal statement by the United Nations to abolish the criminal offences, said in December 2008: 'Ironically many of these laws, like apartheid laws that criminalised sexual relations between consenting adults of different races, are relics of the colonial era and are increasingly recognised as anachronistic and as inconsistent both with international law and with traditional values of dignity, inclusion and respect for all'. In the enjoyment of universal human rights, citizens of the Commonwealth of Nations are not second class in the world. Whilst respect

must be paid to different voices, the violence of the mob, or even the violence of the organised state, should give way to the quiet, insistent voice of international human rights law with its demand for respect for the dignity of members of sexual minorities. Human history sadly teaches that small minorities are often singled out for violence and cruelty. This is part of the infantile character of human prejudice. When it exists, it behoves civilised people, and especially lawyers, to raise their voices and cry 'enough'.

### Wise Commonwealth voices

Wise voices have begun to be heard throughout the Commonwealth of Nations. In Commonwealth cases involving the United Kingdom (*Dudgeon v. United Kingdom* (1981) 4 EHRR 149), Cyprus (*Modinos v. Cyprus* (1993) 16 EHRR 485) and Australia (*Toonen v. Australia* (1994)), the European Court of Human Rights and the United Nations Human Rights Committee have successively upheld the need to reform the laws criminalising adult private sexual activity. So have many national courts of great distinction, acting under their own constitutional mandates (*National Coalition for Gay and Lesbian Equality v. The Minister of Justice*, 1999 (1) SA 6 (South Africa); *McCoskar v. The State* [2005] FJHC 500 (Fiji Islands)). Nor is this a movement that is confined only to courts in Western countries. In December 2007, the Supreme Court of Nepal delivered a very important decision upholding the rights to equal civic treatment of homosexual citizens of that country.

In South Africa, Nelson Mandela, steering his nation to an end to the denial of human rights for any group, told a gathering of Southern African leaders that homosexuality was not 'un-African' but 'just another form of sexuality that has been suppressed for years ... Homosexuality is something we are living with'.

In India, an open public letter signed by Nobel Laureate Amartya Sen, former Attorney-General Soli Sorabjee and many other leaders, demanded, in 2006, an end to s.377. South African Archbishop Desmond Tutu called for an end to the African oppression of homosexuals, stating that he could not bear to see apartheid replaced by such a similar exclusion. Former Singapore Prime Minister Lee Kuan Yew likewise, in April 2007, suggested that the

law should be changed and that it could not now be justified. Live and let live was the inclination of the present Singapore Prime Minister, but the persistence of the old law, and the defeat of legislative reform, means that the law remains in place to authorise inequality, injustice and stigma.

In Hong Kong, the laws on this subject were changed shortly before the end of British rule, in keeping with a belated attempt to delete a form of oppression which (except for a very short period) had never been part of the criminal law of China, as such. The result has been to create an important haven of safety and equality in Asia, almost entirely missing from the other Asian countries once marked red on the map. In a recent decision of the Hong Kong Court of Appeal (*Leung T.C. William Roy v. Secretary of Justice* (HK) [2006] HKCA 106 at 48), the Court observed:

*'Denying persons of a minority class the right to sexual expression in the only way available them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in the way natural to them. ... It is, I think, an apt description [to call it 'disguised discrimination']. It is ... founded on a single base: sexual orientation'.*

Like voices are sometimes raised by informed Commonwealth leaders. Thus, the Deputy Prime Minister of Samoa, the Hon. Misa Telefoni, at a conference on AIDS in New Zealand, declared that the only effective way of tackling that epidemic was 'the human rights approach'. He said: 'Ensuring the emancipation of women and protection of their rights is an important priority ... Working with sex workers and other marginalised groups such as gays and transsexuals works ... Working successfully with marginalised groups means dealing with them at their level and never showing any prejudice against them.'

Whilst issues of principle and the fundamental policy of the criminal law are at stake, and these must not be confused with utilitarian reasons concerning national responses to AIDS, the fact remains that the current approaches, particularly in Commonwealth countries in Africa, Asia and the Caribbean, place an impediment in the way of effectively tackling this major epidemic. Criminalise

people and you cannot reach out to their minds and effectively influence their conduct. Apart from everything else, that message is now one of great importance for the Commonwealth of Nations where AIDS is definitely a priority issue.

The Secretary General of the United Nations, Ban Ki Moon, in an address to the International Aids Conference in Mexico City on 3 August 2008, was similarly plain speaking. He said:

*' ... In most countries, discrimination remains legal against women, men who have sex with men, sex workers, drug users and ethnic minorities. This must change. ... [I]n countries with legal protection and protection of human rights for these people ..., there are fewer deaths. Not only is it unethical not to protect these groups: it makes no sense from a public health perspective. It hurts us all.'*

### **The need for action**

All of these words have been said before. They have been said to national leaders. They have been urged on politicians who waive them aside or blame the 'conservatism' of populist opinion in their own countries. These things have been said for at least ten years to successive leaders of the Commonwealth of Nations. Most respectfully, I urged the outgoing Secretary-General, Don McKinnon, before he left office, to take an initiative to put in place a committee of wise Commonwealth leaders to encourage dialogue, conversation and action on this special Commonwealth problem. Such an initiative might not succeed everywhere or quickly. But to the extent that it succeeded, it would be important on many fronts. Alas, nothing has been done. The result is that many Commonwealth citizens today continue to suffer the apartheid of sexuality.

The Commonwealth once was a great organisation in which we could all rally together against discrimination on the grounds of race. I myself went to anti-apartheid demonstrations in Australia. As a young lawyer, I defended Australian university students who protested at football matches and elsewhere and who put the issue on the world stage. Who now puts the issue of sexual apartheid before the Commonwealth and the world?

True, the numbers affected by sexuality, discrimination and violence are small, by

comparison. True, those affected can often hide their supposed 'flaw'. They can pretend to be something other than God or nature made them. In other parts of the world and of the Commonwealth change has come about. But our community of nations is strangely resistant, silent. It is indifferent and immobile. Nothing is happening.

I hope that, from Hong Kong, which is not itself even a member of the Commonwealth, a message can go that some of us care. That judges and lawyers of the Commonwealth are friends to universal rights, not people to be feared as part of the problem. That we will express our opinions, quietly but insistently. And that, just as 30 years ago, apartheid looked impregnable in fortress South Africa, so in due time, the seemingly unbeatable resistance to law reform of the criminal laws against homosexual people will be removed. The blind spot will be lifted. The dignity and equality of all Commonwealth citizens will be respected. The futile attempt by criminal law to force people to be different from their nature will be abandoned. And the alien legacy of the Imperial criminal codes against homosexuals will be discarded.

On his coming into office as President of the United States of America, Barak Obama faced many challenges. But one thing he quickly changed, altering the decisions of the Bush administration. On 19 March 2009, he announced that the United States would now participate in the statement, presently before the General Assembly of the United Nations, calling for an end to the criminal laws against homosexuals. So far, that Statement has gathered only 67 countries of the 192 countries in the Assembly. Even South Africa has not yet signed on despite the strong provisions of its freedom Constitution and the enlightened decisions of its highest courts. Only three African nations have so far done so, and only one of these (Mauritius) is a member of the Commonwealth.

A world that can conquer space, map the genome, split the atom, create the internet, heal the sick, abolish slavery, conquer polio and overcome apartheid can tackle this further challenge. And we, the lawyers and judges of the Commonwealth have a primary duty to make sure that this is done, and done soon.

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# CHILD VICTIMS AND WITNESSES IN COURT – THE CANADIAN EXPERIENCE

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*Justice Virginia Schuler of the Supreme Court of the Northwest Territories, Canada. A paper from the CMJA Triennial Conference in September 2009*

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In Canada in the last few decades, the issue of child abuse has been given a great deal of media coverage arising from widespread disclosures and a number of high profile cases involving physical and sexual abuse of children at orphanages run by religious orders, residential schools to which the government sent aboriginal children and other institutions. There have also been highly publicized incidents of sexual abuse of young hockey players by adults working with them. Against this background, and Canada's ratification of the UN Convention on the Rights of the Child, there have been a number of changes in the way children are treated in the Canadian legal system.

In the criminal law sphere in Canada, there has been a shift away from the view that child witnesses should be able to understand an oath before being permitted to give evidence. There has also been a shift away from the way children's evidence was once viewed with a degree of suspicion and automatically treated as less reliable than the evidence of adults, for example by requiring corroboration of a child's evidence. The modern view is that children can be reliable witnesses and their evidence should be received by ways and methods that make it easier and more comfortable for them to present their evidence to the court, thus allowing the court to decide whether or how to act on that evidence.

## Competence to Testify

For many years, we brought children into the unfamiliar and imposing, if not intimidating, surroundings of a courtroom, surrounded them with people who are unfamiliar to them and about whom the child may have misconceptions and then we asked them to talk about concepts such as truth and falsehood so that the Judge could determine whether the child understood the nature of an oath. At one time in Canada it was not unusual for a child witness to be asked questions about whether

he or she goes to church, attends Sunday School or believes in God, questions that are meaningless to many children and intrude into private matters. Legislative developments in the area of criminal law have sought to change that.

In the Canadian system, criminal law is under federal jurisdiction. The law of evidence pertaining to criminal proceedings is found in the common law, the Criminal Code of Canada and the Canada Evidence Act. In relation to the competence of a child witness to testify, we have moved from the common law rule that a child could testify only if she or he could be sworn, which meant the child had to demonstrate an understanding of the nature and consequences of an oath, to provisions in the Canada Evidence Act that permitted children to give unsworn testimony if they could demonstrate that they understood the duty to speak the truth, to what is now, since 2006, s.16.1 of the Canada Evidence Act:

- 16.1(1) A person under 14 years of age is presumed to have the capacity to testify.
- (2) A proposed witness under 14 years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.
- (3) The evidence of a proposed witness under 14 years of age shall be received if they are able to understand and respond to questions.
- (4) A party who challenges the capacity of a proposed witness under 14 years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.
- (5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under 14 years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are

able to understand and respond to questions.

- (6) The court shall, before permitting a proposed witness under 14 years of age to give evidence, require them to promise to tell the truth.
- (7) No proposed witness under 14 years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.
- (8) For greater certainty, if the evidence of a witness under 14 years of age is received by the court, it shall have the same effect as if it were taken under oath.

Under s.16.1, therefore, the proposed witness under 14 years of age is not to swear an oath or give a solemn affirmation. If they can understand and respond to questions, they are to promise to tell the truth without being asked about their understanding of the nature of that promise, and their evidence is then received by the court.

*R. v. J.Z.S.*, 2008 BCCA 401, is a case where an accused charged with sexually assaulting a child challenged s.16.1 as an infringement on his fair trial rights. In dismissing the challenge, the British Columbia Court of Appeal said:

*‘... Parliament, in enacting s.16.1, has decided that a promise to tell the truth is sufficient to engage the child witness’s moral obligation to tell the truth. Section 16.1 places child witnesses on a more equal footing to adult witnesses by presuming testimonial competence. A child witness’s moral commitment to tell the truth, their understanding of the nature of a promise to tell the truth, and their cognitive ability to answer questions about ‘truth’ and ‘lies’ may still be challenged on cross-examination during their testimony; their credibility and reliability may still be challenged in the same manner as an adult’s testimony may be challenged. These potential concerns, however, go to the weight of the evidence, not its admissibility.*

*Section 16.1 changes the focus of a child’s evidence from one of admissibility to one of reliability. It discards the imposition of rigid pre-testimonial requirements which often prevented a child from testifying*

*because of their inability to articulate an understanding of abstract concepts that many adults have difficulty explaining. It reflects the findings of [the Queen’s University] Child Witness Project that the accuracy of a child’s evidence is of paramount importance, not the ability of a child to articulate abstract concepts.’*

This decision is under appeal to the Supreme Court of Canada, which has granted leave to appeal. As at the date of writing, the appeal has not been heard.

Under s.16.1(3), the test for allowing the child to testify is simply whether the child witness has the ability to understand and respond to questions. This means that any inquiry is only about the child’s basic knowledge and language abilities: does the child have the ability to remember events and answer questions about those events. The judge has a duty, as in the trial as a whole, to ensure that questions that are put to the child during this inquiry are framed and worded appropriately, having regard to the child’s age and level of development. The prosecutor will often conduct this inquiry, or the judge may do so herself.

In Canada, civil matters that lie within provincial and territorial jurisdiction, such as child custody and protection cases, are governed by provincial and territorial statutes on evidence. The exception is the province of Prince Edward Island, which has no provincial statute applicable to the testimony of children and thus the common law governs: the child can give evidence only if he or she can be placed under oath. The legislation in the remaining provinces and territories varies quite widely. Some statutes require that there be an inquiry as to whether the child can be sworn but if the child cannot, she might be permitted to give evidence upon promising to tell the truth. No province or territory has fully adopted the procedure in the federal Canada Evidence Act, although some, for example Ontario, come closer than others.

It is also worth noting that since 1988, there is no federal statutory rule in Canada that the unsworn evidence of a child in a criminal trial must be corroborated. Additionally, since 1993 it has not been mandatory for a judge to warn the jury about convicting the accused on the evidence of a child. Some provincial and terri-

torial statutes still, however, require that in civil cases the evidence of a child be corroborated.

## Procedures in Court to Accommodate Child Witnesses

Assuming that the child witness in a criminal case promises to tell the truth and is going to give evidence, the next issue is what procedures are available to help her give her evidence in the unfamiliar surroundings of the courtroom.

### *Duty of the trial judge*

In Canada, the trial judge has a duty to ensure that questions are understandable to the child witness and that the atmosphere is suitable for the child to testify in. In *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, Justice L'Heureux-Dubé said that the responsibilities of the trial judge include:

- ensuring that the questions being asked of the child are clear and if they are not, clarifying and re-phrasing questions
- ensuring that the evidence given by the child is clear and unambiguous, for example by asking the child questions to clarify the child's responses
- providing a suitable atmosphere to ease the tension so the child is relaxed and calm [for example by instructing counsel not to raise their voice when questioning the child and to use age-appropriate language].

Judges also have the discretion to permit counsel to ask leading questions in examination in chief in order to get the child's evidence before the court, in recognition that children are less articulate than adults, although this may also affect the weight to be given to the child's testimony: *R. v. F. (C.C.)* (S.C.C.,1997).

As part of her duty to ensure that the atmosphere is suitable for the child, the judge can permit the child to have a favourite toy or comfort item with them in the witness box. Such an item may make the child feel safe and comfortable and thus make the court experience less traumatic.

### *Role of counsel*

From a practical point of view, counsel also have a role to play in making the courtroom experience less traumatic for child witnesses. In Canada, Crown counsel or their victim witness assistant will often take a child witness

to see the courtroom before trial and explain who the various participants will be. Counsel should also take responsibility for ensuring that their questions are understandable to the child.

## Provisions of the Criminal Code

The Criminal Code of Canada provides a number of ways to accommodate child witnesses, lessen the trauma of testifying and make it more likely that the child's evidence can be fully presented. These are summarized below. The statute itself should be consulted for the precise wording:

### *Support person*

Section 486.1(1) of the *Criminal Code* provides that where the prosecutor or a witness under the age of 18 makes the application, the trial judge must order that a support person of the witness's choice be permitted to be present and close to the witness while the witness testifies, unless the judge is of the opinion that the order would interfere with the proper administration of justice. This section is not restricted to any particular offence or type of offences. The section also provides that the judge may order the support person not to communicate with the witness. Further, it provides that the judge shall not permit another witness to be a support person unless the judge is of the opinion that it is necessary for the proper administration of justice.

### *Screen and closed-circuit television*

Section 486.2 of the Criminal Code provides that where the prosecutor or a witness under the age of 18 requests, the judge shall order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused, unless the judge is of the opinion that the order would interfere with the proper administration of justice. However, the witness is not to testify outside the court room unless arrangements are made for the accused, the judge and the jury to watch the witness' testimony by means of closed-circuit television or otherwise and the accused is permitted to communicate with his counsel while watching the testimony.

### *Prohibition against cross-examination by the accused personally*

Section 486.3 of the Criminal Code provides that on application of the prosecutor or a

witness who is under the age of 18 years, the accused shall not personally cross-examine the witness, unless the judge is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination. The judge is to appoint counsel to conduct the cross-examination if the accused is not permitted to do so. A predecessor of this section applied only when the charge was a sexual or violent offence, but now it applies to any criminal proceeding.

In the case of *R. v. A.M.*, [2000] O.J. No. 3774, the self-represented accused was charged with sexually assaulting his own children. In dealing with the prosecutor's application to disallow cross-examination of the children by the accused personally, the trial judge said that in practical terms, for the prosecutor's application to fail, the evidence must show that the right of the accused to cross-examine his own young children represents, in the circumstances, a higher value than Parliament's recognition of the vulnerability of children to be overwhelmed by the criminal process to the extent that the court receives less than a full and candid account of the complaint.

There is some variation across Canada as to how counsel is appointed and who pays, but the recommended practice is that the accused select and retain counsel and the Attorney General arrange for payment of that counsel. One option is for the judge to stay the proceedings against the accused until the state funds and, if necessary, provides counsel to conduct the cross-examination on behalf of the accused. Obviously, it is desirable that all of this be worked out well before the trial to avoid delay of the trial and inconvenience to the child witness and so that counsel who is selected can attend at the trial in order to be prepared for the cross-examination.

### *Exclusion of the public during the child's testimony*

Under s. 486(1) of the Criminal Code, although proceedings against an accused are to be held in open court, the judge may order the exclusion of all or any members of the public from the court room for all or a part of the proceedings if the judge is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice or for reasons relating to national security. The definition of 'proper

administration of justice' includes ensuring that the interests of witnesses under the age of 18 are safeguarded in all proceedings: s. 486(2)(a).

This power to exclude the public is discretionary, not mandatory. Section 486(3) provides that in cases involving certain offences, mostly sexual ones, where the order for exclusion of the public is applied for, the judge is to give reasons for refusing to make the order.

### *Banning publication of information identifying a witness*

Section 486.4 of the Criminal Code provides that on application by the prosecutor, the complainant (of any age) or a witness under the age of 18, the judge must make an order banning publication, broadcast or transmittal in any way of the name of the complainant or the witness, in a case involving specified offences, most of which are sexual offences. For other types of offences, s. 486.5 provides that the judge may make the order if satisfied that it is necessary for the proper administration of justice.

### *Use of a videotape of child's evidence*

Under s.715.1 of the Criminal Code, in any proceeding against an accused, where the victim or other witness was under the age of 18 when the offence is alleged to have been committed, a video recording made within a reasonable time after the alleged offence, in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.

For the victim or witness to adopt the contents of the video recording, they must indicate while testifying a present recollection of having made the statement in the recording and a belief in the accuracy of the statement. The fact that the witness no longer recalls the events described in the recorded statement goes to the weight of the witness' evidence, not to its admissibility. The procedure can be used even if the witness does have a present recollection of the events.

The section provides that the video recording must have been made within a reasonable time after the alleged offence. It has been held that what is a reasonable time depends entirely on the circumstances of the case. The judge may take into account that children often delay disclosure of offences committed against them and that time for investigation is required. On the other hand, the judge should also consider that the accuracy of recollection decreases with time and that children's memories fade faster than those of adults: *R. v. L.(D.O.)*, [1993] 4 S.C.R. 419. Even a three year delay was held to qualify as 'within a reasonable time' having regard to the complainant's fear of the accused in the particular case: *R. v. G.(S.)* (2007), 221 C.C.C. (3d) 439 (Ont. S.C.J.).

Upon the trial judge ruling that the videotaped statement is admissible pursuant to the requirements of s.715.1, the videotaped statement together with any *viva voce* testimony of the witness comprises the witness' evidence in chief. The point of the procedure is that the child not have to repeat again in direct examination what she says happened; the video becomes evidence of the events described as if the child were giving the recorded statements in court.

The child witness is still subject to cross-examination. Even if the evidence in cross-examination contradicts the videotaped statement, that simply goes to the weight of that witness' evidence as a whole: *R. v. F. (C.C.)*, [1997] 3 S.C.R. 1183.

A combination of the various aids and procedures described above may be used. For example, the prosecutor may apply for use of a screen and a support person for the child witness as well as to use a videotaped statement given by the child.

It should be noted that some of the Criminal Code sections referred to, for example, the prohibition against cross-examination by the accused personally, the use of a support person, a screen and closed-circuit television, also provide that no inference may be drawn from the fact that an order is or is not made permitting the procedure in question. Judges are advised to instruct the jury that use of these aids and procedures is designed to help the child witness give evidence by providing a more comfortable environment for the child to do so. The jury should be instructed that it

must not draw any inference adverse to the accused from the fact that a screen or other aid is used, nor use it to help them decide whether the accused is guilty of the offence.

### *Khan* applications

Turning to substantive law, the Supreme Court of Canada has developed what has come to be referred to as the *Khan* exception to the hearsay rule. The case of *R. v. Khan* (1990), 59 C.C.C. (3d) 92 involved a three year old child who made a statement to her mother after leaving a doctor's office. The statement was to the effect that the doctor had sexually assaulted her. The child was ruled incompetent to testify under the law then in effect. The Supreme Court of Canada held that the child's statement to the mother was both necessary and reliable and was accordingly admissible in evidence for the truth of its contents. The mother could testify as to what the child had told her; the child's testimony was not required. Thus, if a child is unable to testify because of age or emotional trauma, the judge hearing the case may find on that basis that there is a 'necessity' to admit 'reliable' hearsay evidence.

The Supreme Court of Canada has said that where it is 'self-evident or evident from the proceedings' that a child cannot give her evidence in a meaningful way, necessity is established: *R. v. F. (W.J.)*, [1999] 3 S.C.R. 569. So, for example, where a child takes the witness stand, but then becomes too upset to testify or will not answer questions, that may fulfill the necessity requirement.

The second of the two criteria, reliability, means that the party seeking to adduce the hearsay evidence must establish 'a circumstantial guarantee of trustworthiness'. Ultimate reliability need not be established for the evidence to be admissible, as ultimate reliability is for the trier of fact to decide at the end of the trial. Generally, the hearsay statement of a young child about sexual abuse is considered to meet the reliability criterion for admission into evidence on the basis that young children do not usually have knowledge of sexual matters and so are unlikely to fabricate allegations on their own. However if there is evidence that the child does have a motive to fabricate the allegation, that would tend to indicate unreliability and may result in the child's statement being ruled inadmissible.

## Assessing children's testimony

The various provisions and principles referred to above recognize that children can be reliable witnesses and that their evidence should not be treated as inherently suspect or discounted. In *R. v. W. (R.)*, [1992] 2 S.C.R. 122, McLachlin J. (now Chief Justice) said:

*'The law affecting the evidence of children has undergone changes in recent years. The first is removal of the notion, found at common law and codified in [former] legislation, that the evidence of children was inherently unreliable and therefore to be treated with special caution ... . The repeal of provisions creating a legal requirement that children's evidence be corroborated does not prevent the judge or jury from treating a child's evidence with caution where such caution is merited in the circumstances of the case. But it does revoke the assumption formerly applied to all evidence of children, often unjustly, that children's evidence is always less reliable than the evidence of adults. So if a court proceeds to discount a child's evidence automatically, without regard to the circumstances of the particular case, it will have fallen into error.'*

The current state of the law is that there is no presumption about children's testimony. Their evidence and credibility must be assessed in light of their individual mental development, understanding and ability to communicate and in the context of all the evidence in the case, just as is done with adults. Although the credibility of both children and adults in criminal cases is assessed against the common standard of proof beyond a reasonable doubt, the standard of 'reasonable adult' is not necessarily apt for assessing the credibility of young

children. A judge should take a common sense approach when dealing with things such as contradictions in the evidence of a child and not impose the same exacting standard as in the case of an adult witness: *R. v. H. C.*, 2009 ONCA 56.

## Civil matters

As noted earlier, civil matters in Canada are generally governed by provincial and territorial laws, which vary across the country. Some provinces, for example Ontario and Saskatchewan, have legislation permitting specific accommodations for child witnesses, while others have provisions for certain matters involving children to be heard *in camera*.

Subject to any prohibitions in the governing legislation, a court should be able to make use of many of the procedures and aids referred to above for child witnesses. Allowing a child witness to have a support person present and to testify using a screen are arguably an aspect of the 'best interests of the child' and civil cases do not involve the same type of fair trial rights and other protections that exist for an accused in a criminal case. An interesting issue is whether a court could prevent a self-represented parent from examining or cross-examining his or her child in a custody or access case and appoint counsel for that purpose. The funding for that counsel is a more complicated issue in a civil case.

In family court proceedings the child will often not be called as a witness as many statutes have provisions allowing the court to interview the child in a less formal way. The various practices for interviewing children as well as recording and disclosing the contents of the interview are also very interesting, but beyond the scope of this paper.

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# THE “LION” KING AND THE LEGAL SYSTEM IN SWAZILAND

*Dr Karen Brewer, the CMJA Secretary General, was invited to participate in a Commonwealth Secretariat Needs Assessment Mission to Swaziland in July 2009 with the new Legal Adviser (Justice Section) of the Legal and Constitutional Affairs Division of the Commonwealth Secretariat.*

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Swaziland is a fascinating country and one of the remaining monarchies in the Commonwealth. The present King, King Mswati III, was one of the many sons of King Sobhuza (who had 70 wives and who was claimed to have had at his death over 1,000 grandchildren). King Mswati III was crowned King in April 1986 at the age of 18 after being chosen by the Royal Council four years before. In the interim, the Queen Mother acted as regent. The appointment of the King is itself an interesting process as all Kings must descend from the royal bloodline of the Dlamini. The Queen Mother who is chosen after a King's death by the Royal Council will be from an unrelated family and must only have one son as a king cannot be followed by his blood brothers. The King is always a Dlamini. The King is expected to unify his position by choosing wives from different sectors of the community, though he has refrained from choosing a wife for the last 5 years. Currently King Mswati III has 14 wives and 23 children. He has been criticised a number of times for his lifestyle in the face of a population where 70% live on US\$1/day and when his country has the highest per capita HIV/AIDS rates in the world.

The balance of power lies between the King and the Queen Mother: the iNgunwenyama (The Lion) represents the hardness as expressed in the thunder and the Ndlovukazi (The Elephant) or Queen Mother, the softness as in water. They assist and advise each other in many activities. The King is also advised (under art 230 of the Constitution) by the “Ligunqa” or Princes of the Realm on

*“sensitive matters or disputes including matters of succession connected with the monarchy...or where that advice is necessary in the national interest to ensure the stability and continuity of the monarchy”.*

On matters of state, the King receives advice from the “Liqoqo” or Advisory Council as well as the “Sibaya” or Swazi National Council (arts 231 and 232).

## Constitutional Progression

The Kingdom of Swaziland became a British protectorate after the Boer War and remained so until it gained independence in 1968.

At independence, in 1968, a Westminster style Constitution of the Kingdom of Swaziland was enacted and this contained a Bill of Rights, and introduced the principle of parliamentary supremacy and the separation of powers between the Executive, Legislative and Judicial branches of Government. In April 1973, King Sobhuza II repealed the 1968 Constitution by Proclamation as he felt it was incompatible with Swazi tradition and custom. He dissolved Parliament, assumed all powers of government and banned political parties and trade unions. However the 1973 Proclamation did retain some of the constitutional provisions relating to the Courts, their methods, the security of judges and the administration of justice.

From 1973 to 1978, King Sobhuza II ruled Swaziland without an elected Parliament, enacting laws through Royal Decrees and Royal Orders in Council. In 1978, the King enacted the 1978 Establishment of the Parliament of Swaziland Order, which meant that legislative power previously held by the King was nominally returned to the Swazi people. Under the provisions of this instrument, the power of Swazi Kings to rule through Decree was removed until a new Constitution was entrenched.

However, whilst a new Constitution was promulgated on 13 October 1978, it was not formally presented to the people and thus did not come into force. The Swazi Monarchy (including King Mswati III) therefore

continued to govern through the use of Royal Decrees and proclamations.

In the 1990s pressure built up to modernise the political system to bring it in line with democratic principles and in 1996 the King appointed a 30 member Constitutional Review Commission (CRC) to examine the suspended 1968 constitution, carry out civic education and determine citizens' wishes before drafting recommendations for a new constitution. The public consultation was considered less than satisfactory and the CRC, in their report of August 2001, recommended that the executive powers of the King be maintained and the position of traditional advisors be strengthened.

In February 2002, a new 16 member CDC (Constitutional Drafting Committee) team was created under Prince David Dlamini's leadership. Despite a number of obstacles, the CDC was able to produce a draft constitution that was released by the King on 31 May 2003.

Although the draft constitution was silent on multi-party democracy it did contain a Bill of Rights that guaranteed various human rights and fundamental freedoms. There was a public consultation on the draft constitution and following further input from the Commonwealth, the CMJA and other international organisations such as the International Bar Association and International Commission of Jurists, the final document was agreed by the King, promulgated and came into force in August 2005. Whilst going a long way towards providing for individual rights, constitutional governance and the separation of powers, the 2005 Constitution cannot be considered to be an aspirational document as there remain inconsistencies and vagueness in certain provisions which have led to some contradictions and difficulties in formulating subsequent legislation and in interpretation. The Constitution provides for a review five years from its coming into force. It seems unlikely that this will occur.

The continued ban on political parties has been a cause of concern of the Commonwealth Secretariat for a number of years. There is therefore no effective means of promoting transparency and expressing dissent. Although there is a right of freedom of association and freedom of expression in the Constitution, police action, sometimes violently expressed,

has severely limited such freedoms being exercised.

One recent problem which emerged related to the continued denial of the rights of citizens to create an opposition group. Due to pressure from the USA, Swaziland passed the Suppression of Terrorism Act in 2008. However the definition of terrorism in this Act is extremely vague and both Amnesty International and the Human Rights Institute of the International Bar Association have expressed concern that the provisions in the Suppression of Terrorism Act do not comply with Swaziland's obligations under international law. The Suppression of Terrorism Act has been used against political activists since its entry into force in 2008 despite the fact that Swaziland has ratified the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention against Torture.

Since the elections of September 2008, elements of the traditional government have started to re-emerge and this seems to have had an impact on the efficiency of legislative and constitutional reforms in the country. It was reported that although the new Constitution provides for legislation to be drafted to implement some of its provisions, many are still in preparation nearly five years after the Constitution came into force in 2005. The process for the enactment of legislation is extraordinarily protracted. For example, the Inheritance and Marriage Bills has been in draft form since 2007 but has yet to be enacted. The Sexual Offences and Domestic Violence Bill had taken four years to reach the point of being gazetted and even when laws have been discussed and agreed by Parliament there can be delays in getting the King's assent to their promulgation.

### Separation of Powers

Although Swaziland is a member of the Commonwealth and has agreed to abide by the Commonwealth fundamental values, tensions between the executive and the judiciary have emerged from time to time since Independence.

In 2001 the King issued Decree No 2 of 2001 making any criticism of him and senior

members of his ruling Dlamini dynasty a criminal offence as well as reinstating an unconstitutional law prohibiting bail for serious criminal offences. Although Decree No 3 of 2001 repealed Decree No 2, certain provisions such as the non-bailable offences continued to be in force.

These tensions culminated in the 2002 Rule of Law Crisis, when the six Court of Appeal Judges (from South Africa), resigned following the refusal by government to recognise two Court of Appeal judgments. The two cases were *Minister of Home Affairs v Fakudze* (concerning the eviction of 200 villagers from their land), and *Gwebu and Bhembe v R* (concerning offences for which bail could not be granted). The Court of Appeal held that the King could only make laws by decree if mandated to do so and that King Sobhuza II had explicitly removed this power pending the establishment of new constitutional framework. The Court held 'that a King's decree can only be made once a new constitution is in place remains an essential requirement'. The Court further held that the Commissioner of the Royal Swaziland Police was in contempt of court for refusing to execute judicial orders.

On 28 November 2002, Prime Minister Dlamini publicly announced that the Government would not recognise the Court of Appeal judgments in both cases as the rulings sought to strip the King of powers accorded to Swazi Kings since 'time immemorial'. The appeal judges categorically stated that they would not reconsider their position unless the Prime Minister's statement was unconditionally withdrawn, an apology issued, and the Government undertook to respect the aforementioned judgments. On 30 November 2002 they resigned and returned to South Africa.

The International Commission of Jurists, Amnesty International and the International Bar Association, amongst others, sent missions to Swaziland to assess the situation and made a number of recommendations in order to resolve the impasse between the King, his government and the Court of Appeal judges. In addition, following the CMJA Triennial Conference in Malawi, a troika of Chief Justices travelled to Swaziland in order to assess the situation and attempt to mediate between the judiciary and the King. However they had little success.

Following a protracted mediation by the Commonwealth Secretariat between the government, the King and the Court of Appeal judges, the latter finally agreed to return to Swaziland provided that the government agreed to execute judicial orders. The King and the Prime Minister agreed to the terms of the judges and the latter returned to duty in early 2004.

Today Swaziland has a dual legal system with one based on tradition and custom that is directly linked to the King and one based on the Roman-Dutch system with common law elements, inherited from colonial times.

## The Dual Legal System of Justice

### *Traditional Legal System*

The Swazi people have a long history and the traditional structures and laws they have developed continue to be extremely important. The traditional authority is vested in the princes and chiefs who are the custodians of Swazi traditional law and customs and continue to wield immense power, providing advice to the King on a regular basis on all matters relating to state affairs.

Traditions and customs are unwritten and although there have been moves to codify these laws, to date this has not happened. The Swazi National Courts (SNC) apply Swazi law and custom. A Judicial Commissioner heads the SNC. The SNC are seized of criminal matters where the maximum penalty is ten months' imprisonment. They also hear civil matters of a monetary value of no more than E160 (£16). Overall they deal with 30-40% of all criminal cases at first instance. Chiefs or Elders may sit with assessors who may guide them through the customs. We observed two hearings at the SNC level. In one case there were three people on the bench, in the second there were four. There is a registrar for the SNC, but this is more of an administrative position.

SNC do not provide for the possibility of legal representation and where someone indicates that he or she wishes to be legally represented, the case will be transferred to the statutory legal court system. Appeals from the SNC go directly to the High Court and Supreme Court.

The Chief Justice is seeking to integrate the SNC into the statutory law court structures and has involved the Judicial Commissioner in

training and in the formulation of the strategic plan for the judiciary and the code of ethics formulated by the judiciary. More recently UNDP have organised training courses for presiding officers in the SNC.

In addition to disputes between residents of different communities where chiefs are the traditional leaders, Swazi traditional law and custom is also applied by the King, acting in his capacity as Monarch. The King, acting under such powers, can issue orders and is advised by a Council of Elders. This was provided for in the new Constitution though his powers have been curtailed by Article 140(1) which states:

*'The judicial power of Swaziland vests in the Judiciary. Accordingly, an organ or agency of the Crown shall not have or be conferred with final judicial power.'*

The King has however, on occasion, sought to exercise his judicial powers. In 2006, acting within traditional law, the King issued orders for the eviction of 20 families from Hlantabita/Sigcaweni area despite the Constitution providing for the protection of citizens from arbitrary eviction.

However, Swazi law and custom is subordinate to the Roman-Dutch/common law system of law. Section 6(1) of the 1950 Swazi Administration Act (still in force) provides that:

*'The Ngunwenyama (King) and every chief shall perform the obligations imposed on them by this Act, and generally maintain order and good Government among Swazis residing or being in the area over which his authority extends; and for the fulfilment of this duty he shall have and exercise over such Swazis the powers of this Act conferred in addition to such powers as may be vested in him by any other law, or by Swazi law and custom for the time being in force, providing such Swazi law and custom is not incompatible with any other law.'*

### *The Roman-Dutch/Common Law System*

This system was inherited from the British at independence. When the British established a national Court system in Swaziland in the 19th century, they decided to use English procedures but to retain the Roman-Dutch law already prevailing in South Africa.

The 2006 Constitution provides for the following court system: A Supreme Court, the High Court and the Magistrates' Court.

The Supreme Court is the former Court of Appeal and it sits four times a year for between two to three weeks at the premises of the High Court in Mbabane. All Supreme Court Judges are currently foreign nationals. In their report on the Rule of Law Crisis in 2003, the International Commission of Jurists stated that:

*'If members of the Swaziland Court of Appeal were to be replaced with Swazi-based Justices, potential conflict of interest situations would abound as the Appellate Court sits for six weeks per year while the national legal profession only numbers approximately 100 lawyers. Were the Court of Appeal to consist entirely of Swazi-based Justices, these Justices would most likely engage in private practice for a majority of the year, taking time out to perform judicial duties. As such, on assuming their duties as Appellate Justices, they would preside over matters where inevitably, they would be either closely associated or have a direct interest in the outcome, thereby creating a conflict of interest.'*

In the opinion of the author, this comment is still true of the situation that presents itself today in Swaziland. The Legal Practitioners Act still in force dates back to colonial times and there is no code of ethics for advocates or attorneys. In addition, the lack of training received by the legal and judicial professions in Swaziland restricts the competence of such professionals to progress to the higher echelons of in the judiciary. This is true at all levels.

The High Court is headed by the Chief Justice and currently consists of eight judges. In April 2009 funding was secured from the Swazi Government for the recruitment of three more High Court judges. The Commonwealth Secretariat currently sponsors two High Court judges in Swaziland. Following Chief Justice Richard Banda's stroke in September 2009, an Acting Chief Justice from Lesotho has been appointed to undertake his duties pending his return.

The High Court building has five court rooms for eight judges. One High Court judge is currently using a court room in the Mbabane

Magistrates' Court where there is only provision for four court rooms for the four magistrates appointed to sit in these courts, thus one magistrate is 'floating' and sits in any court that becomes available.

Swaziland has an Industrial Court located in an annex to the High Court Building in Mbabane. It has three court rooms. Appeals from the Industrial Court are to the High Court.

There are currently twenty magistrates who are ranked at three levels: Principal, Senior and Ordinary. Magistrates appointed before the entry into force of the new Constitution were not required to be fully qualified attorneys in order to become magistrates and a number were transferred directly from the prosecution service or police force. Therefore a number of them have been given the opportunity by the government, to complete their studies so that they are fully qualified to attorney level (previously BA of 4 years + LLB of 2 years – now reduced to a five year qualification). The last two rounds of appointments made by the Judicial Services Commission to the magistracy have been made from qualified attorneys.

There is one Principal Magistrate in each of the four regions of the country. Each Principal Magistrate allocates cases within her or his region. The magistrates are based in the four regions but, except for the Principal Magistrate, all travel on circuit within their region. As there is little accommodation available for magistrates when on circuit, they usually travel to and from the courts on the days of the hearing. This may involve long distances and therefore the magistrate may not be able to arrive on time for court. This has an impact on witnesses' availability and the efficiency of the correctional services in relation to the release of acquitted defendants. In addition due to the lack of courts, many magistrates' courts were attached to police stations and there is a lack of secure storage space for court files and many have been misplaced or even lost.

Magistrates have both civil and criminal jurisdiction. Magistrates have civil jurisdiction in respect of matters which have a monetary value of E2,000 or less. However, the Ministry of Justice is currently drafting a bill for parliamentary approval to extend the jurisdiction of the Principal, Senior and Ordinary Magistrates

in respect of matters of a value of E30,000; E20,000 and E10,000 respectively. There are also plans for the establishment of a Small Claims Court which would have jurisdiction in respect of matters with a value of E10,000 or less. In criminal matters, magistrates can impose sentences of up to 10 years in prison and fines of E2,000.

Save for expert evidence, all evidence in criminal cases must be called live. There appears to be no provision for the reading of witness statements – either with or without the consent of the parties – in court. An Electronic Evidence Bill has been drafted and has been approved by parliament and this will govern the admissibility of electronic evidence.

No legal aid system exists. Approximately 60% of defendants in criminal cases are unrepresented. In murder cases the registrar will appoint a legal practitioner to represent the defendant.

There is little if any security at the magistrates courts and anyone can walk into a court room, offices and chambers of the magistrate without being challenged. A new magistrates' court is being built in the south of the country and construction was shortly to begin of this court. A separate court for the Swazi National Courts is also being built in the same region. Cameras are due to be installed in magistrates' courts throughout the country to ensure the security of the premises, magistrates and court personnel.

Although Swaziland is moving towards the establishment of family courts, there are no dedicated juvenile courts. Judges and magistrates do however, have the power to exclude members of the public from the court if they are dealing with a case concerning a juvenile between the ages of 12 and 16.

### Gender-based violence

We heard from a variety of sources that gender based violence is widespread in Swaziland. It was shocking that when we asked about the prosecution of sexual offences and the treatment of vulnerable witnesses in court, our questions were interpreted as referring to children. The majority of rape victims are aged between eight and twelve years. (This is attributable to the widespread local belief that sexual intercourse with a virgin is a cure for HIV/AIDS and the reluctance by the King and

the government to take the issue of the spread of HIV/AIDS seriously.)

Although one of the court rooms in the High Court is equipped with audio-visual equipment providing a link to a separate room where child witnesses may give evidence remotely, a charge of rape may be tried in the magistrates' court where there are no protective measures (such as screens) available for vulnerable witnesses. In addition, there is anecdotal evidence that child witnesses were treated with insensitivity by some High Court judges and magistrates and the needs of child victims, their age, emotional state and vulnerability were not taken into account. The ill-treatment of witnesses and victims was a major problem and had led to victims becoming increasingly reluctant to come forward with their complaints. The Sexual Offences and Domestic Violence Bill has been approved by cabinet and is to be gazetted for public consultation.

### **Judicial Services Commission (JSC)**

According to the Constitution, the JSC is charged with recommending the appointment of High Court judges and magistrates as well as disciplining members of the judiciary. Its membership consists of the Chief Justice (who is its chairperson), the Head of the Civil Service, two members of the legal profession and two further members who may also be lawyers. The King has appointed three legal practitioners and a member of the clergy to the JSC. Although there had been initial delays in the appointments of the JSC, this is now at full complement. The King appointed the two lawyer members in consultation with the Law Society, though this was disputed by the Law Society members whom the mission met.

Appointments for High Court Judges are not advertised and the system of proposal of candidates is not currently very transparent and does not comply with the Latimer House Principles. The Constitution only provides for the appointment of judges of unlimited jurisdiction from other Commonwealth countries or from legal practitioners as High Court Judges or Supreme Court judges. Progression from the magistracy to the High Court is not possible under the present rules. However, the judiciary is currently examining whether or not magistrates could be considered as legal practitioners and thus become capable of elevation to the bench.

In relation to the magistracy, recent appointments have been advertised and interviews have been set up with candidates and an organised system had been instituted though transparency, perceived or otherwise, remains an issue and this has led to some resentment locally.

The JSC is also responsible for the discipline of judicial officers. The Constitution provides for legislation to be enacted to establish a code of conduct, though this has not yet been implemented and the judiciary itself has established its own code of conduct based on the information provided by the CMJA, acting as the repository of the judicial codes and guidelines of the Commonwealth. However, concern about the behaviour of some judges and magistrates continues to be expressed. The delays in hearing cases, passing sentences, issuing judgements were some of the points that have led to these concerns. Some efforts have recently been made to reduce the backlog but this still remains a major problem at all levels of the judiciary.

### **Court Administration**

The Registrar of the High Court is without doubt the most pressurised court administrative official in Swaziland. In addition to dealing with the administration of the caseload of the Supreme Court and High Court, she is responsible for the daily management of the magistrates' courts, assistant registrars, court clerks, and security personnel of the court system across the country. She is the Financial Comptroller of the Courts and submits and administers a budget of E430million a year. In addition, she is currently the Sheriff and is responsible for the deputy sheriffs and the enforcement of civil judgements as well as being the Secretary to the Judicial Service Commission and the court users' Stakeholders Forum. Although she is assisted by one deputy and four newly appointed assistant registrars, the court administration system has suffered as a result of the workload she has to deal with so far. This has led to severe delays in the administration of justice. It is hoped that the newly appointed assistant registrars will provide the necessary back up to ensure fairer access to justice.

Despite the judiciary having their own budget of E430million and despite the Registrar being responsible for the management of the courts,

the judiciary is not totally independent as far as its budget is concerned as a number of other ministries still retain responsibility for some aspects of court administration. These include the maintenance of court buildings which comes under the Works Ministry and the recruitment of staff, which is jointly the responsibility of the Civil Service Commission and the Registrar.

The Registrar is responsible for the recruitment of all court staff including clerks. Court Staff currently come under the civil service commission and the registrar has to abide by the provisions set down by the civil service commission as far as recruitment and transfers are concerned. She can request certain skill sets for different posts and draft job specifications. However, in her recent experience, these proposals have not always been accepted by the Civil Service Commission.

The Registrar is responsible for the organisation of the courts. Although funding was received for computers for court staff and magistrates and new computers have been purchased (including laptops for the magistrates and judges) these have not all been set up. In addition court staff and the magistracy are awaiting training in the use of the computers.

The Registrar receives complaints from the public against any magistrates which are then passed on to the Chief Justice and JSC to deal with. She is also responsible for organising the timing and location of training for magistrates and court personnel.

At the instigation of the Chief Justice, a Stakeholders Forum has been set up which includes the prosecution service, attorney general's office, police and correctional services. This had been useful in clearing the backlogs. But there was a need for a permanent secretariat for the Stakeholders forum. There are also stakeholders fora being set up at regional level (where they were to be lead by the Principal Magistrate) once a month. The Principal Magistrate will then report to the Registrar who will feed this into the main Stakeholders Forum.

## Conclusion

This paper is an attempt to outline the historical and current status of affairs in Swaziland. Although much progress has been made since

the beginning of the 21st century, the needs assessment mission observed that there remained many challenges still facing the judiciary in Swaziland. The delays in amending the laws of Swaziland to bring them in line with the Constitution and international law are a cause for continuing concern. The continued lack of transparency of appointments to the judiciary at all levels, the lack of training of judicial officers and court administration staff, the extraordinary delays in the court system as well as the dearth of basic legal materials are all issues that need to be addressed. The High Court Library was very sparse and the access to IT legal sources such as the South African Legal Information Institute (SAFLII) was limited with a government administered server constantly breaking down. SAFLII had been assisting the judiciary recently in relation to uploading the High Court judgements on to their site. In addition the judiciary have received assistance in updating the Swazi Law Reports through the Open Society Institute and the International Bar Association. At present access to judgements by the magistracy in Swaziland is non-existent but it was hoped that this would improve with their inclusion on SAFLII although this will only be operational when magistrates and court staff are trained in the use of the computers they have been allocated and when these have been installed.

At the magistrates court level libraries are non-existent. Since the mission, the CMJA has provided some of its publications for use by magistrates at the four regional centres. The Commonwealth Secretariat is also organising a training course for judicial officers for early 2010. It is also hoped that ongoing training can be provided by the foreign judges who are currently working in Swaziland who have volunteered to assist with the training requirements in particular in relation to judgement writing.

In 2007, the judiciary, with the aid of some funding from UNDP developed a five year strategic plan. This involved a series of workshops at which various stakeholders and court users discussed the strengths, weaknesses, challenges and threats to the judiciary in Swaziland and identified the key focus areas as being: Judicial independence; Quality of judgments; Growth and development; Human Resource Capacity

Development; Customer Service; and Information technology

Although more resources in some areas are required, no judicial system in the Commonwealth is blessed with all the resources it needs. Existing resources might be better used and better practices adopted in order to make the judicial system more efficient and reduce the backlog of cases. The

Commonwealth Secretariat is currently investigating this suggestion. The CMJA will continue to strive to assist the Swazi judiciary and court administration as much as possible, but there also continues to be a need for the Swazi political elite to abide by the rule of law and the constitutional provisions as well as the Commonwealth fundamental values of the respect of the independence of the judiciary.

## 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.

# LAW REPORTS

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## PANDAY v JUDICIAL AND LEGAL SERVICE COMMISSION

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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THE SUPREME COURT OF MAURITIUS

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*Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord Carswell, Lord Mance, Sir Paul Kennedy. 1 December 2008*

Mr Panday was appointed a Temporary District Magistrate in 2003. His letter of appointment stated that his employment was liable to termination by one month's notice on either side. On a number of occasions in 2004 and 2005 Mr Panday was told that his performance was unsatisfactory. The Judicial and Legal Service Commission, without consulting Mr Panday, decided in March 2006 to terminate his appointment. The Supreme Court of Mauritius rejected Mr Panday's challenge to his dismissal, holding that the Judicial and Legal Service Commission Regulations had no application to temporary magistrates. In its view, his appointment was temporary and subject to one month's notice and could therefore be terminated at will by giving such notice.

The Board, in a judgment delivered by Lord Mance, allowed Mr Panday's appeal. It was clear that he had been appointed under powers given by section 86 of the Constitution of Mauritius, which gave his appointment a public law aspect; it was not merely contractual.

In *Fraser v. Judicial and Legal Services Commission* [2008] UKPC 25, on not dissimilar facts, the Privy Council had held that protections in the Constitution of Saint Lucia against removal from office applied to a magistrate appointed for a period of one year, which operated over and above the contractual terms of his appointment.

The Board noted that circumstances might arise in relation to temporary magistrates which could call for the operation of the disci-

plinary regulations. One example would be a suspected incident of corruption in the course of such a magistrate's duties, where this was the only suggested basis for termination of his appointment. But the temporary nature of an appointment permits removal for reasonable cause, of which the Judicial and Legal Service Commission was the judge (*Thomas v. Attorney General of Trinidad and Tobago* [1982] AC 113).

The only Regulation which could apply to Mr Panday's case was regulation 9 of the Judicial and Legal Service Commission Regulations. This provides for the Commission to call for a full report from the Chief Justice and to give the officer an opportunity of submitting a reply to the grounds on which his retirement was contemplated. This procedure had not been complied with.

Even if Regulation 9 did not govern the case, the Commission would have a public law duty to act fairly and in accordance with natural justice. The need for a report to the Commission from those with knowledge or information about the relevant matters and issues, for communication of the substance of such matters and issues to the judicial officer affected to enable him or her to respond, and for consideration of any response by the Commission were all elementary aspects of procedural fairness.

The purported termination of Mr Panday's appointment was for the reasons set out in paragraphs 1 to 19 procedurally unfair and so ineffective. The Board therefore allowed the appeal, set aside the Supreme Court's order, gave the appellant leave to apply for judicial review of the respondent's decision to terminate the appellant's appointment as a temporary district magistrate with effect from

30 April 2006 and set aside such decision. The Board remitted the appellant's application for an award of unpaid salary and general consti-

tutional damages to the Supreme Court for determination.

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## HLOPHE v CONSTITUTIONAL COURT OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA (WITWATERSRAND LOCAL DIVISION)

### LANGA v HLOPHE [2009] ZASCA 36

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA, 30 MARCH 2009

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In March and April 2008, after certain matters involving the President of the African National Congress, Mr J G Zuma, [later elected president of South Africa] had been argued before the Constitutional Court and when judgment in those matters was pending, the applicant, who was Judge President of the Cape High Court twice visited Judges Chambers at the Constitutional Court. In May 2008, the judges of the Constitutional Court lodged a complaint against the applicant with the Judicial Service Commission and also released a media statement on the letterhead of the Court. This identified the gist of the complaint that Judge John Hlophe had approached some of the judges of the Constitutional Court in an improper attempt to influence the Court's pending judgment in one or more cases (which were listed). The statement said that the judges of the Constitutional Court viewed conduct of this nature in a very serious light, and that any attempt to influence this or any other Court outside proper court proceedings not only violated the specific provisions of the Constitution regarding the role and function of courts, but also threatened the administration of justice in our country and indeed the democratic nature of the state.

The statement and the complaint itself which was in similar terms contained no particulars, such as the names of the judges allegedly visited. As the Supreme Court noted, at this early stage (a) Judge Hlophe was not apprised of the allegations or their source; (b) he was not asked for his version or comments; (c) he received no effective prior notice of the inten-

tion to lodge the complaint; and (d) he was not told of the intention to issue a media statement. The public, too, was not given any detail and was left with nothing more than the knowledge that a complaint with serious implications had been lodged. On 10 June 2008 Judge Hlophe lodged his own complaint with the Commission against the judges of the Constitutional Court complaining (inter alia) that the judges of the Constitutional Court had undermined the Constitution by making a public statement before properly filing a complaint with the Judicial Services Commission.

Particulars of the complaint by the judges of the Constitutional Court were eventually given to the Commission on 17 June 2008. The particulars were signed by all the judges, including two, Nkabinde J and Jafta J, who were the alleged recipients of the visits and who on 12 June 2008 had issued a statement that they had not lodged a complaint and did not intend to do so.

Judge Hlophe then sought various orders from the High Court. These were declarations:

- that the lodging of a complaint of gross misconduct against him by all the judges of the Constitutional Court of South Africa violated the judicial authority of the Constitutional Court of South Africa (prayer 1);
- that the publication of a media statement by the judges of the Constitutional Court of untested allegations of gross misconduct against the applicant made by two of the

judges of the Constitutional Court was unlawful (prayer 2); unreasonably and unjustifiably violated his constitutional right to human dignity (prayer 3), privacy (prayer 4), right to a fair hearing (prayer 5), right to equality (prayer 6) and his right to access to courts (prayer 7);

- that a decision by the the judges of the Constitutional Court to lodge a complaint with the Judicial Services Commission is unlawful and legally incompetent (prayer 8).

The motion was heard by a full bench of the High Court. It found that the judges of the Constitutional Court had not acted as a court but as individuals. The High Court rejected prayers 1, 4, 7 and 8. This left the arguments that the publication of the media statement of untested allegations of gross misconduct against the applicant was unlawful (prayer 2); unreasonably and unjustifiably violated his constitutional right to human dignity (prayer 3), right to a fair hearing (prayer 5), and right to equality (prayer 6).

MOJAPELO DJP (with whom MOSHIDI and MATHOPO JJ agreed) referred to ‘a salutary rule of practice in our courts that if the head of court or a senior judge receives a complaint from a litigant or member of the public alleging some form of judicial misconduct on the part of a judge, the head of court or senior judge refers the complaint to the judge concerned for the comments of the latter before considering or referring the complaint to the Judicial Service Commission’. Although there was no no obligation on the two judges directly concerned to offer the applicant the right to be heard before proceeding to lodge the complaint, there was certainly such an obligation on the rest of the judges who acted.

He held that the judges also ‘possibly’ had a right to decide to go public about the complaint inasmuch as they possibly considered it in the public interest to publish. In deciding to go public at that initial stage of the complaint the respondents had to act in a manner that ensured a delicate balance between the right of the public to know and the inevitable result that publication itself may result in the corrosion of public confidence in the judiciary. The public right to know had to be balanced with the way that knowledge and information is purveyed. That balance was lost in the speed and haste with which the matter

was handled and the lack of sufficient averment of factual details of what the applicant allegedly did which constitute an improper approach, how he approached such person or persons, where and when he made the approach, and what in the approach constitutes an attempt to influence the pending judgment of the court. The applicant was dealt with unfairly and his rights were violated by the failure to strike a balance between the right of the public to know and the need to maintain public confidence in the judiciary.

GILDENHUYS J (with whom Marais J substantially agreed) dissented. Judge Hlophe had made his own complaint to the Commission which was in a better place than the court to deal with it. Declaratory orders should not be made when an action in damages was available on the alleged facts, nor to preempt the Commission’s decisions.

The SUPREME COURT (Harms DP, Streicher, Mthiyane, Nugent, Cloete, Ponnann, Mlambo, Snyders and Mhlantla JJA) in a unanimous judgment observed that Judge Hlophe’s application to the High Court was premised entirely on the allegation that the appellants had acted together institutionally (‘as a court’) when they laid the complaint and issued the statement. It was abundantly clear that they did not do so, as the High Court correctly found. That should have been the end of the matter. However the court proceeded to examine whether on any basis established by the facts Judge Hlophe’s constitutional rights had been violated.

The duty to hear a person, on which the High Court relied, was at common law always limited to judicial or some administrative organs; and a person acting in a private capacity had never had such a duty. The Constitution was not different. Since the appellants did not ‘act as a court’ the fair trial provision did not arise and since they did not act as an administrative body the administrative justice provision did not apply either.

The reasoning of the High Court seemed to be that if a complaint against a judge, at its early stages and prior to it being lodged, was conveyed to a senior person who did not personally observe the alleged misconduct, the rules of natural justice required that the judge accused should be afforded an opportunity to be heard when such senior person considers lodging such complaint. The Supreme Court

could not accept this reasoning; it was not readily apparent to that court on what legal grounds they were founded.

There was considerable merit in the submission that a judge who was minded to lay a complaint against a colleague had special duties that were not shared by lay complainants, for there is an overarching duty upon judges, in whatever they do, to preserve the dignity of the judicial institution. The Constitution itself commanded all organs of state, which include the judiciary, to 'assist and protect the independence, impartiality, dignity, accessibility, and effectiveness of the judiciary'. The duty that was cast upon judges no doubt called upon them to act with due care and circumspection before exposing the judicial institution, and those who hold office in the institution, to loss of public confidence through allegations of misconduct. But the Supreme Court was not adjudicating ethical questions but questions of law. The duties referred to were not sourced in rules of law that are enforceable in the courts. They were sourced in ethical duties attaching to judicial office that were enforceable ultimately only by the sanction of removal from office.

So far as the media release was concerned, once the Supreme Court had found that the judges did not act unlawfully in laying the complaint it could see no basis for finding that they were obliged to keep that secret. On the contrary there was much to be said for the contrary proposition (bearing in mind the circumstances in which it occurred) that the constitutional imperatives of transparency obliged them to

make the fact known. The fallacy of the High Court's finding that the appellants had failed to strike a balance between the right of the public to know and the need to maintain public confidence in the judiciary was that the court would seem to have considered the truth or untruth of the defamatory allegation to be irrelevant. Disclosure of an allegation of gross misconduct against a judge might in certain circumstances not be for the public benefit but that could hardly be the case if the allegation were true. If Judge Hlophe did in fact approach the two Justices in an attempt to influence their judgment it would have been to the public benefit that that fact be made known. The fact that he was a judge does not give him special rights or special protection. Judges are ordinary citizens. What applies to others applies to them.

It will always be distressing for a judge to learn in the media that he or she has been accused of misconduct but that is an inevitable hazard of holding public office. The remedy that is available to a judge who finds that he or she is in that position is to insist that the body charged with investigating such a complaint does so with expedition so as to clear his or her name. Nor should it be thought that such accusations may be made with impunity: a judge, like any member of the public, is entitled to the consolation of damages for defamation if the publication of the statement cannot be justified.

*By a majority of six votes to four, the Judicial Service Commission's disciplinary committee decided in August 2009 not to continue with the investigation into the complaint against Judge Hlophe.*

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## IN RE APPLICATION BY THE ATTORNEY GENERAL OF FIJI

*Hickie J, 4 December 2008*

IN THE HIGH COURT OF FIJI, [2009] FJHC 8

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The respondents had pleaded guilty to contempt by scandalising the High Court of Fiji and three of its judges following the publication of a letter in *The Fiji Times*. The letter complained at what it called 'the totally biased, corrupt and self preserving judgment' handed down by three named judges.

The Attorney-General was given leave to issue an Order of Committal on the day following the appearance of the letter (22 October 2008). On 29 October 2008, the solicitors for the newspaper wrote to the Attorney admitting that the article was in contempt, and on 5 November 2008 an apology was published in *The Fiji*

*Times*. The court cited the judgments of the Supreme Court of Malaysia in *Attorney General v Arthur Lee Meng Kuang* ([1987] 1 MLJ 207), the Supreme Court of India in *Brahma Prakash Sharma v State of Uttar Pradesh* (AIR 1954 SC 10) and the High Court of Australia in *R v Fletcher; Ex parte Kisch* ((1935) 52 CLR 248) on the notion of scandalising the court. It also noted criticisms by academic writers and others of the existence and vagueness of the offence. There was no doubt that the offence existed in the Fiji Islands.

A useful guide had been provided by the High Court of Hong Kong, Court of First Instance, in its headnote to *The Secretary for Justice v The Oriental Press Group Limited* (1998):

- (1) A person, firm or company cannot be convicted of the criminal offences of scandalising the court or interfering with the administration of justice unless the facts establish beyond a reasonable doubt that there was a real risk, as opposed to a remote possibility, that the acts complained of would undermine public confidence in the due administration of justice in the minds of at least some of the persons who were likely to become aware of the acts complained of.
- (2) The offences of scandalising the court and interfering with the administration of justice do not require proof that the alleged contemnor intended to undermine public confidence in the due administration of justice. It is sufficient if he [or she] intended to do the acts which are said to constitute the contempt.
- (3) Upon the assumption that making the scandalising of the court a criminal offence amounts to a restriction on the right of freedom of expression, that restriction was
  - (a) for the protection of “public order (ordre public)” within the meaning of Art. 16(3)(b) of the [Hong Kong] Bill of Rights because it was for the protection of the rule of law to the extent that the rule of law is eroded if public confidence in the due administration of justice is undermined, and
  - (b) necessary for the achievement of that objective. Accordingly, the criminal offence of scandalising the court has not been abolished or modified by the Bill of Rights.

The court went on to consider sentences for this type of offence imposed in previous Fiji cases and in other Commonwealth jurisdictions. Reference was also made to a paper by Professor K W Patchett at the CMJA's 1975 conference in Kuala Lumpur, Malaysia:

*The fervent wish to make constructive improvements in the quality of the law may lead to outspoken public criticism of the judiciary. Unless this is put into the context of rational debate, it may serve merely to exacerbate the situation...*

*It is axiomatic that, for a judge to practise his independence, he needs to know that any independent stand will be respected and will not be followed by vindictiveness or adverse repercussions against himself personally or on the judiciary as a whole ...*

*There are no simple safeguards, and especially no obvious new ones which could be embodied in the law, to make the vulnerable judge more certain and to permit him more than at present to discharge his [or her] functions without constantly looking over his shoulder. The judge ... has been cast by the Constitution in a pivotal role in holding one of the essential balances between competing power weights. The ability to hold that balance depends in part upon his [or her] own strength and in part upon the degree of stress which is placed upon the crucial element. Too much stress, insufficient strength, and the system will break.*

The court referred to the recent history of the Fiji Islands. In December 2006, what was seen as the fourth coup d'état in just over 19 years took place. This led to extensive litigation in the High Court (see *Qarase v Bainimarama*, High Court of Fiji, 9 October 2008). Comments from while judgment was awaited clearly bordered on contempt; reactions to the judgment again clearly bordered on contempt. The role of politicians and members of the legal profession appeared to have been at the forefront of such contempts as well as constant attempts at undermining public confidence in the judiciary.

Even if it were proven that *The Fiji Times* was biased, they still had a right to publish. Any decision to be so biased is up to them: people can laugh at them, ridicule them and

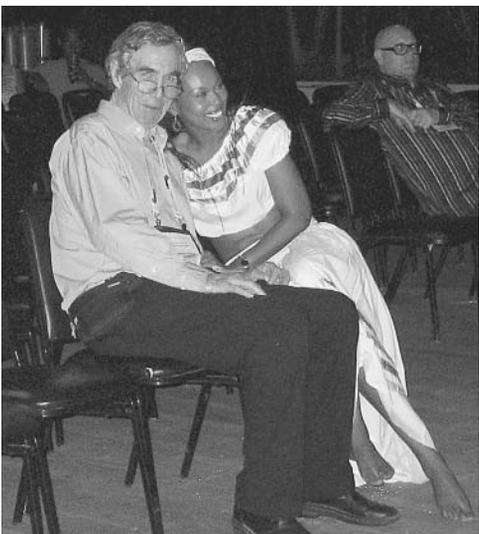
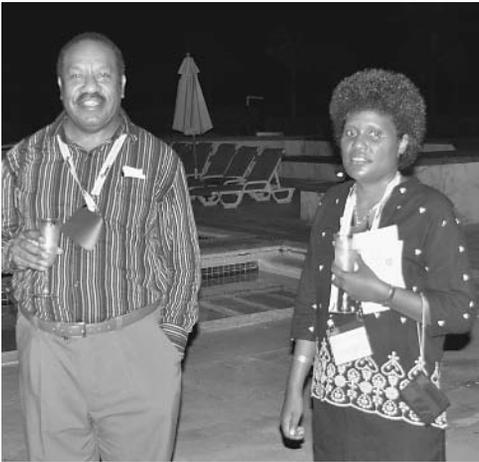
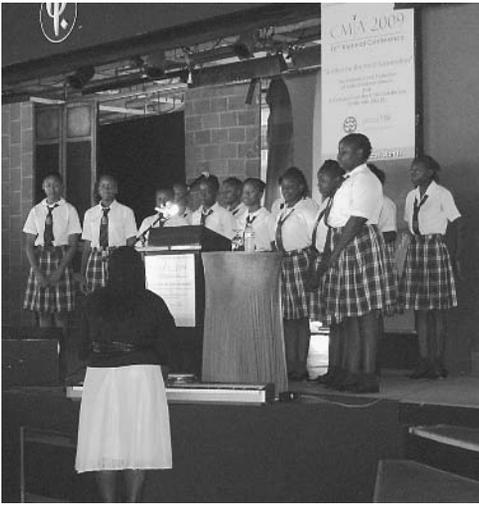
question whether they want to be taken seriously as a media organisation, but, as a private company, they are entitled to be so biased so long as they do so within the law. This was a vicious and cowardly attack upon the integrity of the judiciary and, in particular, three of its longest serving judges. Cowardly, as no person has as yet been prepared to come forward and say that they wrote the letter under a nom de plume or that they are “Vili Navukitu” of Australia.

It was the Court’s understanding that it was not in dispute in relation to the Fiji Times Limited as publisher of *The Fiji Times* that there were procedures in place to assist staff in dealing with potentially contemptuous matters. It was the Court’s finding that the system in place, however, was that it was left to the responsibility of the Editor in Chief as to whether he availed himself of such assistance, and which on this occasion he did not citing oversight and pressure of work. In view of the above, the Fiji Times Limited as publisher of *The Fiji Times* must accept ultimate responsibility for the actions of its staff. Indeed, there

had been no evidence led that the Editor in Chief acted outside of or not in accordance with his responsibilities such that the company has sanctioned him personally. Rather the ‘remedy’ has been (a) that it had published an apology; and (b) that the timing of the contempt coincided with the recruitment of an Associate Editor to relieve the workload of the Editor-in-Chief.

The Editor in Chief of Fiji Times Limited including the *Fiji Times* was sentenced to a custodial sentence of three month’s imprisonment to be suspended upon his entering into a bond to be of good behaviour for a period of 2 years. The Chief Executive Officer of Fiji Times Limited and acting publisher of *The Fiji Times* was discharged subject to the condition that he enter into a bond without surety be of good behaviour for a period of 12 months. The Fiji Times Limited was fined \$100,000 and ordered to enter into a bond (to be entered into in its behalf by its Chairman) in the sum of \$50,000 to be of good behaviour for a period of 2 years.

## Some Photos from the Triennial Conference



# COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION

(Registered Charity 800367)

## AIMS

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

## MEMBERSHIP

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

## ACTIVITIES

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

## PUBLICATIONS

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

## APPLICATION FOR ASSOCIATE MEMBERSHIP

Name: .....

Address: .....

.....

.....

Judicial position: .....

Annual Subscription @ £30.00 / 5 Year Membership @ £120.00  
10 Year Membership @ £220.00 / Life membership @ £500.00

CMJA Tie (s) @ £10.00 each  
CMJA Cufflinks @ £9.50 each  
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Memorabilia: packing/postage charge of £1.50 per order

I enclose my cheque for £..... (prices include postage)

Signed..... Date.....

### Please send this form and payments to:

The Secretary General  
Commonwealth Magistrates' and Judges' Association  
Uganda House, 58-59 Trafalgar Square, London WC2N 5DX, United Kingdom

Cheque and banker's draft should be made payable to "CMJA". If you wish to pay by credit card (Mastercard, Access or Visa) please give card holder's full name, billing address, card number, security code (last 3 digits on reverse of card) and expiry date. Also please state whether it is a Visa, Access or Mastercard. There will be a 2.45% surcharge on all credit card payments.

# RIPA INTERNATIONAL

For 2010, RIPA International has updated and extended the portfolio of programmes to support you and your organisation through Justice Sector Reform. Our new targeted suite of seminar-style programmes provide you with expert techniques and strategies for success in developing demonstrable and tangible 'real world' solutions that will develop your efficient and effective justice system.

Justice systems around the world continue to be subjected to unprecedented change. Though early judicial and legal reform efforts focused on changes to the substantive laws, it is now widely recognised that drafting new laws is by itself insufficient.

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This highly practical, intensive, world-renowned programme will develop your skills as a legislative drafter and equip you with the means and knowledge required for the drafting of legislation.

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Examine the key concepts in the management and administration of court systems and see at firsthand how these ideas have been put into practice in the English and Welsh court system.

### Case Management

Learn about recent reforms to the UK justice system which have sought to reduce delay and to bring greater efficiency to court administration procedures. Justice system professionals will have the opportunity to design a case management regime that meets the needs of the jurisdiction.

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Analyse the key factors that underpin judicial ethical behaviour through an ethical framework that can assist you in regulating judicial behaviour.

## Contact Us

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