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CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX, U-K. Tel: +44 207 976 1007

Fax: +44 207 976 2394 Email: info@cmja.org website: www.cmja.org

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CONTENTS

EDITORIAL		2
<i>Paul Norton</i>	650 years of the Magistracy	3
<i>Aruna Narain</i>	Technology in Court: the Mauritian Experience	8
<i>Martin Cardinal</i>	Forced Marriages	11
<i>Bridget Shaw</i>	Children as Witnesses	16
<i>Baroness Prashar</i>	Judicial Appointments	21
<i>Justice D.P. Bernard</i>	The Role of the Appellate Court	26
LAW REPORTS		
<i>Stubbs v Attorney General</i>		39
<i>Nicholls v Michael Wilson and Partners Ltd</i>		41
BOOK REVIEW		
<i>Without Prejudice: CEDAW and the determination of women's rights in a legal and cultural context</i>		43

EDITORIAL

As Sawyer P observed in the Bahamas Court of Appeal in *Maycock v Attorney General* ([2010] 3 LRC 1), ‘a person, in a democracy like The Bahamas, has no legal or constitutional right to choose his judge’. That is undoubtedly true, but it seems to be becoming more common for parties to ask a judge to ‘recuse’ him- or herself because of some apparent bias. We note in this issue another Bahamas case, *Stubbs v Attorney General* ([2010] 4 LRC 103) in which the limits of recusal were explored. In that case Longley JA doubted whether rulings of the law on interlocutory points could ever properly be the subject of an allegation of apparent bias. In one of those coincidences which give to the law a special charm, the New South Wales Court of Appeal dealt only a few months later with a case, *Nicholls v Michael Wilson and Partners Ltd* ([2010] NSWCA 222, also noted below) in which interlocutory proceedings in a complex commercial case were held to give rise to just such apparent bias.

The recusal practice, properly followed, can help protect the reputation of the courts and of individual judges. That reputation is in almost all Commonwealth jurisdictions deservedly high, even if not every judge matches the counsel of perfection advanced by Mr Justice Hickinbottom: ‘The paradigm judge is ... robust and patient, sensitive and thick-skinned, enthusiastic and cautious, a committed lawyer and someone who does not spend his time exclusively with the law, an independent thinker who works well with others, someone who can decide the most complex points of law but also deal efficiently with a list of paper applications and administer a court or tribunal centre’.

Selecting judges with as many of those qualities as possible is a challenging task. Baroness Prashar was the founding chair of the Judicial Appointments Commission in England and Wales and her paper in this issue describes the approach it adopted under her distinguished leadership.

Even judges of the highest quality can make mistakes, and appellate courts have an important role in correcting errors and ensuring consistency. An article in this issue by Justice Bernard offers a comparative account of some of the appellate courts in the Commonwealth.

History and modernity both feature. Paul Norton surveys the 650 years of history behind the magistracy in England, while Aruna Narain gives an account of the experience of Mauritius in introducing information technology to the courts.

Two papers look at court powers and practices. Martin Cardinal writes on the way the courts in one jurisdiction deal with the issue of ‘forced marriages’ and Bridget Shaw looks at best practice in respect of child witnesses.

The CMJA, along with other Commonwealth organisations in the legal field, was represented at two recent meetings in London, of Senior Officials from Commonwealth Law Ministries and of Law Ministers and Attorneys General from Small Commonwealth Jurisdictions. Those meetings demonstrated once again the remarkable extent to which the Commonwealth, with such a diverse membership, has a common approach to many issues faced by its legal systems. It is good to rejoice both in the diversity, enhanced by the recent membership of more States in the civil law tradition, and in the Commonwealth’s continuing emphasis on the Rule of Law.

CALL FOR CONTRIBUTIONS

The Editor is calling for contributions from Readers. Articles, essays, reviews are all encouraged. Contributions, ideally no more than 3,000 words should be sent to the Editor c/o the CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX or by email: info@cmja.org.

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

LETTERS TO THE EDITOR

If you have a burning issue you want to raise in the Journal, or if you feel you need to respond to an article that appears in the Journal, the Editor would welcome your input and feedback. Please contact him at the address above.

650 YEARS OF THE MAGISTRACY

Paul G Norton, who has served as a Justice of the Peace in England and Wales for 27 years. He is Life Member of the Magistrates' Association; and since 2003 he has been a Trustee/Director, the Honorary Treasurer and Life Member of the CMJA.

20 March 2011 will be an important date in the history of the office of 'justice of the peace' in England and Wales. That date will mark the 650th anniversary of the Statute of Westminster 1361, by enacted by King Edward III, which confirmed the office of justice of the peace.

At the CMJA Conferences, there is some incredulity expressed when I say in talking to judicial officers from other states that the magistracy in England and Wales is unpaid. Perhaps on this 650th anniversary some explanation about the system and how it has come about might be of interest.

Magistrates' courts to-day

Since April 2005 Her Majesty's Courts Service for England and Wales has linked the administration of Magistrates', Crown, County and High Courts together for the first time. The aim of the court service is expressed in these words:

'All citizens according to their differing needs are entitled to access to justice, whether as victims of crime, defendants accused of crimes, consumers in debt, children in need of care, or business people in commercial disputes. Our aim is to ensure that access is provided as quickly as possible and at the lowest cost consistent with open justice and that citizens have greater confidence in, and respect for, the system of justice.'

Magistrates' courts, numbering about 300, are a key part of the criminal justice system. All criminal cases start there and 95% of cases are completed there. In 2009 the number of completed criminal proceedings in the magistrates' courts was 1.9 million. In addition, magistrates' courts deal with many civil cases e.g. family matters, appeals on liquor and betting and gaming licensing; these civil cases number about 125,000. For 650 years Justices of the Peace have held courts in order to punish law-breakers, resolve local disputes and keep order in the community.

Cases in the magistrates' courts are usually heard by a panel of three magistrates (justices of the peace or 'JP's) supported by a legally qualified Court Clerk or Legal Advisor. Unlike the Crown Court where a jury makes decisions of guilt or innocence and the judge sets the sentence, magistrates in their courts work without a jury and then impose penalties on the guilty in accordance with guidelines. The magistrates are collectively called a Bench and are assigned to a Local Justice Area but have a national jurisdiction pursuant to the Courts Act 2003.

Magistrates are appointed on behalf of the Queen. They retire from adjudicating in court at the age 70. They are not paid, but may claim expenses (travel costs and a subsistence allowance) and if applicable, an allowance for loss of earnings. They come from all walks of life and do not need to have any legal qualifications. Like a jury, they are a cross section of society. Qualified clerks advise them on the law. There are around 30,000 magistrates in England and Wales. Women were ineligible for appointment as JPs until 1919, when the first woman was appointed. Since then the gender balance has been addressed and the number of women holding the office of JP is about equal to that of men. The minimum commitment is 26 half-day court sittings per year with most magistrates sitting considerably more, with four to eight weeks a year being not uncommon. They undergo a substantial amount of training supervised by the Judicial Studies Board. Training manuals and sentencing guidelines are used.

The speaking role in the court is held by the chairman who normally will have had about five years' or more experience of sitting in court and will have received additional training before being appointed to that role. The chairman is *primus inter pares*.

Newly appointed JPs have an induction course of 16 hours before sitting. They receive in the first year 12 hours of further training during

which time they are mentored and appraised on their performance. Further training takes place in years two and three and refresher training every three years thereafter.

Although JPs are not remunerated, they are appraised every three years. Chairmen are appraised every three years separately on their performance in the adult, family or youth courts. The appraisers are trained and experienced JPs and who often sit in courts other than the one in which the appraisee adjudicates. The purpose of the appraisal is to maintain and improve standards and to identify individual and group training needs to the Bench Training and Development Committee.

In addition, there are also about 130 District Judges (Magistrates' Courts). District judges in magistrates' courts are required to have at least seven years experience as a Barrister or Solicitor and two years experience as a Deputy District Judge. They sit alone and deal with the longer, more complex or sensitive cases e.g. extradition and serious fraud cases. Until August 2000 these District Judges were known as Stipendiary Magistrates, but were renamed in order to recognise them as members of the professional judiciary. They have increased in number from 58 in 1989 to 130 now.

Magistrates' normal sentencing powers are limited to sentences of imprisonment that do not exceed 6 months (or 12 months for consecutive sentences), community penalties or fines not exceeding £5,000. In cases triable either way (in either the magistrates' court or the Crown Court) the offender may be committed by the magistrates to the Crown Court for sentencing, if the JPs consider that their sentencing powers are not sufficient and in 2009 this involved about 38,000 proceedings. Magistrates enforced fines in 2009 totalling £251 million. Of the 1,913,000 completed proceedings in the magistrates' courts in 2009, only 13,000 led to an appeal being heard in the Crown Court. Magistrates sit in the Crown Court with a judge to hear appeals from Magistrates' courts against conviction or sentence and also to hear committals for sentence.

The average time between charge and disposal in the magistrates' court is 6.9 weeks and the current aim is to reduce this to 6 weeks.

So where did all start?

The roots

Sir Thomas Skryme, founder of the Commonwealth Magistrates' Association in 1970 (which in 1988 became the CMJA in order to reflect more accurately its membership), wrote an authoritative *'History of The Justices of the Peace'* covering the developments both in England and in Commonwealth countries.

The administration of justice over the centuries has taken many forms. The 'divine providence' principal of discovering innocence or guilt by 'ordeal', the result of whether someone survived drowning or exposure to fire that operated in Anglo Saxon times was terminated as an option by the Lateran Council in 1215.

When William the Conqueror invaded and took over England in 1066 he generally accepted the institutions of the Anglo Saxons and decreed that the courts should continue to operate. This is what happened nine centuries later in a number of countries colonised by Britain, with local institutions remaining in place, and co-existing with the English legal and judicial system. At independence both systems were retained though both the English legal system and the systems in the former colonies have since evolved.

In 1195 King Richard I, faced with unruliness in certain areas of the kingdom, decided to appoint knights to preserve the peace and these knights were known as 'Keepers of the Peace'. The start of local justice can be identified back to the 1327 Statute which provided for the appointment of 'good and lawful men' to maintain the peace in every county and these men were known as Wardens or Conservators of the Peace. Their powers were to hear and decide cases brought before them and to impose punishments.

650 years ago on 20th March 1361 King Edward III enacted a statute to address some of the issues of guardians of the peace imposing unjust punishments and excessive fines. The Statute of Westminster completed the transformation from the title of Keeper of the Peace to Justice of the Peace, a title still used today. It established the justices as an integral part of the machinery of justice. The 1361 Statute stated

'that in every shire (county) of England shall be assigned for the keeping of the

peace one lord, and with him three or four of the most worthy in the shire, with some learned in the law; and they shall have power to restrain offenders, rioters, and all other barrators, and to pursue, take and chastise them according to their trespass or offence; and to cause them to be imprisoned, and duly punished according to the laws and customs of the realm, and according to what shall seem best to them to do by their discretions and good deliberation; and also to inform themselves and to inquire of all those who have been pillagers and robbers in the parts beyond the sea, and have now returned and go wandering and will not labour as they wont to do in times past; and to take and arrest all those that may find indictment or by suspicion and to put them prison; and to take those who are not of good fame, wherever they shall be found, sufficient surety and mainprise for their good behaviour towards the king and his people; and they are to punish the others duly, to the intent that the people may not be troubled or injured by such rioters or rebels, nor the peace be endangered, nor merchants or others passing on the king's highway be disturbed And that fines which are to be made before the justices for trespass done by any person shall be reasonable and just, having regard to the quantity of the trespass and the cause for which they are made'.

The Statute empowered JPs to deal with troublemakers and it would appear that they could arrest a person on the ground of bad reputation. The Statute states that 'they may take and arrest all those that they may find by indictment or suspicion'.

From about the 1350s the post of Clerk of the Peace or Clerk of the Justices came into being. His main function was keeping records, but being a lawyer, justices came to rely upon him for guidance in matters of the law.

The post of JP in the fourteenth century was time-consuming and often hazardous as there were few roadways to reach sessions and the magistrate sometimes faced life-threatening situations.

By the 1400's the JPs were assisted by village constables. In the fifteenth century JPs not only tried cases but also had a responsibility to

carry out inquiries, pursue and apprehend offenders. Some justices abused their position and oppressed their local community. A rebellion in 1450 in Kent was mainly due to the wrong indictment and imprisonment of innocent men in order to appropriate their lands and possessions. Generally, however, JPs had a reputation for fair dealing. The Privy Council oversaw justices who could be disciplined. Every bench had several non-resident Privy Counsellors to monitor them. People were encouraged to report corrupt justices and some magistrates were prosecuted in show trials.

In 1461 trade and industry was added to their regulatory functions with the aim to prevent fraud and maintain quality of craftsmanship. Silver merchants came under their supervision. By 1487 two justices sitting together could grant bail to prisoners held on suspicion of felony.

Wales was united with England in the 1536 Act of Union and this resulted in the appointment of Justices of the Peace in Wales.

About 57 textbooks for JPs appeared between 1505 and 1599 in response to a demand from the increasingly literate justices and facilitated by the development of the printing trade. The *Boke of Justyces of Peas* published in 1506 contained summaries of the principal statutes relating to JPs. The best known textbook for JPs was *Eirenarcha* first published in 1583 and it was highly regarded until the mid-1800's. Sentencing guidelines and handbooks are part of the material used by magistrates today.

Many changes in the composition of the bench took place in the mid-1600's. JPs were still not paid, but it was regarded as a prestigious position to hold. At the time of the Civil War at least half of the Members of Parliament were also JPs. Even so, Oliver Cromwell, who successfully led the Parliamentary revolution, placed the magistracy under military control. It is interesting to note that in some parts of the Commonwealth, history has repeated itself over the last few years! At that time Oliver Cromwell replaced many magistrates with lesser gentry, tradesmen, and merchants. There was further interference by James II who had half the JPs removed from office to be replaced by Catholics; he was deposed two years later.

After 1731 JPs were required to own land yielding £100 a year and most of them were members of the Tory party. In 1700 all Members of Parliament who were not JPs were appointed JPs. The Whigs carried out a purge of many of the Tory party JPs after they came to power in 1714 so that the Whigs dominated the Commissions of the Peace. Governmental control over the choice of JPs could greatly offend local views.

At that time magistrates' could sentence offenders to hanging, transportation to North America, or to the Caribbean, whipping, the stocks, imprisonment and fines. Prisoners had to pay for their own upkeep. The penalty for theft of goods worth over one shilling from a domestic dwelling was hanging.

In 1715 the Riot Act came into force making magistrates responsible for maintaining public order. The JP could read out a proclamation commanding a crowd of twelve or more people to disperse. JPs could call for armed assistance if the order was not carried out. Failure by the crowd to carry out the order was a capital offence.

By 1832 there were over 5,100 JPs. In 1828 the previous rule that only members of the Church of England could be JPs was lifted and the government allowed nonconformists and Roman Catholics to become magistrates. In 1833 JPs lost the power to inspect cotton factories and deal with such matters as footpath closures.

In 1842 the justices' power to try capital crimes was finally removed by statute and these cases were reserved for trial by jury at the Assizes. The Act was an important landmark because it also removed the death penalty from most of the offences concerned and subsequently they could be heard at Quarter Sessions. At that time over 200 crimes could attract the death penalty.

The Indictable Offences Act 1848 dealt with the JPs preliminary examination of all persons accused of indictable offences. All sworn testimony of witnesses for the prosecution had to be taken down in writing and the accused was permitted to question them. The JPs decided whether a *prima facie* case had been made out and whether the accused should be committed for trial at Quarter Sessions or Assizes. The proceedings did not have to be in public and

the accused was not allowed to give evidence on his own behalf until 1898.

In Saxon times the age of criminal responsibility was 12 and a child below that age was held to be *doli incapax*. The Normans lowered the age of immunity to 7 where it remained for 900 years. Until the middle of the nineteenth century there were no special provisions for the treatment of children by the courts. The punishments which the courts could impose were the same as for adults. There were cases of children under the age of 14 being hanged and of 8 and 9 year olds sentenced to transportation. It was not until 1908 that the matter was addressed. Magistrates in recent years have been specially selected and trained to sit in Youth Courts involving 10 to 17 year olds, where procedures are less formal than in an adult court. In Youth Courts magistrates hear all cases unless the charge is a grave crime when the case will be sent to the Crown Court. Sentences are directed more towards the needs of young offenders.

The 1906 Justices of the Peace Act removed the property qualification for county justices and this ended the link between the magistracy and landed gentry. In 1912 advisory committees were set up to select the most suitable persons as JPs. Mental ability was identified as a problem and the Justices (Supplemental List) Act 1941 forced justices to retire at 75. The retirement age now is 70.

Justices of the Peace may, and many do, pay a subscription and join the Magistrates' Association which was founded in 1920. The Magistrate' monthly journal provides useful reading on changes in the law and court topics.

Magistrates beyond England

The earliest extensions of the JP, or lay-justice system as it used to be referred to, occurred within the British Isles. Wales was the first territory, and then Scotland and in 1835 the Isle of Man. In the seventeenth century justices were brought to the American colonies and about the same time to the West Indies including Jamaica in 1661. Nova Scotia in Canada claims that they had a British Justice of the Peace in 1727. They arrived in Australia about 1788 at the time of the penal settlements and then in 1814 found their way to New Zealand.

In most African, Asian and Pacific territories the judicial work, which in England was

performed by JPs, was conducted either by British officials appointed by the colonial government or by local customary courts, which had existed long before the colonial power arrived. Many of these customary courts were manned by laymen serving on a part-time, unpaid basis which is similar to the English system. In 1821 there was provision for JPs in Freetown, Sierra Leone. In 1829 seven JPs were commissioned at Cape Coast and Accra in the Gold Coast (now Ghana). The Cape of Good Hope (South Africa) had a JP in 1837.

In India stipendiary magistrates were well established by 1898 and the Indian Justices of the Peace or 'honorary magistrates' were governed, as were the stipendiary magistrates, by the Code of Criminal Procedure. In 1804 in Sri Lanka, formerly Ceylon, there were references in a Ceylon Proclamation to JPs.

Merits of the magistrates' system in England and Wales

In the Crown Court the decision of guilt or innocence is decided by a jury and not by lawyers. There is therefore good reason for non-lawyer magistrates to carry out this function in the magistrates' courts. Some merits of the system started 650 years ago are listed below:

- Lower cost of administering justice as magistrates are unpaid for their service to the community
- They are appointed from the local community to deal with the misdemeanours of the local community
- They come from a range of educational and employment backgrounds bringing additional knowledge and understanding to the process
- They are not beholden to Government for employment or for their salaried livelihood and therefore in court they are independent in their actions
- They cannot obtain promotion from magistrate to another higher level in the judiciary and therefore the post is non competitive in career terms.
- They do the work because they want to serve the community and not as a job.
- The defendant's fate is in the hands of more than just one person and the responsibility of the magistrates' action is a shared one.
- By sitting as a group of magistrates, training is ongoing as each person draws from another person's knowledge and experience whilst sitting together.
- They receive regular training, mentoring at certain stages, and 3-yearly appraisal assessments of their performance
- Attempts to unlawfully influence the decisions of three magistrates who sit on a bench which may be formed for a larger group of many magistrates is less likely to happen compared to when one person sits alone and is known to be the person who will hear the case.

TECHNOLOGY IN COURT: THE MAURITIAN EXPERIENCE

Aruna Narain, Attorney-General's Office, Mauritius. A paper for the Meeting of Law Ministers and Attorneys General of Small Commonwealth Jurisdictions, reproduced by permission of the Director of the Legal and Constitutional Affairs Division of the Commonwealth Secretariat.

Small Commonwealth jurisdictions often face logistical and financial constraints in the administration of justice. As litigation grows in amount and complexity, courts in such jurisdictions have to grapple with their existing backlog of cases, systemic delay and inadequate resources. There can be no doubt that a judicious use of technology in our courts would enhance court administration, allowing proceedings to be held and disposed of within a shorter period, judicial officers and court staff to make more effective use of their time and skills and a better service to be dispensed to the public and the legal profession.

Small jurisdictions cannot realistically be expected to invest in the establishment of technology courts from the very outset. It is believed that priority areas should be identified for the gradual introduction of technology in the courtrooms with a view to addressing key concerns, such as the clogging of courts (especially by persons in custody), the protection of certain vulnerable witnesses and the length of proceedings generally. This was the approach adopted in Mauritius following the setting up in 1998 within the Supreme Court of a Computerisation Committee, chaired by Justice Paul Lam Shang Leen.

This paper seeks to present an overview of some of the ways in which technology has been gradually harnessed in the administration of justice in the Republic of Mauritius over the last decade or so; it will focus on the existing benefits of the introduction of the live video and TV link system and of digital recording and transcribing of proceedings, and will present the E-judiciary project that will shortly be implemented in the country.

Key Activities

Live Video and TV link

Provision was made in the Bail Act 1999 for the establishment of a Bail and Remand Court

which has the exclusive jurisdiction of determining whether a defendant or detainee shall be released on bail or remanded in custody, except where the question arises in the course of proceedings before another court or it is otherwise impractical to do so.

Part VII of the Bail Act also provides that the Bail and Remand Court may, in its discretion, order a detainee or defendant who is in custody to appear before it, in relation to an application for his release on bail or an extension of his remand in custody, through such live video or live television link system as may be approved by the Chief Justice. The Bail and Remand Court has been endowed with live video facilities since 1999 and detainees are routinely remanded from the Central Prisons in Beau-Bassin and Grand River North West Prison by the Magistrate sitting in the Bail and Remand Court in the New Court House in the capital, Port-Louis. Further, detainees in Rodrigues (a dependency of Mauritius, 560 km away from mainland Mauritius) were remanded from the Bail and Remand Court in Port-Louis for a considerable time before a resident Magistrate was appointed to sit in Rodrigues District Court. Where the detainee makes a bail application before the Bail and Remand Court from the prison, the Court may make necessary orders to ensure that there is a fair hearing in the matter, for example, by determining who may or may not be present in the room where the detainee is appearing. Should the detainee make allegations of physical brutality against police or prison officials, he may be required to show the relevant part of his body through the video link or to appear personally before the Bail and Remand Court for the Magistrate to inspect him.

Hearing bail applications of, and remanding, detainees by live video link has allowed the State to cut down on the costs of conveying detainees from and to the prisons while

managing the security risks involved in transporting them in heavily-congested traffic. Detainees who were brought to court for remand purposes or bail applications would often, despite being in custody, meet friends and relatives in court albeit briefly and it was believed that they were somehow remitted drugs or other unauthorised items surreptitiously in the course of those short meetings. The operation of the live video link system at the Bail and Remand Court has permitted the authorities to address those issues while ensuring that the defendant's detention is brought and kept under judicial supervision and his constitutional rights are respected.

Following the successful implementation of the live video link system in the Bail and Remand Court, the law was amended in 2003 to provide that the Court may, in its discretion, and on motion made by the prosecution, allow a complainant in a sexual offence case (one in which the charge is of rape, attempt upon chastity or unlawful sexual intercourse) to depose before it through such live video or live television link system as the Chief Justice may approve. The use of such facilities protects the complainant from having to face her assailant in court and relieve her traumatising experience, and at the same time ensures that the constitutional right of the accused to cross-examine any prosecution witness is observed; it is particularly encouraged where the complainant in a sexual offence case is a child.

The Mutual Assistance in Criminal and Related Matters Act 2003 also provides for evidence to be recorded by live video or television link for use in proceedings abroad. Arrangements were made recently for a witness in Mauritius to give evidence by live video link in proceedings in Australia.

In criminal proceedings, it has been held (see e.g. *Sip Heng Wong Ng v R* (1985) MR 142) that the same Magistrate or Judge has to see and hear all the witnesses in the case in order to make a finding as to their respective credibility and determine whether their evidence may be relied upon for the purposes of assessing whether the accused is guilty. The admissibility in proceedings in Mauritius of evidence heard and recorded abroad, without the witnesses being cross-examined and without the Judge being in a position to assess their demeanour and credibility, is seen as

being problematic in that respect and such evidence recorded abroad has never been relied upon in local criminal proceedings. As crime becomes increasingly transnational and as it becomes more and more difficult to secure the physical attendance of foreign witnesses in our courts, it is believed that the law will now have to be amended to allow witnesses to give live evidence in courts in Mauritius from abroad by live video or television link; bilateral treaties or other arrangements will have to be considered, where necessary, for that purpose.

Digital Recording and Transcription of Proceedings

Courts in Mauritius are courts of record and until recently proceedings in all courts in Mauritius, including the Supreme Court, were recorded *verbatim* manually by the Judge or Magistrate. Questions had to be put by Counsel "at dictation speed", impeding effective examination and cross-examination of witnesses at times. The Judge or Magistrate who has to assess the credibility of the witness by, inter alia, observing his demeanour in court found it hard to do so when he also had to record the oral testimony faithfully. The length of proceedings was generally protracted as a result of the presiding Judge or Magistrate having to record the evidence and proceedings as well.

Digital recording of proceedings started in 1999 on a pilot basis at the Supreme Court and was soon extended to other courts. The law was amended to provide that the evidence and proceedings in any criminal or civil case before the Intermediate Court may be recorded by tape or other technological means. As at March 2010, all courtrooms in Mauritius are equipped with facilities for live recording of proceedings and the presiding Judge or Magistrate in such a court is only required to keep minutes of proceedings. The transcription which was initially effected by Supreme Court staff has since been entrusted to private contractors. Transcripts of the evidence and proceedings are available to the prosecution or the defence for a small fee shortly after the hearing has taken place. In some cases, the length of court proceedings has halved as a result of the live recording of proceedings.

E-Judiciary

The E-Judiciary project, as announced in the Budget Speech of late 2009, aims essentially at

implementing the electronic filing system and case management system in Mauritius, taking into account best practices in countries like Singapore (where the electronic filing system was launched in 1997) and South Africa. The project is being funded by the Government jointly with the Investment Climate Facility for Africa, and will be implemented together with a project aiming at introducing mandatory mediation for civil and commercial cases.

The system will aim at providing for initiation of cases, filing of documents in court and exchange of documents between solicitors to be effected electronically, and will result in the creation of electronic archives, a decrease in the backlog and in the costs of claims and a general enhancement of the judicial system that will increase investor confidence. Physical movement of persons and of paper documents will be kept to a minimum. Prompt accessing and retrieval of court documents will be facilitated.

It will be possible for an attorney to lodge a case electronically via a service provider for a fee without physically lodging the case at the Registrar's Office. The computer system will accept the case so lodged if the attorney has sufficient funds on credit to cover the fee and will designate a Judge or Magistrate, as the case may be, who will be responsible for the case until its disposal. Practitioners will be able to access the case file and ascertain its status from anywhere in the world.

It is expected that the electronic filing system will decrease from 150 to 45 days the minimum time for a civil case to be ready for mediation and eventual trial from its date of initiation at the Supreme Court. Commercial and civil cases will, as far as possible, be heard and disposed of within 100 days. Commercial Chambers cases are to be heard within 36 days of their being lodged.

The Courts Act was amended in December 2009 to allow the Chief Justice to make rules for the electronic filing of documents and management of cases.

Conclusion

The introduction of technology in courtrooms will no doubt greatly assist in the administration of justice in small Commonwealth jurisdictions and in the delivery of an enhanced service to litigants and the legal profession. Small jurisdictions which have yet to make use of information technology in their courts may well decide to follow the Mauritian model *mutatis mutandis* by identifying priority areas for gradual implementation. The Commonwealth Secretariat may assist small Commonwealth jurisdictions in securing financial assistance from international donors and in facilitating the provision of technical assistance and sharing of best practices by the more technologically-endowed Commonwealth jurisdictions.

FORCED MARRIAGES

His Honour Judge Martin Cardinal, Circuit Judge, England. A paper from the CMJA's Brighton conference.

Introduction

Forced marriage is a gross abuse of human rights. ... It is a form of domestic violence that dehumanises people by denying them their right to choose how to live their lives...no social or cultural imperative can extenuate and no pretended recourse to religious belief can possibly justify forced marriage. [Munby J in *Re K, A Local Authority v N* [2007] FLR 399]

I am a Circuit Judge sitting at Birmingham Civil Justice Centre, in the centre of Birmingham, a city with a wide variety of ethnic and religious groups settled within its borders. I deal with mostly family law matters full time and in addition to that I am the Diversity and Community Relations Judge for Birmingham so have many opportunities to meet with differing ethnic and religious groups and to see the interface between British law and cultural practices from elsewhere, mainly though not entirely in the Commonwealth.

Arranged marriage, in contrast to forced marriage, has an honourable tradition. Where it is practised with the agreement of all it is very often successful, and entirely appropriate. Parties consent to the family making arrangements for them and are content to fit in with cultural and religious traditions. There is no intention in applying the Forced Marriage legislation of denigrating or demeaning religious customs and cultural norms. This is something the English judiciary entirely accept. 'Forced is always different from arranged' as Singer J said in *Re SK (An Adult) (Forced Marriage: Appropriate Relief)* [2005] 2 FLR 230.

Just occasionally parents and families go too far: a party, mostly a woman but on occasion it has been a man, does not want to abide by the family tradition. He or she may have already chosen their intended life partner and/or in any event does not wish to have to marry the spouse chosen for them. On some ghastly occasions, violence, injury or even death is threatened to the party refusing the

union arranged by the family. There are some spectacular examples in the UK of these so called honour crimes being perpetrated. They have one thing in common: they are matters of shame and not honour at all.

As a result, the Forced Marriage Civil Protection Act came into force on 25th November 2008. It amended our legislation about domestic violence between spouses or those living together or indeed even between formerly engaged parties and inserted a new Part 4A into the 1996 Family Law Act. It protects both those who are facing being forced into marriage and those who already have been.

Birmingham Civil Justice Centre is one of the limited number of courts with jurisdiction at present to hear applications; and it so happens that I have heard the majority of applications at Birmingham to date. Indeed it appears that I have dealt with a large number of injunctions compared with many and certainly at one point more than any other Circuit Judge; hence it falling to me to speak to yourselves about this.

What is a forced marriage?

Section 63A (4) of the Family Law Act says that a person is forced into marriage if another person [whether their intended spouse or otherwise] forces them to enter into a marriage without their free and full consent. The force, the coercion, need not be against the victim of the forced marriage- it could be by way of a threat to another, and 'forced' includes coercion by threats or other psychological means. So it is not simply a case of the proverbial pistol applied to the head!

How do forced marriages come about?

The aim may begin by being laudable enough. There may be a desire to protect family land in the country of origin perhaps by marrying a relation; there may be general family pressure; a desire to stop unsuitable relationships especially where a child has become more

westernised than the family is comfortable with; there is a desire to protect religious and cultural traditions or even prevent a trans-racial or trans-religious marriage. Sometimes the reasons may be wholly well intentioned, to protect a disabled son or daughter after the parents have lived their lives and are no longer on this earth, there can be genuine concern as to the welfare of the person involved.

How are forced marriages discovered? They are discovered through a school, a college, a hospital report or a complaint to a social worker or the police. Hopefully they are discovered before they take place but inevitably this is not always so. How are they arranged? The victim of the forced marriage may be told his/her education cannot continue if they do not marry; or there is an excuse for a trip abroad, sometimes with only one parent aware of the plans; the victim may be told he or she is to see a sick relative; there can be threats, beatings or even drugs administered; above all the fear of being ostracised and omitted from a tight and otherwise loving family may be sufficient. The majority of those who are victims are under 18, but it need not be so. Quite independent adults may be involved and coerced.

How do cases come before the Courts?

Applications can be made *ex parte* to the court, i.e. with no notice at first to the family from whom the victim is estranged or with whom he or she is in disagreement. The procedure is fairly simple and judges have a tick box form dealing with the available orders that can be made. Who can bring applications? Parties themselves, a Local Authority and others with leave of the court for example the Police.

Most applications to date have been brought by the Police. Progress in some Local Authorities has been a little slow and pressures of work have meant that often it has fallen to the Police to undertake protective work. Applications by parties themselves are rare though I have seen them with the benefit usually of a conscientious social worker's support and guidance.

West Midlands Police [the force with whom I deal] has throughout endeavoured to be supportive of and encouraging to the protected party to the proposed or actual forced marriage. At the hearings before me, the Police

attend usually together with the protected party [with the exception of cases where that party is mentally disabled and cannot leave the family home or the Care Home where he/she lives – or is missing] and as applicants they stay of course until the application is fully considered, collecting the order themselves and arranging for service. My experience is that they clearly have come expeditiously and only when seriously concerned; the local vulnerable protected parties unit is well 'geared up' to assisting protected parties. Nearly every case involves an *ex parte* application requiring the family to know of the injunction only after it has been granted but giving them a chance to oppose it at a second hearing.

I have never to date refused the Police permission to bring an application and have granted a Forced Marriage Protection Order, though one of my colleagues in an application before her advised a later application on one occasion. Inevitably preparation by the Police is limited to completing the application form and the leave form and we rarely have witness statements though on occasion section 9 statements [statements in a form usually seen in a magistrates' court] have been tendered as evidence. But the local police have intervened timeously for example in a case where a family were to take a disabled man from his Care Home to get married abroad and where a young girl had been taken against her will to Pakistan.

The lack of a full witness statement inevitably means I have to hear some oral evidence, and where appropriate I follow the guidance of Munby J. and recite a summary of the evidence I have heard in the *ex parte* injunction order.

What sort of cases do you encounter?

Provincial centres do not generally see cases where a victim has already been spirited abroad, for the very good reason that it is appropriate to have an order by a High Court Judge and only the Royal Courts of Justice in London can guarantee having a judge of the Family Division sitting all the year round.

That said, I have had such cases on occasion. In one case the distraught parent reported her that her husband had just taken the daughter out of the country to Dubai and there was little prospect of the order of a mere Circuit Judge counting for much; so I immediately directed

the case referred to a High Court Judge in London. I understand an order was made overnight though with what result I do not know. In another case, the parents of the girl victim had arranged for an aunt to take her abroad and they remained in the UK. Since they were within the jurisdiction I ordered them to secure her immediate return and listed the matter next week before a Family Division Judge: I am glad to say she was returned within the week.

What sort of problems do we encounter?

In many cases the protected party is under the age of 18. Provided he or she has the required capacity, I take the view that the child should be a party. On occasion I have arranged for a member of the Law Society Children Act Panel to represent the child; indeed on one occasion a local solicitor even attended before the child left the court that very afternoon. Children are entitled to their own voice.

In some cases the protected parties have been incapable of handling their own affairs because of mental incapacity. As a result I have again made them a party and invited the Official Solicitor to act for them, an invitation he has taken up on every occasion. Indeed he is usually able to arrange representation via a local solicitor agent within 8 days or so where the matter is urgent. I have the advantage of being a nominated Circuit Judge at the Court of Protection who deals with health and welfare issues, so I have on occasion had the forced marriage return date on the same date as the directions in the Court of Protection.

What of the role of social services?

Dealing with these cases is a relatively new task for social workers and giving full support to the protected party and the family places a heavy demand upon a social worker at time when social services are very stretched. You may know that care applications have substantially increased last year. There are substantial training needs. Moreover a protocol has recently been negotiated between Birmingham City Council and the West Midlands Police. I believe that the implementation of such a protocol may well see an increase in applications before the court as will the sort of training that is necessary.

How do I involve social services? Where I am dealing with the cases of mentally incapacitated

adults I have made an order making the Local Authority a party, directing the named social worker to attend and asking when a health and welfare application will be made to the Court of Protection. This has resulted in two such applications to date. Where I am dealing other children cases, I still make the Local Authority a party and seek the attendance of a suitable social worker. I may for instance wish to obtain a report from the Local Authority as to the possibility of care proceedings being issued, as they have been in more than one case.

Where parties are over 18, I take the view that if social services are not aware and if the party consents then the Local Authority should be informed; for social workers can provide valuable resources for re-housing and protection.

Are proceedings contested?

Only on one occasion have I had to date to list a matter for a disputed hearing but that did not proceed because the parents were unable to secure public funding. Frequently the family [and remember that Respondents are not just Mother and Father but often members of the extended family and friends] will attend to say that whereas they do not accept they behaved in this way they will not contest the application.

How have proceedings settled?

On a few occasions the protected party has assured me through a social worker or via his or her solicitor that the matter was in fact a family dispute and the injunction may be lifted. On two occasions the parents of the protected party have separated and the proposed forced marriage plan was the trigger for that; the child has gone with the parent not agreeing to the marriage and again the injunction has by consent been withdrawn. I confess I have been anxious about settlements: it is plain that resisting a family's marriage plans for him or her puts immense cultural and familial strain upon the protected party. Resistance inevitably means a breaking with the family and maybe with a close-knit network. Where a child of the relationship has been conceived that adds to the pressure. But the best the Judge can do is to ensure the protected party has been spoken to carefully by a social worker with appropriate skills and that he or she is convinced that the

decision has been reached by them of their own free will. Likewise I have had young people come and ask for their passports back after the court has had them securely and I for my part ensure that the police are served before they are returned so investigations can be undertaken. It is often a pleasure to see young women now free of the burden of a threatened marriage they did not want.

What are my powers?

A Forced Marriage Protection Order may contain (a) such prohibitions restrictions and requirements; and (b) such other terms as the court consider appropriate for the purposes of the order [s 63B]. Accordingly even in the county court I have wide powers usually associated with the High Court. So I can order the return of a protected person to the United Kingdom by the family and have done so. In my view however there are cases which can and should go to the High Court simply because many jurisdictions regard a High Court Judge's order with very considerable seriousness, as indeed they should.

Briefly then on an injunction application I can make protective directions that no steps be taken to secure the betrothal, engagement or marriage of the person involved, no steps to obtain a passport or other travel documents be taken, the passport or passports that are currently held be lodged at the court, that the protected party not be assaulted or indeed harassed or molested in any way. I add of course a power of arrest to any order in accordance with my powers under the Act where appropriate.

The role of the High Court

What should be sent up to a High Court Judge? Where the protected party has produced a child who may not be in the jurisdiction a High Court Judge has wider power of intervention than a mere County Court Judge. Where the protected party is abroad already a High Court order is needed generally.

In addition certain evidential matters may need yet to be considered. If for example a protected party has married and has a sexual relationship with the person whom she did not wish to marry or perhaps when she has a mental disability then there are questions of possible prosecution, and decisions as to the release of evidence into Crown Court proceedings are in

my view for the High Court judiciary. Again the initial orders can be in the county court but I will transfer up.

What could we do better?

Over the last two years I have sought to assist Local Authority training needs, I have attended a meeting to draft the Local Authority protocol with the Police; I have attended training sessions at several of our principal family barristers' chambers in Birmingham. In short I am anxious that lawyers and Local Authorities are on top of what they have to do.

I would like to see more widespread publicity of a potential victim's rights in schools and in hospital in particular.

Some examples of forced marriage

I think of three instances:

The first is the reported case of *B v I (Forced Marriage)* [2010] 1 FLR 1721. Baron J. was faced with a case where a girl had in effect been kept prisoner by her family who had forced her into a marriage ceremony abroad with a cousin; although the marriage was over three years old in the circumstances of a threat of physical danger to the girl, a declaration was made in the High Court that there had never been a marriage capable of recognition within the jurisdiction. That case came before the Court under the inherent jurisdiction of the High Court rather than under the forced marriage legislation as the court needed to exercise its powers as to the status of the marriage.

In a case before me, a young lady had been married off to a man 5 years ago despite the fact that she has a mental age of 8 although she is in her twenties. Despite the time that had elapsed I made a forced marriage order to protect her from her husband and required the Local Authority to show me why they had not instituted a Court of Protection application. One followed and there are issues as to possible criminal offences and immigration offences to be resolved. I have sent that case to a Family Division Judge who will doubtless consider the status of the marriage

A more usual application involved a frightened young woman of 17 who had been threatened by her father and brother than unless she married her cousin she would be seriously injured; believing them, she had the sense to

contact the Police. I made the appropriate *ex parte* orders and arranged for her to be legally represented. The family attended on the return day of my injunction but did not oppose the order in the end though they made unconvincing denials. Twelve months later the young lady came to see me requesting the return of her passport which at my direction had been lodged at the court. The withdrawn and terrified young lady had become a mature and confident woman. She had been re-housed, she was at college training for a profession and had a boyfriend whom she wanted to marry one day. She no longer, sadly, saw her family and wanted her passport so she could go on a college trip to France which she was looking forward to. She thanked me very warmly for protecting her from her family, and hoped that one day they would see her but she would keep away for the moment. It is a case such as that which makes doing this work worthwhile. Her independence and her right to choose arranged marriage or not had been restored to her.

What more can be done to protect vulnerable protected parties?

It seems to me that the following are very necessary:-

- Early applications to court.
- Effective consultations between the police and Local Authorities

- The obtaining of evidence by statement where time permits to be filed with the applications for leave and the application for an order
- Effective training, not just of social workers but also of teachers [who often see distressed pupils before their removal from school] and health workers too who may see injuries on occasion or be suspicious about the way a person is watched in hospital.
- The encouragement of the police vulnerable persons units
- Communication in those communities where forced marriage has been practised so that the potential victims get to know their rights.
- Important steps to protect the young person. I am aware of what breaking away from a tightly knit family/community might mean; this issue needs to be carefully addressed by those with responsibility for protecting not just young persons but adults too in this very sad situation.

Above all else these cases need to be handled with sensitivity and understanding. I hope that the path we are treading in Birmingham is doing just that.

CHILDREN AS WITNESSES

Bridget Shaw, Assistant Magistrate, St Helier, Jersey. A paper from the CMJA's triennial conference in the Turks and Caicos Islands

Our adversarial system has evolved almost exclusively based on cases in which adults give evidence. Daunting courtrooms, imperious judges and aggressive cross examination may be the ingredients which will best serve the interests of justice where adults are concerned but do we really believe this is the best way to hear what the child has to say? Children have different capabilities and different needs. Their understanding of language is at different stages; many are already scarred by their experiences with adults and their openness and confidence in adults will vary. Children's memories may not be as long or as detailed as those of adults and their ability to express themselves will vary with age and development.

There are still serious delays in bringing cases to trial. Trials are still postponed through late applications for disclosure or legal arguments. Delay is one of the most pernicious aspects of the legal process putting immense stress on child witnesses and their families alike. Repeated adjournments can increase anxiety enormously for witnesses and families. Until the trial is over families may sometimes be separated as some members may be witnesses for one side and some for the other. Families cannot resume normal lives; communication between the child and adults is restricted if they cannot discuss the one thing that troubles the child most; much needed holidays cannot be planned; schoolwork is disturbed. The list could go on.

I have been a Stipendiary Magistrate in Jersey for just over a year. Previously I was a prosecution lawyer in Jersey for 10 years, and prior to that I prosecuted in the UK for a similar period. Much of that time I spent advising on and prosecuting offences committed against children.

As a prosecutor I was able to gain what I might call 'inside knowledge' of what the Court system is like for children who have to give evidence in these very difficult cases and how the system itself takes its toll on children and their families.

In Jersey our procedures for children giving evidence are similar to those in the UK although we still have the corroboration rule (that is: the judge must warn the jury that it is dangerous to convict on the evidence of the complainant in sexual cases or on the evidence of children in any case unless that testimony is supported by independent evidence). Provisions which assist a child in giving evidence are sometimes known as 'special measures'.

Every jurisdiction should look at what special measures can be put in place to enable children to give evidence and to be properly cross examined. Evidence via video and TV link is no longer a novelty to be restricted to a very limited type of case or to the specific age of the child. I can see no logic in limiting special measures to cases of a sexual and violent nature as they are now. A child who has witnessed a drug deal or a car crash is in need of no less assistance than a child who has witnessed an assault. Neither can I see any good reason for different age limits to be applied for the use of the video (evidence in chief) and the TV link (cross examination); nor why the age limits should be different for a witness to a violent offence as opposed to a witness to a sexual offence. If special measures will help a child give the best account of their evidence to the court such measures should be available to that child regardless of their specific age or the type of offence being tried.

Whether special measures are available for children or not, the judge can still do much to minimise delay, distress, confusion and fear and so to ensure that children can give the best account of their evidence to the court and that evidence can be effectively but fairly challenged.

Use of video

In my view the greatest advance in allowing children to give evidence and allowing their voice to be heard in Court is the use of a video shown in Court to replace the child's evidence in chief.

In Jersey when the Police become aware of a child's complaint they interview the child on video in comfortable surroundings so that, if conducted properly, that interview will become the child's evidence in chief.

The child will be accompanied by a volunteer from the Witness support service who will explain court procedures. The supporter will also answer any questions the child has but will not discuss the evidence in the case with the child. If the child becomes distressed or confused at any stage the supporter will alert the judge.

The video has significant benefits. Firstly, as a prosecutor I know that there have been many cases where, after initially denying the offence, the defendant is confronted with the video. When he sees what he knows to be true and has at last come to light he admits the offence. Even where he does not make admissions in interview with the Police he later pleads guilty.

This is because he *knows* the child's evidence will be given; the video *is* that evidence and the jury or Magistrate will see it. The video captures the child's evidence as near to the events as possible. The child's memory might fade as trials are delayed but the video will not fade.

As a judge I find that video evidence in Court lacks immediacy and it is awkward to deal with cross examination by TV link as the natural communications between counsel and the witness and indeed between counsel, the witness and the judge are somewhat stilted. It is not ideal but to my mind the advantages outweigh the disadvantages, particularly the use of the video itself. Incidentally, anecdotal evidence from the UK suggests that the bigger the TV screen used in Court to show the video evidence to the jury, the more likely they are to convict; an interesting observation which is perhaps best left to the psychologists to examine.

In Jersey the child will come to the court house on the day of the trial to watch their video and to be cross examined on it. A child must still be cross examined live but this is by TV link to a room other than the Court room. Again this is an improvement on having a child physically in the courtroom being intimidated by both the defendant and counsel, and, of course the courtroom setting itself. It does however, in my

experience, impede the flow of cross examination and is not ideal. A major drawback is that the video cannot be used unless the child is available for cross examination. That allows scope for intimidation of the witness into not being willing to be cross examined. Lengthy delays in cases coming to trial and repeated adjournments mean that the child and their family will not escape months of anxiety, and often fear, leading up to the day upon which the child is cross examined.

Children's memories also fade in the time it takes for the case to come to trial. Nine or twelve months might not seem a long time for an adult but for a child it is a significant proportion of their life so far. Ideally, cross examination would take place at the time of the Police video interview but at this stage the Police investigation is rarely complete, let alone has anyone been charged. The defence have no disclosure and therefore no firm basis for cross examination. They have not yet begun to prepare their own case. Thus it has so far proved impracticable for the child to be cross examined at such an early stage and all the more reason why the Court should resist applications to adjourn the case based on lack of proper preparation by the parties. Whilst delays might be a strategy employed by some defendants in the hope of intimidating or wearing down a witness to the point at which they will not come to Court, it can also work against the defendant. An innocent person wrongly accused has every interest in having his case heard as soon as possible. If a child's evidence is on video the complaint is fresh but the child may not be able to remember sufficient to be cross examined effectively on it to the detriment of the defence.

One of the most upsetting aspects of a recent trial in Jersey was the realisation part way through a trial that because of trial delays a witness passed her 16th birthday and was no longer eligible for cross examination by TV link due to her age, but the video of her evidence in chief *was* admissible as there was a different age limit. I fail to understand the logic behind these provisions. At 16 she was still a vulnerable young person. If she was eligible for the protection of the video, why was she not eligible for the protection of the TV link for cross examination, potentially the most gruelling part of her evidence? Delays in the same case, almost unbearable distress for the

witness and her family, an (unintentionally) intimidating meeting with judge and giving evidence unexpectedly live in court left this particular witness saying at the end of the experience that she wished she had never spoken to the police in the first place. The court experience was worse than the original abuse. And we thought we had come a long way in dealing with such cases.

NSPCC Research

In July 2009 NSPCC (a major UK children's charity) published a report entitled *Measuring Up?* based on extensive research with children who have been witnesses in sexual and violent cases and their parents.

The research found that:

'Overall, ..there is still a significant gap between the vision of policy and the reality of many children's experiences. The picture therefore remains disappointing'

- Only 55% of eligible young witnesses made video recordings of their evidence (some fraction of these cases may have been a positive choice by the witness not to accept recording)
- 44% neither met a 'supporter' before the trial, nor had a pre-trial visit to the Court
- 66% were accompanied by someone they had never met before
- 65% had problems dealing with questioning in Court – too complex, didn't understand, too fast, being talked over
- 20% felt they were unable to tell the court everything they had to say
- 57% were accused of lying and 58% said the defence lawyer tried to make them say things they didn't mean.
- Judges and Magistrates did not always intervene when questioning was inappropriate or comprehension problems arose

80% felt worried, stressed or intimidated during the pre-trial period, highlighting the need for trials to be brought on as soon as possible.

It makes sobering reading for any of us who thought we were doing so much better with special measures at our disposal.

The Role of the Judge

As the NSPCC research shows, even where special measures such as video evidence are available much still needs to be done to give the child an effective voice in Court. In countries where there is no legislation to protect the child witness the judge's role is even more difficult. However, in both cases the management of the case by the judge can be vital in allowing the child's evidence to be heard and heard promptly. If we manage cases efficiently and sensitively we can ensure that the defendant receives a fair trial within a reasonable time and that the child is not so traumatised by the Court proceedings as to regret (as some children do bringing the matter to the attention of the Police at all.

A Case Management Check list

I would recommend that any judge dealing with a case in which a child is a witness gives careful thought both to pre-trial directions and the management of the trial itself. In doing so, they can greatly reduce delay, confusion, distress and anxiety for the child and their family and enhance the fairness of the proceedings overall. I cannot present the following as a counsel of perfection but I hope it will be of some use.

Pre-trial directions

- Identify cases involving child witnesses on the defendant's first appearance in court.
- Set a timetable. Do not accede to spurious applications to adjourn
- Identify the issues in the case at an early stage. This is vital to be able to manage disclosure, rule on admissibility and generally prevent delay. It is also very practical. For example, if there is no dispute that the child was injured, a formal admission can be made and eliminate the need for the child to have to refer to their injuries or see photographs of them
- If the child will have to refer to their own body, consider having a diagram prepared
- Deal with legal argument where possible at a pre-trial hearing, not on the day of the trial with the child waiting to give evidence

- Seek the child's views as to how they would like to give evidence – some might prefer to be in court with screens
- If using technology practice; if you are unfamiliar with it, make sure it works and that those in court can operate it (!)
- Consider whether the child can give evidence from another facility by video link? Does the child really need to be in the courthouse at all?
- If you have to use the Courthouse ensure a pre-court visit takes place for the child and that they practice using the video/TV link. Think about whether the child needs to see the inside of the courtroom at all
- Make sure there are separate exit and entrances to keep the child away from other witnesses and the defendant or, if not, ensure different arrival and departure times so they don't meet.
- Ensure the child can have refreshments and something to do whilst waiting (we have SKY TV at my court)
- Consider the age of the child and their educational/social development and attention span. Ask the party calling the witness to give you some assessment. You can then give directions as to how often there should be breaks for the child and what language is appropriate for the advocates to use.
- General directions regarding language can be given e.g. no complex sentences with multiple sub-clauses, no double negatives, no talking over the child etc
- Who will accompany the child? The child should get to know the person first. Ideally a trained witness support volunteer (must have been subject to vetting for suitability to work with children)
- Ensure the supporter knows how to alert you to a child when a child does not understand a question or is becoming distressed (we use a yellow card to indicate the child is becoming uneasy; red card for stop)
- Ensure the child has been taken through any literature designed to explain court procedure

Should the child meet the judge before the trial?

- It is now common practice in Jersey and the UK for a child to meet the judge before the trial (either on the day or at the earlier court visit).
- Ask through the family what the child wants. I have found it very beneficial as I will have to speak to the child during the trial. I gain an impression of the child's abilities to answer questions and I hope the child will have confidence to tell me if they do not understand questions put to them or that they are distressed.
- This need only be a brief meeting. Visit the child with prosecution and defence counsel and a Greffier (Court clerk) but make it clear that you are in charge.

Court dress

- It is generally assumed that gowns and wigs (if you wear them) are not appropriate for this type of case, but ask the child. In the last case I did, the child wanted 'a proper judge' – so I kept my red robe on!

Timing of the Child's Evidence

- Children are generally more alert in the mornings so it is better to take their evidence then. If there is to be legal argument, start that the afternoon before.

When should the child view the video?

- If the court is to view a lengthy video, consider when it is best that the child sees that. It may be better the child sees it the day before and arrives in court after the court has seen the video.

Who can the child see?

- Ensure the child cannot see the defendant either in court or via TV link.

Who should be able to see the child on the TV link or behind the screen?

- Advocates, judge and jury. The defendant press and public probably do not need to see the child and it could be very distressing to the child to know that they would.

Is it in the interests of justice that the public be in court?

- We go to some lengths to protect the identity of children in such cases and then allow in any prurient member of the public who happens to want see the case for what ever dubious reasons. Consider whether it is in the interests of justice to allow the public into the court. Perhaps one nominated member of the press is sufficient.

Cross Examination

- Keep counsel under control as to their questioning and body language. Do not ask a child to look at photographs of their

own injuries or point to intimate parts of their bodies. A body diagram might help

Saying Thank You

- Thank the child at the end of their evidence. NSPCC research found that children had a better experience of court, even if the defendant was acquitted, if they were supported throughout and thanked at the end.

Feedback

- Ask parties for feedback after the event. None of us is perfect. We can always improve.

JUDICIAL APPOINTMENTS

The Rt Hon Baroness Prashar CBE, Chairman of the Judicial Appointments Commission in England and Wales, 2005 to 2010.

The Latimer House Principles state that:

‘Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:

- equality of opportunity for all who are eligible for judicial office;
- appointment on merit; and
- that appropriate consideration is given to the need for progressive attainment of gender equity and the removal of other historic factors of discrimination.’

Judicial independence is a key aspiration of any democracy and yet the mechanisms of such independence, particularly through the appointments process, have not until recently received sufficient attention. It is increasingly being accepted that judicial independence can be compromised by a system that confers undue power of selection upon either the executive or the legislature. There is also now a growing recognition, in many democratic states, of the benefits of establishing independent appointments commissions to select judges.

Such a judicial appointments commission was set up in England and Wales in April 2006, following the Constitutional Reform Act 2005 (CRA). The creation of the Judicial Appointments Commission (JAC) was an unprecedented move in that country to make the process for selection of judicial office holders more independent of the executive and the judiciary. It also brought greater transparency and introduced a lay element in order to bring broader perspectives to the process. It was designed to enhance judicial independence and increase the judiciary’s legitimacy by making it more reflective of contemporary society.

Balancing independence and executive involvement

The former Lord Chancellor, Lord Falconer of Thoroton, said: ‘In a modern, democratic

society, it is no longer acceptable for judicial appointments to be entirely in the hands of a government minister. For example, the judiciary is often involved in adjudicating on the lawfulness of the actions of the executive. And so the appointments system must be, and must be seen to be, independent of government.’

Before the JAC was established there were concerns about the transparency of judicial appointments. The Lord Chancellor’s Department (later the Department for Constitutional Affairs) made judicial appointments through ‘secret soundings’ with peers and supervisors, which led to a widespread perception that only barristers received ‘the tap on the shoulder’ to be a judge. As a result, the Law Society representing solicitors would have no part in the process and in 1991 described it as ‘a very peculiar creature indeed’. The Association of Women Barristers was one of a number of other organisations which had similar misgivings. While the judiciary selected under the old system was of unquestionably high quality, the process for selecting the judges did not engender confidence, and the judiciary’s composition was criticised for being mostly white and male and coming from a narrow social and educational background.

The CRA 2005 therefore was an important move towards a greater separation of powers between the legislature, the executive, and the judiciary, and was a significant step forward for the constitution. It enshrined in law a duty on government ministers to uphold the independence of the judiciary. They are specifically barred from trying to influence judicial decisions through any special access to judges. The CRA changed the role of the historic office of the Lord Chancellor who had simultaneously acted as a cabinet minister, the head of the judiciary and Speaker in the House of Lords. The CRA also established the JAC, an independent body responsible for the selection of judges.

The present balance of responsibilities in the appointment process was carefully calibrated

in the CRA to ensure an appropriate level of involvement for the executive and the judiciary. Despite the name, the Commission does not make appointments; it provides the Lord Chancellor with recommendations. When the Commission sends the names of those selected to the Lord Chancellor, there is only one name per appointment and he has the power to accept, request reconsideration or reject a recommendation. But he can only exercise those options once for each office a selection is made, and he cannot suggest an alternative candidate.

Under the CRA, the JAC is also required to consult with the Lord Chief Justice (head of the judiciary) and another judge from the relevant jurisdiction before the Commission finalises who to select. This helps to maintain the confidence of the judiciary in the selections which are made. However, the JAC's independence is maintained as the Commission may or may not take these views into account.

There are fifteen Commissioners, including the Chairman, and with the exception of three Commissioners who were selected by the Judges' Council, all were selected and appointed through an open and transparent recruitment process. Membership of the Commission is drawn from the judiciary, the legal profession and includes five lay people - a slightly misleading term as they are all highly distinguished in their respective fields. The Commissioners are appointed in their own right and are not representatives of the professions that they may come from. It is this diverse make up of the Commission which means that each member is able to bring knowledge, expertise and above all independence of mind.

Developing the new selection processes

Under the CRA, the Commission has three key duties in the selection of judges. These are to:

- select candidates solely on merit
- select only people of good character
- have regard to the need to encourage diversity in the range of people available for selection for judicial office

From the outset, the Commissioners were very conscious that judicial office holders deal with matters affecting the rights and freedom of individuals and that judicial independence is a

key principle of our constitution and a safeguard to the liberty, rights and protection of our citizens. It was, therefore, important to create a system of judicial appointments that protected judicial independence and excellence and provided greater accountability, promoted democratic values and enhanced the legitimacy of the judiciary. A modern democratic society demands that its judges are not only chosen in a fair and open way, but are seen by the public to have been chosen in the fairest possible way, taking nothing into account other than the ability to do the job. Perception, confidence and trust are vitally important, and diversity is a key factor. The Commissioners were fully aware of the debate and the activity taking place in the name of diversity, its benefits, why it is important and how to achieve it. They did not see merit and diversity as incompatible. The benefit of widening the range of applicants for them had a powerful simplicity. If more people from a wider range apply to be judges, the merit of those who are selected can be enhanced. If there are a variety of intellects and views drawn from a wider field of experience then decision-making, argument and ultimately justice will be better served. Our task was how to integrate diversity fully into the organisation and all its operations, and conduct the selection of judges to the highest standard.

Mindful of the fact that the precedents set by the inaugural Commission would determine the future operation of the JAC, independence became the Commission's guiding principle and professionalism its hallmark.

The JAC identified three priorities to meet its statutory responsibilities:

- defining merit: that is, what makes a good judge
- developing effective and fair methods for assessing merit
- developing strategies to encourage a wide range of applicants

Defining merit

Since October 2006, the Commission has been using a new system for selecting judges, and new criteria for what makes a good judge. After extensive consultation and discussions with all the key interested parties, the Commission developed a set of qualities and

abilities against which to measure merit. The Commission developed a simple, streamlined definition that would be easy to understand, not burdensome for candidates, enable effective assessments and help referees to provide pertinent observations.

This includes:

- intellectual capacity – expertise, analysis and appropriate knowledge of the law
- personal qualities – integrity, sound judgement and decisiveness
- understanding and the ability to deal fairly with people
- authority and communications skills
- efficiency

For some posts, more weighting may be given to certain qualities and abilities to ensure the most appropriate candidate is selected for that particular role.

Developing fair and effective processes

The key priority was to develop effective, fair, non-discriminatory, rigorous and proportionate selection processes to enable the effective application of the merit criteria, in order to achieve high quality outcomes. While merit must include objectively determined and consistently applied criteria, what matters more is how these criteria are applied and the authenticity of the reasons for selecting candidates. Appointment on merit is, therefore, as much about open and fair process, as the elements of merit itself. Robust quality assurance measures and equality checks were integral to the new selection process, which includes an application form, qualifying tests, role-plays, references and interview.

Written qualifying tests were introduced in 2007 and are designed to assess candidates' ability to perform in a judicial role, by analysing case studies, identifying issues and applying law. They were developed to help deal with the large increases in applicant numbers and to provide a fairer and more objective method of short-listing those without previous judicial experience than paper sifts using application forms and references, which are perceived by some as favouring those known to the serving judiciary. When there are a small number of vacancies or in other limited circumstances, such as for senior judicial vacancies of Senior Circuit Judge level and

above, the JAC may instead choose to use a paper sift. The qualifying tests are marked by experienced judges and the results are carefully moderated by the judge markers and the JAC to ensure consistency in the marking. The Law Society said: 'Written tests are proving to be an invaluable method of sifting applicants. More women, ethnic minority and solicitor candidates are progressing to interview and eventual appointment.'

For entry-level appointments, part of the selection day assessment includes a role-play to simulate a Court or Tribunal environment. This asks candidates to take on the role of a judge to help assess how they would deal with situations they might face if appointed.

In its first year, the Commission issued 'good character' guidance. This was to assist candidates in identifying whether there is anything in their past conduct, or present circumstances that would affect an application for judicial appointment, in line with the JAC's aforementioned statutory duty to select only people of good character.

In four years the JAC has handled over 13,000 applications, run over 80 selection exercises and made 1,700 recommendations for appointment to the Lord Chancellor.

The JAC receives very few complaints and those they get are usually about a candidate's dissatisfaction with not being selected rather than the process. Since 2006 to July 2010, complaints formed a little over one per cent of all applications and no complaint against the JAC has ever fully been upheld by the Judicial Appointments and Conduct Ombudsman.

Strategies to widen the pool

Diversity is crucial to the future of the bench in terms of perception, confidence and trust. The wider the range of views, and the wider the field of experience from which judges are drawn, the more fully considered their decisions will be in court. Consideration of diversity is integral to all that the JAC does – it is embedded in the assurance of fairness in their processes and extends into outreach work to encourage applications from those currently under-represented in the judiciary.

The Commission has needed to listen and learn to understand how best to attract applicants from as wide a pool of eligible candidates as

possible. The JAC was aware from an early stage of a number of barriers to entering the judiciary and that widening the pool was not within their sole gift. They have found through detailed research that most of the barriers to applying for an appointment are usually centred upon commonly held myths and perceptions: that you have to be an advocate; that you have to be known to the senior judiciary; that you have to be from a certain educational background. There are other real barriers to applying for an appointment: such as the expectation candidates for salaried posts will normally have fee-paid experience; restrictions on government lawyers; a lack of part time working and many solicitors' firms not supporting judicial applications in the way barristers' chambers do. The Commission discovered many of these real and perceived restrictions through research it commissioned in 2009 on barriers to application to judicial appointment, and continues to dispel and tackle them at every available opportunity. The research provided a sound basis for future work and the JAC's key partners – including the judiciary, Ministry of Justice and legal professional bodies – agreed that progress could be made only by working together. The JAC established a Diversity Forum to bring together those in positions to make a real difference so that they could collaborate effectively in identifying and breaking down the barriers.

The arrival of the new Commission has acted like a litmus paper, revealing the extent to which progress on judicial diversity is restricted by systemic barriers which are outside the JAC's control. A number of diversity initiatives had previously been in place across the justice system, but there was a sense that everyone was working in isolation. The establishment of a Diversity Forum by the JAC in 2008 to bring together the legal profession, the judiciary, the MoJ and other interested parties to highlight their interdependency and encourage collective working to speed up change has enabled greater interaction and dialogue and deepened understanding of the issues, with better co-ordination of respective initiatives. Importantly, it has allocated ownership of the problem to those capable of making a difference. This is a real cultural shift.

To encourage applications from a wider pool, the JAC advertises vacancies through well-established, targeted campaigns. In addition,

they run approximately 40 outreach events per year, engaging more than 1,000 potential candidates, to explain the selection process, working in partnership with associations such as the Bar Council, the Law Society, the Institute of Legal Executives and minority groups. The JAC website attracts several thousand visitors per week and the e-newsletter reaches some 3,500 subscribers. The Commission also encourages applicants to sign up to vacancy alerts which can attract 2,000 names each.

To prevent bias in selections, the JAC has developed robust quality assurance methods. For example, they recruited their own selection panels through open competition and provided them with comprehensive training, to which equality and diversity awareness was integral. All selection material is equality proofed by independent and external equality experts. Also, progression rates of candidate groups are monitored throughout each selection exercise to ensure none has been unfairly disadvantaged.

The JAC's commitment to the promotion of equality of opportunity and the elimination of discrimination was encompassed in a single document published in 2008 called the 'Single Equality Scheme'.

There have been some notable diversity successes. We selected five women to the High Court in 2008, which when they were all appointed meant at that time there were more women than ever before on the High Court bench – and over 50 per cent more than before the Commission was established.

The Tribunals, Courts and Enforcement Act 2007 meant that legal executives could apply for some judicial appointments and this autumn the first Institute of Legal Executives Fellow judge was appointed.

An analysis of the diversity of appointments since 1998, jointly published by the JAC and Ministry of Justice (MoJ), showed under the JAC more women and black minority ethnic (BME) candidates are applying; more women are being recommended and BME candidates are doing well in selection exercises for posts such as Recorder and Deputy District Judge, which are traditionally the first step on the judicial ladder. The JAC wants to see BME candidates continue to climb that career

ladder. The JAC has also just published a 10-year analysis of solicitors' appointments, alongside the MoJ. It showed solicitors are performing better under the JAC selection process at entry and mid-level positions, again setting an excellent base for future progress.

Achieving a judiciary which is properly representative will take time. Some people thought the creation of a Commission would itself resolve the lack of diversity in the judiciary. This was unrealistic. The present bench and legal professions need to become more reflective of society first as this is the pool from which the JAC are trying to recruit. Changes are also needed to the culture of the judiciary to, for example, make part-time working more

accepted. Co-operation is crucial. By working with our partners to widen the pool of candidates and ensuring there is no bias in our processes which disadvantages any group, progress is being made and it will get faster.

To sum up, how judges are selected and appointed is a matter of constitutional significance. Selection is not just about sterile processes. It is about selecting on merit. It is about balancing independence, accountability and legitimacy. It is about ensuring that the process for selection is not captured by any one vested interest. Above all it is about achieving democratic imperatives of judicial independence and the rule of law.

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THE ROLE OF THE APPELLATE COURT

The Hon. Mme. Justice D.P. Bernard, Judge, Caribbean Court of Justice

The topic of this address is multi-jurisdictional and multi-dimensional. As such it involves discussion of court systems which are jurisdictionally different even among countries which share a common law history. Primarily appellate courts are courts of review of the decisions of lower courts, and may be intermediate courts, or courts of last resort with a power of review only on points of law where the leave of such a court is obtained, or courts such as the Constitutional Court of South Africa whose sole function is review of decisions concerning a country's constitution or basic law.

Discussion of the appellate courts of a few selected Commonwealth countries (England and Wales, Canada, Australia, India, South Africa, New Zealand and the Caribbean) will form the basis of this paper, with some comparative reference to the United States Supreme Court. One of the enduring legacies of British colonialism being the court and judicial systems, it is appropriate to commence our journey with a historical tour of the systems of England and Wales.

England and Wales

The passage of the Judicature Act 1873 was transformational in the judicial system of England and Wales merging as it did the common law and equity, and establishing the High Court and the Court of Appeal. The Criminal Appeal Act 1907 brought into being the Court of Criminal Appeal, the jurisdiction of which later passed to the Court of Appeal under the Criminal Appeal Act 1966.

The House of Lords was vested with a judicial function as a court of last resort, its jurisdiction being regulated by the Appellate Jurisdiction Act 1874 and later Acts. The new Supreme Court of the United Kingdom replaces the House of Lords at the apex of the hierarchy of the English court system. The Court's appellate jurisdiction covers appeals from the Courts of Appeal of England and Wales and of Northern Ireland, civil appeals from the Court of Session of Scotland, appeals directly from the High Court of England and Wales and Northern Ireland 'leapfrogging' the Court of Appeal, and

appeals from the Court Martial-Appeal Court. An appeal from a lower court is accepted only with leave of that court or of the Supreme Court except an appeal from the Court of Session of Scotland which requires only a certificate that there are reasonable grounds for the appeal. The Divisions of the High Court (Queen's Bench, Family and Chancery) also exercise appellate jurisdiction as administrative and divisional courts hearing appeals from crown courts, county courts, magistrates' courts and tribunals.

Precedent

Inevitably any discussion on appellate courts involves the applicability of the doctrine of precedent which in one sense depends on the hierarchy of courts, and in another on whether an appellate court is bound by its own decisions known as *stare decisis*. The hierarchy of courts dictates that the decisions of higher courts are binding on courts of lower jurisdiction, for example, decisions of the Supreme Court, Court of Appeal and High Courts bind the magistrates, crown and county courts in England and Wales. An appellate court such as the Court of Appeal may also be bound by its own decisions as was first decided in *Young v Bristol Aeroplane Co Ltd* ([1944] KB 718). In that case the Court of Appeal held that it was bound to follow its own decisions and those of courts of co-ordinate jurisdiction, the only exceptions being (1) to decide which of two conflicting decisions of its own to follow, (2) to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords, and (3) not to follow a decision of its own if it is satisfied that the decision was given *per incuriam*. A fourth exception where a law was assumed to exist in a previous case, but did not, was established in *R (Kadhim) v Brent London Borough Housing Benefit Review Board* ([2001] QB 955).

Lord Denning, that illustrious and renowned jurist of revered memory who acquired the reputation of being the great dissenter while in the Court of Appeal (and also while in the

House of Lords), expressed strong views against rigidly following *Young*, and found ways of getting around a previous decision if he felt that it was wrongly decided, sometimes by distinguishing it either on the facts or the law.

Unusually, the Criminal Division is not bound by its previous decisions, no doubt placing the need to be fair and just above the need to be certain and rigid.

Prior to 1966, the House of Lords like the Court of Appeal was bound by its own decisions; in fact as far back as 1898 in *London Street Tramways Company Ltd v The London County Council* ([1898] A.C. 375) the House held that a decision upon a question of law is conclusive and binds the House in subsequent cases. The Earl of Halsbury LC reasoned that although cases of individual hardship may arise after a judgment is given and which the profession may find to be erroneous, greater inconvenience would ensue in having each question subject to be re-argued and ‘the dealings of mankind rendered doubtful by reason of different decisions so that in truth and in fact there would be no real final Court of Appeal.’

This continued to be the position until 1966 when a Practice Statement (Judicial Precedent) was issued in which the learned Law Lords recognised that ‘too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.’ They reserved the right to depart from a previous decision whenever it appeared right to do so. This did not affect the value of precedent in cases in lower courts, and all other courts that recognised the House of Lords as the court of last resort. So far the position seems to be the same in relation to the new Supreme Court.

Before leaving the discussion on precedent, mention should be made of the European Court of Justice in relation to the House of Lords and its successor, the new Supreme Court. This Court, established under the Treaty of Rome 1957 and now part of the English legal system by virtue of the European Communities Act 1972, is clothed with jurisdiction to determine questions of law pertaining to any Community instrument, and as such can overrule all other national courts on matters of Community law. Only in this

regard does the Supreme Court yield to any other court as the final arbiter of issues.

The Judicial Committee of the Privy Council

The Privy Council as it is familiarly known (and will hereafter be so described) can be said to be the most multi-faceted court in the judicial system of the United Kingdom since its establishment by the Judicial Committee Act 1833. Besides being one of the highest courts in the United Kingdom it is also the court of last resort for several Commonwealth countries which were former colonies. In addition to jurisdiction in some domestic matters, the Government may refer any issue to the Committee for ‘consideration and report.’ Additionally, it is the court of final resort in certain cases arising within the Church of England.

Precedent

Judgments of the Privy Council in cases from overseas Commonwealth jurisdictions are only persuasive in courts of the United Kingdom, but are binding precedent in the lower courts of the jurisdiction from which they emanate.

Not unlike the former House of Lords, the Privy Council never regarded itself bound by its own decisions, and this was held to be so in three cases from the Caribbean (*Lewis v A-G of Jamaica* (2000) 57 WIR 275; *Mathew v The State* (2003) 64 WIR 270; *Gibson v The Government of the USA* (2007) 70 WIR 34. Lord Hoffmann, however, was of the opinion that the fact that the Board has the power to depart from earlier decisions does not mean that there are no principles which should guide it in deciding whether to do so. He went on to state that

‘if the Board feels able to depart from a previous decision simply because its members on a given occasion have a doctrinal disposition ‘to come out differently,’ the rule of law itself will be damaged and there will be no stability in the administration of justice’

Further reference will be made later about the impact of the judgments of the Privy Council when discussing the appellate courts in the selected jurisdictions.

Canada

Within the hierarchy of the Canadian judicial system, the Supreme Court of Canada which came into being in 1875, and is now governed by the Supreme Court Act, stands at the apex of a structure which is multi-dimensional. It comprises both federal and provincial court systems as well as military courts and tribunals. The Federal Court of Appeal hears and determines appeals from the federal court trial division and federal administrative tribunals, and the Provincial Courts of Appeal function as appellate courts for provincial, superior courts and provincial administrative tribunals. The Supreme Court is the ultimate court of appeal for all of these courts including the military courts.

Leave to appeal to the Supreme Court is given if the case involves issues of law or a question of great public importance that warrants consideration. In addition, the Court can hear references from the Governor or Governor-General in Council for opinions on the constitutionality or interpretation of federal or provincial legislation.

The early beginnings of the Supreme Court did not augur well for its future. Its first case in April 1876 was a reference sent from the Senate requesting the Court's opinion on a private bill; it was not until one year after its first sitting that the Court began to sit regularly.

Despite the creation of the Supreme Court in 1875 the Privy Council continued to be the court of last resort for Canada until 1933 for criminal appeals, and 1949 for civil appeals.

Precedent

Shortly after appeals to the Privy Council were abolished, the Supreme Court's approach to decisions emanating from the House of Lords began to change, and their relevance to Canadian jurisprudence was called into question. Illustrative of this is the case of *Fleming v Atkinson* ([1959] 18 DLR (2d) 81) involving a collision between a motor car and cattle on the municipal highway and the right of an adjoining landowner to permit cows to run at large on the highway. The question arose whether an English common law rule was applicable. It was held by a majority of the Supreme Court that the injured motorist was entitled to succeed. Reference was made to a House of

Lords decision, *Searle v Wallbank* ([1947] AC 341), that the English common law rule was to the effect that highways in England having come into existence by dedication rather than by governmental action, there was formerly no real risk of damage from the presence of straying animals, hence no duty of care to users of the highway. Although this had been followed in a previous case in Ontario, Judson J writing the majority judgment reasoned that the historical basis for the rule in *Searle* was dependent upon the peculiarities of highway dedication in England which had never existed in Ontario; the public right of passage on the highways of Ontario was never subject to the risk of stray animals as the highways were created by the province and vest in the province. He concluded that this alone was sufficient to distinguish the law of Ontario from the law of England and to render the principle stated in *Searle* inapplicable to Ontario.

Later in *Ares v Venner* ([1970] SCR 608) the issue of the admissibility of hospital records and exceptions to the hearsay rule arose and involved discussion of the House of Lords decision in *Myers v Director of Public Prosecutions* ([1965] AC 1001) and whether extension of the exceptions to the hearsay rule should involve a legislative or judicial solution. Hall J in delivering the judgment of the Supreme Court adopted and followed the minority views of Lords Donovan and Pearce in *Myers* which supported a judicial solution rather than a legislative one. Lord Donovan had expressed the view that 'the common law is moulded by the judges and it is still their province to adapt it from time to time so as to make it serve the interests of those it binds.' The opposite view was taken by Lord Reid who posited that 'the most powerful argument of those who support the strict doctrine of precedent is that if it is relaxed judges will be tempted to encroach on the proper field of the legislature.' Hall J's opinion was that the Supreme Court should adopt and follow the minority view rather than resort to saying in effect: 'This judge-made law needs to be restated to meet modern conditions, but we must leave it to Parliament and the ten legislatures to do the job.' This indicated a pragmatic and less rigid approach to precedent commensurate with modern conditions.

The scope of the Canadian Bill of Rights enacted in 1960 as a federal statute was limited,

and rarely were such statutes deemed to be inoperative by the Supreme Court. However, in *R v Drybones* ([1970] SCR 282), a landmark decision, the Court held that section 94(b) of the Indian Act which prohibited Indians from being intoxicated off a reserve was inoperative being in violation of section 1 of the Bill of Rights which recognised the enjoyment of certain rights without discrimination based on race, colour or national origin.

Dissatisfaction with the Bill of Rights eventually led to the adoption in 1982 of the Canadian Charter of Rights and Freedoms which was entrenched in the Constitution of Canada. It broadened the scope of the fundamental rights and freedoms with wide powers of interpretation and enforcement being given to the courts, the Supreme Court of Canada being the ultimate authority. This mandate was utilised by the Supreme Court in several cases, two of them being foremost in mind, *R v Morgentaler* ([1988] 1 SCR 30), involving abortion rights when the court found that section 251 of the Criminal Code violated a woman's right to security of the person under section 7 of the Charter. The other was *Vriend v Alberta* ([1998] 1 SCR 493) in which the Supreme Court held that a legislative omission regarding sexual orientation in the Alberta Individual Rights Protection Act violated section 15 of the Charter.

Australia

Provision in section 71 of the Constitution of Australia led to the establishment in 1901 of an appellate court known as the High Court of Australia with its first sitting taking place in 1903 and comprising jurists from the newly created Commonwealth of Australia with a jurisdiction embracing the State Supreme Courts. In *Dalgarno v Hannah* ([1903] 1 CLR 1) the court expressly stated that section 73 of the Constitution

'provides that the High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders and sentences of any federal court, or court exercising federal jurisdiction, or of the Supreme Court of a state.'

Defying critics who at the time feared that the court would be a tribunal with no real status,

the court spoke through its judgments and over the years gained a reputation for judicial excellence.

The High Court stands at the pinnacle in the hierarchy of courts in Australia with two streams – the superior courts which comprise the Supreme Courts in each State and Territory and which normally hear appeals from inferior courts in their area, and federal courts which are superior courts with jurisdiction over laws made by the federal Parliament, and the Family Court of Australia. Appeals to the High Court are by special leave only; hence for most cases the appellate divisions of the Supreme Courts of each state and the federal court are the ultimate appellate courts. The Full Court of the High Court is now the court of last resort for the whole of Australia.

The High Court and the Privy Council

Section 74 of the Constitution prohibited appeals to the Privy Council on constitutional matters involving disputes about the limits of Commonwealth or state powers except where the High Court certified the appeal, which occurred only once. In *Kirmani v Captain Cook Cruises Pty Ltd (No 2)* ((1985) 159 CLR 461) the High Court explained the reason for this to be that it rigorously insisted on maintaining its ultimate constitutional responsibility to decide conflicts between the Commonwealth and the States without the intervention of Her Majesty in Council; in fact, the court felt that by granting a certificate for the appeal it would be abdicating its responsibility to decide finally questions concerning the limits of Commonwealth and State powers, questions which had a peculiarly Australian character and were of fundamental concern to the Australian people.

In 1968 by the Privy Council (Limitation of Appeals) Act all appeals to the Privy Council involving federal legislation were discontinued, and in 1975 the Privy Council (Appeals from the High Court) Act closed the door on all appeals to the Privy Council. In 1986 with the passage of the Australia Acts all appeals from State Supreme Courts to the Privy Council were finally terminated, leaving the High Court as the only court of last resort for all Australian courts.

Precedent

The question whether the High Court should be bound by its own decisions (*stare decisis*)

was decided as far back as 1913 when, in *Australian Agricultural Company v Federated Engine-Drivers* ([1913] 17 CLR 261) Isaacs J reasoned that ‘where the prior decision is manifestly wrong, then, irrespective of consequences, it is the paramount and sworn duty of the Court to declare the law truly.’ This liberal approach to precedent preceded the House of Lords’ Practice Statement (Judicial Precedent) by thirty-three years, and is consistent with the approach of the Australian courts to eschew rigidity in interpretation of the law in favour of pragmatism and practicality.

With the severing of ties to the Privy Council in 1968 and 1975, Gibbs J in *Viro v R* ([1978] 141 CLR 88) articulated the view that

‘The Court was not bound by decisions of the Privy Council, which no longer occupied a position above the High Court in the judicial hierarchy. As such it was for the High Court to assess the needs of Australian society and to expound and develop the law for Australia in the light of that assessment.’

India

The Supreme Court of India which was inaugurated on 28 January 1950 as the highest court in the judicial system has a tri-partite jurisdiction, original, appellate and advisory. The exclusive original jurisdiction relates to disputes between Government and one or more States or between States involving any question on the existence or extent of legal rights or the enforcement of fundamental rights. The appellate jurisdiction covers judgments of one or more of the twenty-one High Courts in civil and criminal cases, and the special advisory jurisdiction may be invoked by the President of India by specific referral to it according to the Constitution.

One unique feature of the Supreme Court’s jurisdiction is the somewhat recent innovation of entertaining and deciding matters of public interest sent to it by members of the public either by writ petition or a simple letter addressed to the Chief Justice of the Court. This ‘public interest litigation’ has led to several landmark cases being decided by the Court.

Lower down the hierarchy in the judicial system are the High Courts of each State, and below them subordinate district courts all

dealing with civil, criminal and family litigation. The High Courts serve primarily as appellate courts hearing appeals from lower courts although they have an original jurisdiction in civil and criminal matters specifically conferred on them by a State or under federal law. Constitutionally all inferior courts including the High Courts are bound by the decisions of the Supreme Court.

The relationship between the executive and judicial arms of the State has not been without some degree of conflict since the establishment of the Supreme Court. One area of law which gave rise to a confrontation was the Executive’s attempt to abridge the fundamental rights provisions in the constitution by the passage of amendments to implement land distribution and which affected one’s right to property. In *Golaknath v The State of Punjab* ([1967] AIR 1643) the Court held that fundamental rights could not be abridged or taken away by amending legislation. In the course of one of the judgments, the learned Justices opined that fundamental rights are the primordial rights necessary for the development of human personality, and were rights which enabled a man ‘to chalk out his own life in the manner he likes best.’

Similarly in *Kesavananda Bharati v The State of Kerala* ([1973] AIR SC 1461) the learned Chief Justice emphasised the importance of the preservation of the freedom of the individual which could not be amended out of existence; therefore the fundamental rights conferred by the Constitution cannot be abrogated, though a reasonable abridgement of those rights could be effected in the public interest. The judgments of the other justices reflected the same opinion that amendments to the Constitution could be made providing the basic structure remains intact. The fallout from this decision was that during a state of emergency in 1975 an amendment to the Constitution was passed which nullified the effect of the decision. However, a few years after the emergency the Supreme Court reaffirmed its power of judicial review.

Precedent

For the Supreme Court of India *stare decisis* arose for determination in the case of *The Bengal Immunity Co Ltd v The State of Bihar* ([1954] INSC 120). In doing so reference was made to decisions of the English and

Australian courts as well as the Supreme Court of the United States of America. In the course of his judgment *Das AgCJ* concluded that there was nothing in the Indian Constitution which prevented the Supreme Court from departing from a previous decision if it was convinced of its error and the baneful effect on the general interests of the public. He articulated the view that in considering the applicability of English decisions it should be borne in mind that those decisions may well have been influenced by considerations which could no longer apply to the circumstances then prevailing in India. Bhagwati J adopted the reasoning of other final courts that the only safeguard which should be put on the exercise of the power of reconsideration of earlier decisions was that the earlier decision should be manifestly wrong or erroneous particularly when the court is concerned with the construction of provisions of a Constitution (as was the case before them) which could not easily be amended. The Court ultimately decided to review an earlier decision in order to rectify an erroneous interpretation of the Constitution which had resulted in considerable inconvenience and hardship.

On this issue, the dissenting opinion of Ramaswami J in *Golaknath v The State of Punjab* (supra) was that even though the Constitution is an organic document intended to serve as a guide to the solution of changing problems which the Court may have to face from time to time, the Court must be reluctant to accede to the suggestion that its earlier decisions should be frequently reviewed or departed from. He opined that in such a case the test should be what is the nature of the error alleged in the earlier decision and its impact on the public good; further, it is also a relevant factor that the earlier decision had been followed in a large number of cases and multitude of rights and obligations had been created.

South Africa

With the establishment of the Constitutional Court in 1994, South Africa now boasts of two courts of last resort in its judicial system, the other being the Supreme Court of Appeal. The Constitutional Court, however, is regarded as the highest court, and is the final court for appeals relating to the Constitution. In this regard its decisions are binding on all other courts, and it has exclusive jurisdiction to

declare any Act of Parliament invalid or unconstitutional.

The Supreme Court of Appeal formerly referred to as 'The Appellate Division' which was first established in 1910 when the Union of South Africa was created, was given its present name in the constitution of 1996. It is the final court of appeal in all matters from the High Courts and lower courts except those concerning the Constitution when it gives way to the Constitutional Court.

In addition to its function as an appellate court in civil and criminal matters from the high courts, there is a special procedure for referrals to be made to the Supreme Court of Appeal by the Minister for Justice and Constitutional Development whenever there is any doubt as to the correctness of a High Court decision in a criminal case on a question of law or where such a decision is in conflict with a decision given by another High Court. The Supreme Court of Appeal may hear arguments in order to determine the issue for future guidance of all of the courts. Similar referrals may be made by the Minister to the Supreme Court after consultation with the South African Law Reform Commission where there are conflicting decisions in civil matters from different high courts.

In relation to constitutional matters, although the Supreme Court of Appeal may make orders upholding the validity of Acts of Parliament or concerning conduct of the President, an order of constitutional invalidity has no force unless confirmed by the Constitutional Court. The importance and ultimate authority of the Constitutional Court as the final arbiter on all issues pertaining to the constitution was emphasised in the judgment of Chaskalson P in *Re Pharmaceutical Manufacturers Association of South Africa* ([2000] 2 ACC 1) which raised the question whether a court has the power to review and set aside a decision made by the President of South Africa to bring an Act of Parliament into force. The Transvaal High Court was requested to review and set aside the President's decision to bring a 1998 Act into operation in order to govern the registration and control of medicines for human and animal use. The High Court declared the decision of the President null and void, and referred it to the Constitutional Court for confirmation of its order. The Constitutional

Court confirmed the order of the High Court but for different reasons, raising the issue of whether the High Court's order setting aside the President's decision was a finding of constitutional invalidity that required confirmation by the Constitutional Court under section 172(2)(a) of the Constitution.

In the course of his judgment Chaskalson P stated that the Constitutional Court occupies a special place in the new constitutional order, and was established as part of that order as a new court to be the highest court in respect of all constitutional matters and, as such, the guardian of the constitution. It had exclusive jurisdiction in respect of certain constitutional matters, and made the final decision on those constitutional matters that are also within the jurisdiction of other courts. He went on to say that that was the context within which section 172(2)(a) provides that an order made by the Supreme Court of Appeal, a High Court or a court of similar status concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President has no force unless confirmed by the Constitutional Court.

The Constitution of South Africa has been regarded within legal circles as one of the most progressive in recent times, particularly with regard to the protection of fundamental rights and freedoms, formulated as it was to correct the harsh abuses of the apartheid system. In this regard the role of the Constitutional Court was defined as protector and enforcer of the Bill of Rights embodied in the Interim Constitution of 1994. That Bill of Rights applied to all law, and section 173 of the Constitution gives to all higher courts (the Constitutional Court, the Supreme Court of Appeal and the High Courts) 'the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

A very interesting case which exemplifies the Constitutional Court's obligation to develop the common law in order to promote the objects of the Bill of Rights is *Carmichele v Minister for Safety and Security* ([2001] CCT 48/00). The applicant sued the respondents for damages arising out of an attack on her by a man who was awaiting trial for attempted rape on another woman, and who was granted bail despite his history of sexual violence. Both

the High Court and the Supreme Court of Appeal dismissed her claim on the ground that she had failed to establish a legal duty specifically owed to her by the police and prosecutor who could not therefore be liable to her for damages. In a unanimous decision the Constitutional Court upheld an appeal against the decisions of the lower courts. In the course of a most enlightening judgment Ackerman and Goldstone JJ remarked that under the Constitution of South Africa the duty cast upon judges is different in degree to that which the Canadian Charter of Rights cast upon Canadian judges. The South African Constitution brought into operation, 'in one fell swoop', a completely new and different set of rights imposing on all of the courts a general duty to develop the common law where it deviates from the spirit, purport and objects of the Bill of Rights. This duty upon the judges arises in respect of both the civil and criminal law whether or not the parties in any particular case request the court to develop the common law.

The Constitutional Court remains unswerving in its mandate to uphold the law and the constitution of South Africa.

New Zealand

The Supreme Court of New Zealand (like the Caribbean Court of Justice) is one of the newest courts of final resort, having come into existence on 1 January 2004 by virtue of the Supreme Court Act 2003 replacing the Privy Council as New Zealand's final appellate court. Appeals to the Supreme Court in civil matters only are by leave of the court if it is satisfied that is in the interests of justice to give such leave, and in the criminal matters specifically authorised by statute. Generally appeals are heard from the Court of Appeal only, but in exceptional circumstances the court may give leave to appeal from a decision of a lower court.

Prior to the establishment of the Supreme Court, the Court of Appeal of New Zealand had existed since 1862 hearing appeals from the High Court, then called the Supreme Court.

Precedent

A discussion on precedent in the court system of New Zealand must centre mainly around the decisions of the Court of Appeal having

regard to its long existence and the more recent establishment of the Supreme Court.

After the English decision in *Young v Bristol Aeroplane Co Ltd* (supra) in which the Court of Appeal held that it was bound by its own decisions, the Court of Appeal of New Zealand in *Re Rayner (dec'd)*, *Daniell v Rayner* ([1948] NZLR 455) held in a majority decision that

'the Court of Appeal is free to overrule a judgment of that Court which is contrary to the current of New Zealand authority theretofore existing, or which, though not expressly overruled, is, in principle, in conflict with a decision of the House of Lords or the Privy Council or inconsistent with a judgment of the High Court of Australia.'

The issue of *stare decisis* arose on several occasions after *Rayner* but with no definitive position taken. In *Collector of Customs v Laurence Publishing Co Ltd* ([1986] NZLR 404), Richardson J stated that while the court had not pronounced in any definite way on the circumstances in which it would reconsider an earlier decision the practice of the court indicated a cautious willingness to review earlier decisions in perceived appropriate cases, and a reluctance to be completely fettered by its own past decisions. He conceded that adherence to past decisions promotes certainty and stability, but concluded that the court had the final responsibility within New Zealand for the administration of the laws of New Zealand, and while its decisions were subject to review by the Privy Council few litigants who were unsuccessful in the Court of Appeal felt able to follow that path; hence he thought it unwise to formulate any absolute rule.

Finlay J in *Re Rayner* (supra) had stated in his judgment that the Court of Appeal in New Zealand occupied a position in the judicial hierarchy which differed very materially from that of the Court of Appeal in England, and it followed consequently that the Court of Appeal was in effect, in nearly all cases, the final court of New Zealand. This was based on the fact of the final court (the Privy Council) being thousands of miles away. With the establishment of the Supreme Court of New Zealand this is no longer the position, and in light of this a more definitive position of the effect of *stare decisis* on the Court of Appeal will inevitably change if it has not done so

already. The focus of the doctrine now shifts to the Supreme Court.

The Privy Council and New Zealand

This can best be addressed by reference to a speech given by Chief Justice Dame Sian Elias to the 13th Commonwealth Law Conference held in Melbourne, Australia, in April, 2003 before the establishment of the new Supreme Court. While agreeing that the real benefit obtained by New Zealand's legal system from appeals to the Privy Council was the benefit of a second appeal, albeit in a tiny number of cases, Dame Elias posited the view that in some cases where the New Zealand Court of Appeal was rightly reversed, the same result would have been achieved on further appeal within New Zealand. She went on to state that the main reason that there were so few landmark decisions on appeal from New Zealand was that in the common law world such decisions were landmarks for all countries in that the common law tradition tended to pull all countries together in most cases. This meant that the landmark decisions of the House of Lords, or the High Court of Australia, or the Supreme Court of Canada generally gained acceptance in New Zealand and throughout the common law world as much as or even more than those of the Privy Council.

Dame Sian Elias observed that the Privy Council had increasingly accepted that local conditions justify different treatment. Two cases amply exemplify this point of view. In *Invercargill City Council v Hamlin* ([1996] NZLR 513) the Privy Council held that although New Zealand had inherited English common law, it did not follow that New Zealand common law would develop identically. The Court of Appeal should not be deflected from developing New Zealand common law merely because the House of Lords had not regarded an identical development as appropriate in England. Accordingly, the Court of Appeal was entitled consciously to depart from English case law on the ground that conditions in New Zealand were different.

Similarly in *Lange v Atkinson* ([2000] NZLR 257) the Board noted that for some years it had recognised the limitations on its role as an appellate tribunal in cases where the decision depends upon considerations of local public policy. It concluded that the courts of New

Zealand were much better placed to assess the requirements of the public interest in New Zealand than the Board, and accordingly on the particular issue it would not substitute its own views, if different, from those of the New Zealand Court of Appeal.

Since its establishment the Supreme Court decisions have covered a varied spectrum of issues. In *Ngan v R* ([2007] NZSC 105) the Court had to consider the scope and application of section 21 of the New Zealand Bill of Rights Act 1990 regarding the right to be free of unreasonable search and seizure, and held that evidence of a crime discovered incidental to an inventory search of a car involved in an accident was admissible in court. The Court found that the Act did not make the search of Ngan's property unlawful. Another decision of the Supreme Court delivered recently in the case of *Jeffries v The Privacy Commissioner* ([2010] NZSC 99) involved the question of whether privilege is capable of applying to unsolicited communications and information, and whether the identity of the informant is capable of being within the scope of the privilege.

The Supreme Court of New Zealand seems well on its way to developing its own jurisprudence and carving a niche for itself among the final appellate courts both within and outside of the Commonwealth.

Caribbean appellate courts

The grant of independence to the former British colonies of the Caribbean led to the establishment of appellate courts within their jurisdictions with the Privy Council retaining its status as the court of last resort for all except Guyana. The inauguration of the Caribbean Court of Justice in April 2005 has seen three Caribbean states, Barbados, Guyana and recently Belize, accepting this Court as their final appellate court. Antigua & Barbuda, The Bahamas, Dominica, Grenada, Jamaica, St Christopher & Nevis, St Lucia, St Vincent & the Grenadines, and Trinidad and Tobago have still retained the Privy Council as their final appellate court.

The appellate courts in the Caribbean, the Courts of Appeal in Bahamas, Barbados, Belize, Guyana, Jamaica, and Trinidad & Tobago, and the Eastern Caribbean Court of Appeal for Anguilla, Antigua & Barbuda,

British Virgin Islands, Dominica, Grenada, Montserrat, St. Christopher & Nevis, St Lucia, and St Vincent & the Grenadines hear and determine appeals from their domestic courts, and have over the years sought to develop a jurisprudence which reflects the mores and customs of their societies while applying the common law which for all former colonies has been the common law of England. This was preserved legislatively after the attainment of independence, for example, in Trinidad and Tobago (by section 12 of the Supreme Court of Judicature Act, Chap. 4:01) and in Guyana (Section 3(b) of the Civil Law of Guyana Act, Cap. 6:01 in relation to immovable property).

However, in some instances, the common law did not square with local circumstances and situations. Crane JA sitting in the Court of Appeal of Guyana in the case of *Persaud v Pln Versailles & Schoon Ord Ltd* ((1970) 17 WIR 107) expressed strong views that despite the fact that statute stipulated that the common law of the (then) Colony was to be the common law of England, that in no way fettered the jurisdiction of the Guyana court from itself developing and expanding the common law to meet the justice of the case when necessary.

Effect of the Privy Council's decisions in the Caribbean

Apart from a few dependencies and small colonies in world-wide geographical locations the Privy Council's greatest remaining influence is felt within the Commonwealth Caribbean region comprising in some instances States that have shed the colonial mantle for over forty years. As it is the court of final jurisdiction for these States, their courts are bound by decisions emanating from the Privy Council with results which are oft times baffling and bewildering to citizens and which run counter to accepted norms in their societies.

The Trinidadian case of *Sealey v The State* ((2002) 61 WIR 491) provides an apt illustration. The two appellants who were charged and convicted of murder appealed to the Court of Appeal of Trinidad and Tobago who dismissed the appeal whereupon they appealed to the Privy Council. The prosecution's case rested mainly on the testimony and positive identification of the appellants at the scene by an off-duty corporal of police who knew both of them from childhood and lived in the same

neighbourhood; in fact one of the appellants under cross-examination at the trial admitted that he knew the police corporal who lived next to him. Their Lordships of the Privy Council at the hearing recognised that the case against the two appellants was a very strong one and that from a reading of the transcript the alibi evidence appeared unimpressive. However, allowing the appeal, a majority of the Board concluded that there was an omission of a good character direction by the trial judge, which was a defect in the conduct of the trial despite the fact that the omission was not attributable to the trial judge but the fault of defence counsel who did not raise it in evidence. They reasoned that whilst it appeared probable that the jury would have convicted, they were unable to conclude that the jury would inevitably have convicted. Both the majority and the minority of the Board agreed that the alibi evidence was in reality very weak as against the strength of the evidence of the police corporal. In the opinion of the minority the appellants had had the benefit of the usual directions on the presumption of innocence and of the approach which must be taken to defence evidence; also it was stretching imagination too far to suppose that a good character direction would have made any difference to the result of the case.

The acquittal of the appellants still remains inexplicable to the average citizen of Trinidad and Tobago who cannot comprehend that two men who were positively identified by a reliable witness were freed despite the failure of their defence counsel to lead evidence of their good character. Such are the vagaries of the law.

There have been instances when the Privy Council has conceded that judges of the domestic courts are in a better position to determine certain issues based on their knowledge of local conditions and their experience. So, in *Seepersad v Persad* ((2004) 64 WIR 378) the Board expressed the view that the amount determined by the Trinidad and Tobago Court of Appeal as damages for pain and suffering in an accident claim was the product of the views of appellate judges on a topic peculiarly within their own experience and their Lordships were not disposed to amend it. A similar approach was taken in *Panday v Gordon* ((2005) 67 WIR 290) in a libel suit when the Board opined that how words of the alleged character would

be understood and what effect such words would have on those who heard them are matters on which local courts were far better placed than their Lordships.

Caribbean Court of Justice

For the past five years since its inauguration on 16 April 2005 the Caribbean Court of Justice has sought as its mission to foster the development of an indigenous Caribbean jurisprudence, and visualises an accessible, innovative and impartial justice system reflective of the region's history, values and traditions. This Court is regarded as being unique in that it seeks to combine in twin jurisdictions, appellate and original, the Caribbean region's need for a court of last resort for domestic appellate courts as well as an international court with a mandate to interpret and apply, where necessary, provisions of a regional economic treaty.

Within one year of its inauguration the Caribbean Court was required in *Attorney General v Joseph* ((2006) 69 WIR 104) to decide an appeal from a decision of the Court of Appeal of Barbados on a constitutional motion involving, *inter alia*, whether, and in what manner unincorporated international human rights treaties which give a right of access to international tribunals affect the rights and status of a person convicted of murder and sentenced to a mandatory death penalty. The Court of Appeal of Barbados relied on a decision of the Privy Council in *Lewis v Attorney General* ((1999) 57 WIR 275, an appeal from Jamaica) by which it was bound, the Privy Council being at that time its final appellate court. The Caribbean Court felt obliged to determine whether *Lewis* should or should not continue to be the law of Barbados, and this required a re-examination of other judgments of the Privy Council. The Court was mindful of the fact that its establishment had given rise to speculation concerning its approach to judgments of the Privy Council. In deciding what this approach ought to be it was necessary to bear in mind the stated mission of the Court to foster the development of an indigenous Caribbean jurisprudence. In pursuing this goal the Court in *Joseph* postulated the view that it would consider the opinions of the final courts of other Commonwealth countries and particularly the judgments of the Privy Council which deter-

mine the law for those Caribbean states that accept the Privy Council as their final appellate court. It stated further that in this connection it accepted that decisions made by the Privy Council in appeals from other Caribbean countries while it was still the final appellate court for Barbados were binding in Barbados in the absence of any material difference between the written law of the respective countries from which the appeals emanated and the written law of Barbados. Further the Caribbean Court stipulated that these decisions continue to be binding in Barbados notwithstanding the replacement of the Privy Council unless and until they are overruled by the Caribbean Court.

After extensive consideration and deliberation of the case law drawn from several jurisdictions on the issue mentioned earlier the Caribbean Court concluded that the result which it arrived at was not dissimilar to that reached by the Privy Council in *Lewis*, albeit by a different route, and saw no reason to disagree with the Board's conclusions.

Over the past five years of the Court's existence several other cases provided the opportunity to elucidate and interpret some troubling points of law particularly in cases concerning title to land in Guyana. In *Harrinauth Ramdass v Salim Jairam* ((2008) 72 WIR 270, an appeal from the Court of Appeal of Guyana), the issues related to the ongoing debate of whether equitable interests in land are recognised in Guyana having regard to the development of the law governing immovable property and its Roman-Dutch history. A review and analysis of the relevant case law led to a final conclusion that equitable interests in land are not recognisable in Guyana. This was followed by another Guyanese appeal, *Jassoda Ramkishun v Conrad Ashford Fung-Kee-Fung* (CCJ Appeal CV 14/2007) concerning the concept of fraud in relation to immovable property, the relevance of South African case law as well as the position of heirs as volunteer transferees and the grant of specific performance against a volunteer both in English law and Roman-Dutch law, issues which are of extreme importance to the development of land law in Guyana.

The Caribbean Court is still in its infancy when compared with other appellate courts

with a final jurisdiction; hence it may be too early for it to decide whether it will be bound by its own decisions, which though it may result in certainty and stability may give rise to rigidity and inflexibility when later cases require the Court to revise its thinking on a particular precedent. However, a final court's review of its earlier decisions ought not to be undertaken whimsically or fancifully, but must be taken after careful consideration and a conviction that the earlier decision was completely erroneous. A change in the composition of the court ought not to be good reason to depart from an earlier decision. However, in *Mathew v The State* ((2004) 64 WIR 412) the Privy Council with an enlarged Board overruled *Balkissoon Roodal v The State* ((2003) 64 WIR 270), both cases from the Court of Appeal of Trinidad and Tobago, the purpose being to decide whether *Roodal* should be followed not only in Trinidad and Tobago but also in other Caribbean states which have similar constitutions and a right of appeal to the Privy Council. Their Lordships considered that 'it would be impossible to apply it to other countries merely for conformity with Trinidad and Tobago but equally impossible to declare that it was not the law in other countries but still formed part of the law of Trinidad and Tobago.'

These are situations with which the Caribbean Court of Justice will have to grapple in the years ahead as it strives to develop its own jurisprudence.

Supreme Court of the United States

Although this paper is directed mainly at the role of appellate courts of Commonwealth jurisdictions, it can only be enhanced by a comparison with the court of final jurisdiction of the United States of America where there are more similarities than differences, the common law being the *fons et origo* of both jurisdictions.

Like any court newly constituted the Supreme Court established in 1789 in its early era heard few cases, the first being *West v Barnes* (2 US 401) argued two years later. It involved a procedural issue where the Court was required to overrule a Rhode Island State statute. However, *Marbury v Madison* (5 US (1 Cranch) 137 (1803)) is regarded as the landmark case, which formed the basis for the exercise of judicial review in the United States under Article 111 of the Constitution, and

which declared the Supreme Court to be the supreme arbiter of the Constitution.

The Supreme Court's main jurisdiction is appellate although it may exercise an original jurisdiction involving disputes between two or more States much like the Caribbean Court of Justice, but which it rarely exercises.

The United States court structure comprises Courts of Appeals which are intermediate appellate courts of the federal court system. These courts hear appeals from district courts within the federal judicial circuit, and review decisions serving as the final court in most federal cases. This is primarily due to the fact that fewer than 100 cases are heard annually by the Supreme Court which stands at the apex of the federal court system. On matters concerning interpretation of federal law and statutes, including the US Constitution, decisions of the Supreme Court are binding on all lower courts even on State courts which are not part of the federal system.

The Supreme Court has to its credit several important decisions handed down over the years during the tenure of various Chief Justices, the most notable being by the Warren Court (1953-1969) in *Brown v Board of Education of Topeka* (347 US 483 (1954)) when it held segregation in public schools to be unconstitutional, and the Burger Court (1969-1986) in *Roe v Wade* (410 US 113 (1973)) which ruled that the Constitution protected a woman's right to privacy and control over her body thereby removing bans on abortion.

Precedent

With jurisdiction of courts within the United States' judicial system comprising State and federal courts, the doctrine of precedent follows the same pattern. As is generally accepted courts of lower jurisdiction are bound by the decisions of courts of higher jurisdiction, with the decisions of courts of last resort normally binding all courts within a court system. Within the States' court systems, decisions of State appellate courts bind only courts of lower jurisdiction within that State, but not those of other States. Within the federal system higher federal courts bind lower federal courts within their jurisdiction. Conflicting decisions within federal courts as to the meaning of federal laws are usually resolved by the Supreme Court whose decision is binding on all courts.

What will now be considered is the Supreme Court's approach to precedent in relation to its own decisions. In *Burnet v Coronado Oil & Gas Co* (285 US 393 (1932)) Brandeis J in a dissenting opinion expressed the view that '*stare decisis* is usually the wise policy because in most matters it is more important that the applicable rule of law be settled than that it be settled right... But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions.' He went on to say that 'the reasons why this Court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting the Constitution.'

One can conclude that in constitutional matters the Supreme Court exercises more flexibility in applying the doctrine of *stare decisis*. In *Smith v Allwright* (321 US 649 (1944)) the Court postulated that when convinced of former error it had never felt constrained to follow precedent, and where constitutional questions were concerned with corrections depending upon amendment rather than upon legislative action, the Court throughout its history had freely exercised its power to re-examine the basis of its constitutional decisions. There have been opinions expressed which indicate that while adherence to precedent is not to be applied rigidly in constitutional matters, any departure from the doctrine of *stare decisis* demands special justification. This was the view of O'Connor, J in *Arizona v Rumsey* (467 US 203 (1984)). Later in *Planned Parenthood of Southeastern Pennsylvania v Casey* (505 US 833 (1992)) together with Kennedy and Souter JJ, O'Connor J reiterated that view when seeking to uphold the earlier decision in *Roe v Wade* (supra) that 'only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure and an unjustified repudiation of the principle on which the Court staked its authority in the first instance.'

Conclusion

An assessment of the role of appellate courts in the jurisdictional hierarchy of any court system

indicates that even though they are mainly courts of review of decisions of lower courts, in discharging this mandate one of the main objectives is ensuring stability in and conformity with the law even though not always resolutely adhering to consistency in their decisions. The waning influence of the House of Lords and the Privy Council on former colonies was aptly demonstrated when a majority of these independent States and former colonies unapologetically indicated that the development of the law in their countries depended solely on the crafting of their own jurisprudence and not on one moulded in the traditions of their former masters. Unfortunately this approach has not been adopted by all of the newly independent States.

One feature common to all appellate courts in whatever jurisdiction is the doctrine of *stare decisis* which has been discussed. While its binding force affects lower courts in a judicial hierarchy, and is generally immutable, courts of last resort enjoy much more flexibility and freedom to effect change in their decisions. This sometimes depends on the composition of a final appellate court or the need for review if circumstances of a later case require that the relevant law be elucidated. One commendable aspect of a final court's decision not to be bound by its own decisions is that it is utilised sparingly and with special justification bearing in mind that such courts should be perceived as fulfilling their objectives of achieving judicial consistency and certainty in their decisions without making them the sacrificial lambs on the altar of expediency. This will always be the role of an appellate court in every jurisdiction where the common law is applied in whatever form peculiar to the needs and traditions of the people of that jurisdiction.

With the establishment of indigenous final appellate courts in most of the former colonies of the United Kingdom, the judgments of these courts are often cited as persuasive authority in judgments of fellow appellate courts, and even

in judgments of the House of Lords and Privy Council. This cross-fertilisation can only enhance and enrich the development of jurisprudence based on the common law across borders and continents within the Commonwealth.

I shall end this presentation by making reference to a lecture given by Sir Shridath Ramphal, former Commonwealth Secretary General, in 2009 entitled 'A Commonwealth of Laws: At 60 and Beyond' (reproduced in this *Journal* in June 2010). During the course of the lecture he made reference to the fact that, strange as it may seem now, the issue of a Commonwealth Court of Appeal as a final court of appeal for all Commonwealth countries, including Britain, was prominently addressed at 1965 Commonwealth and Empire Law Conference held in Sydney, Australia. Sir Shridath quoted from a background paper prepared by Lord Gardiner, then Britain's Lord Chancellor, when he was silk together with R. Graham Page, who put the case for a Supreme Court of the Commonwealth in terms which he said may surprise us today. One paragraph urged that with such a court Commonwealth countries would influence each other in the development of Commonwealth law. All countries submitting to the jurisdiction would in every way be treated on an equal basis, subordinating their own final courts of appeal to the overriding appellate jurisdiction of the Supreme Court of the Commonwealth.

Sir Shridath's opinion was that it was too late in 1965, and for all its merits he believed it still was, at least today. He expressed the hope that if the Commonwealth itself prospers, some such collective judicial forum may one day become more generally acceptable. This may seem an impossible dream as we gather here today discussing the role of appellate courts in our various jurisdictions, but we can at least revel in the dream that at some distant futuristic day that dream may somehow become a reality. We can dream, can't we?

LAW REPORTS

STUBBS v ATTORNEY GENERAL

15 September 2009, [2010] 4 LRC 103

COURT OF APPEAL OF THE BAHAMAS, *Sawyer P and Longley and John JJA*

Allen J presided over the trial of the appellant and two others on the same charges in 2002. The appellant and his co-accused were all convicted. They appealed their convictions and sentences and their appeals were allowed by the Court of Appeal on the basis that the trial judge had allowed one of the jurors an extended break from the trial to bury and mourn the death of her mother, over the apparently strong objections of the appellant, as a consequence of which the trial was adjourned for a period of about three weeks, which also included a short period of illness suffered by one of the persons charged. Retrials were ordered. A retrial was conducted by Isaacs J but that trial was aborted.

The matter was then set down before Allen J as she was the other judge assigned to crime, and on that occasion application was made for her to recuse herself on the basis that in the first trial before her she had made decisions which she might once again have to rule on or decide. She refused, and the appellant took the matter to the Court of Appeal on the grounds (1) the learned judge failed to properly apply the test in *Porter v Magill*, *Weeks v Magill* [2001] UKHL 67 and (2) the learned judge failed to have a proper regard for the fact that in the appellant's previous trial she had made decisions, and it is likely that she will face those same issues and be called upon again to make decisions on the same facts. The test referred to, and cited by Allen J in reaching her decisions, is that the Court must first ascertain all of the circumstances which have a bearing on the suggestion that it was biased and then ask whether those circumstances would lead a fair minded and informed observer to conclude there was a real possibility, or a real danger, that the Court was biased.

LONGLEY JA first considered whether recusal was a discretionary matter. he referred to

Mummery LJ's statement in *AWG Group Ltd v Morrison* [2006] EWCA Civ 6 at paras [19] and [20]:

[19] What is the position of this court on an appeal from the judge's decision not to recuse himself? If the judge had a discretion whether to recuse himself and had to weigh in the balance all the relevant factors, this court would be reluctant to interfere with his discretion, unless there had been an error of principle or unless his decision was plainly wrong.

[20] As already indicated, however, I do not think that disqualification of a judge for apparent bias is a discretionary matter. There was either a real possibility of bias, in which case the judge was disqualified by the principle of judicial impartiality, or there was not, in which case there was no valid objection to trial by him. On the issue of disqualification an appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias.

Longley JA held, therefore, that this was not a matter of discretion. The Court of Appeal must as informed observers with knowledge of the relevant facts and circumstances make an assessment of the case and determine if there was a real possibility of bias.

It was necessary to examine the decisions that Allen J had made in the course of the first trial. Apart from that leading to the long adjournment which had been the basis of the earlier appeal, these were decisions on the admissibility of evidence, and whether the prosecution had put before the Court sufficient evidence to be left for the consideration of the jury. In

considering the recusal request, Allen J emphasised that decisions on these matters involved no determination as to the reliability or credibility of witnesses and no resolution of the factual merits of the case. She had made no determinations on the facts of the case, namely whether the applicants were guilty or not. Nor had she, as she put it, ‘expressed myself in such vituperative language that a reasonable person would regard me as disqualified from being able to revisit those issues with an open mind.’

Longley JA accepted this analysis. On the record nothing transpired in the first trial to support the charge of apparent bias on the part of the trial judge; this was not a case of a judge formulating views, premature or otherwise, about the evidence or about the case for the appellant. He cited *R (on the application of Holmes) v General Medical Council* [2002] EWCA Civ 1104, where the English Court of Appeal distinguished two types of bias.

The first was where the judge was on the facts subject to extraneous influences such as a financial interest in the case’s outcome or a personal connection with one of the parties. In those situations, as a general rule there was no need to show that the judge was actually influenced by such considerations: the suspicions of the parties and the public that he might be so

influenced, even unconsciously, were reasonable, could not be allayed, and the judge must stand down.

The second situation was where, absent any extraneous influence, there was an apprehension that the judge would approach the case with a closed mind. Such an apprehension would only arise in reality where it was said that he has *pre-judged* the issue, and in consequence it was reasonably feared that he could not or would not revisit the issue with an open mind. Examples were a judge had presided at a first instance trial and roundly concluded on the facts—after hearing disputed, perhaps hotly disputed, evidence—that one of the parties lacked all merit. There might also be cases in which a judge called on to make a preliminary decision expresses himself in such vituperative language that any reasonable person would regard him as disqualified from taking a fair view of the case if he were called on to revisit it.

Longley JA added that he entertained grave doubts about whether accurate rulings of the law on interlocutory legal skirmishes in the course of a trial could ever properly be the subject of an allegation of apparent bias in order to ground an application for recusal.

SAWYER P and JOHN JA agreed.

NICHOLLS v MICHAEL WILSON & PARTNERS LIMITED

[2010] NSWCA 222, 15 September 2010

NEW SOUTH WALES COURT OF APPEAL, Basten JA, Young JA, Lindgren AJA

Litigation involved Michael Wilson Partners Limited (MWP), a company incorporated in the British Virgin Islands, owned in turn by a Liechtenstein company and operating as a law firm in Kazakhstan specialising in investment matters. Allegations were made that two Australian lawyers employed by MWP were in breach of duties to MWP *inter alia* by soliciting MWP's contacts, clients, employees and consultants, destroying documents, and acting fraudulently. The case is noted here solely on the issue, dealt with in the judgment of Basten JA, that the primary judge should have recused himself when requested to do so, prior to the commencement of the trial.

BASTEN JA noted the test to be applied, whether a fair-minded lay observer might have formed the opinion that the primary judge might not have brought a mind free from pre-judgment to the assessment of the case at the trial. The approach required to be applied by the Court was a relatively undemanding one: that was because of the value placed by the law on not merely the fact, but the perception, that judges will determine cases on the material before them, uninfluenced by extraneous views, namely views formed otherwise than in the ordinary course of the trial, hearing from the parties on both sides of the record, and based on admissible evidence. On the other hand, the administration of justice would soon become unmanageable if judges were too readily disqualified because of pre-trial judgments, adverse to the interests of a particular party. The answer in a particular case will depend on the nature of the decision being made and the surrounding circumstances, a position which gives rise to important questions as to the knowledge and understanding of the proceedings which must be attributed to the hypothetical fair-minded lay observer.

As explained by Allsop P in *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414:

'The fictitious 'fair-minded lay observer' and what he or she might think is a mechanism deployed by the courts for protecting the respect and integrity of the judicial system through a test employing a reasonable member of the public. That test involves an evaluation by judges as to how the public, through the posited 'fair-minded lay observer', would view the working of the legal system in the particular instance under consideration.'

The assessment was complicated in the present case by the fact that the matters which might have created a reasonable apprehension of bias occurred in closed court. A question thus arose as to whether the hypothetical observer would take that fact into account, would consider the manner in which the events became known to the appellants and others entitled to observe the litigation, and the explanations given by the primary judge in his judgments on the recusal applications as to how his Honour viewed the matter. In accordance with principle, all of these matters are to be taken into account.

The temporal issue

A temporal issue also arose. If, at the time of the recusal applications, the test of reasonable apprehension of bias were satisfied, could the refusal of the application nevertheless be justified by reference to subsequent events or conduct? On the other hand, if the recusal application were properly refused on the material available at the time when it was made, should the final judgment nevertheless be set aside on appeal because, viewing the whole of the trial, the Court is satisfied that there was a reasonable apprehension of bias? The correct approach to these questions was to be found in the principles to be applied by this Court in considering an appeal against a final judgment. Where a recusal application, which should have been granted at the time it was

made, was later shown to be unwarranted, the appeal should be dismissed on the basis that no substantial miscarriage of justice has eventuated. In the other circumstance, because the appeal is brought against the final judgment and is not in form an appeal against the failure to recuse, the judgment must be set aside if, on the material before the appeal court, a reasonable apprehension of bias is demonstrated.

The actions of the judge

There were in total seven *ex parte* applications made to the judge. Application was made to vary, without notice, orders as to evidence made previously by consent and to make the material disclosed the subject of elaborate confidentiality, justified by reference to a fear that the defendants would dissipate assets in Switzerland thereby endangering the purpose of the proposed criminal complaint to the Swiss authorities. Confidentiality was sought to be maintained by orders that the notice of motion, the documents produced and the associate's note of the making of the orders not be shown on the Court file, but that the documents be retained in the judge's chambers. The Registry was directed not to make an electronic record of the orders, the notice of motion or 'any other aspect of the closed Court hearing of 28 March 2007'. The orders were to be entered forthwith and the sole Registry copy of the orders was to be 'directly delivered to the chambers of his Honour Justice Einstein'.

Basten JA said:

'The respondent is entirely correct to say that the making of an interlocutory order does not, of itself, preclude the judge from sitting on the trial in the same matter. Certainly that is so where interlocutory

orders are made inter partes and it cannot be said that there has been communication between one party and the judge in the absence of the other party or parties. Further, an interlocutory order will not usually require a judge to determine any matter on a final basis. For example, a finding that there is a serious issue to be tried, will not generally prejudice an independent and unbiased assessment of the plaintiff's case once all the evidence is presented.

An interlocutory order made ex parte, that is in the absence of one party, gives rise to different concerns. Those concerns will be mitigated where an opportunity is afforded promptly following the ex parte hearing which will allow the other party to present its views in respect of the interlocutory order.

The fact that one party appeared before the judge on seven separate days in closed court raised a different and additional concern. It is quite possible in such circumstances that the judge's mind will become familiar with the character of the plaintiff's case to an extent that, consciously or subconsciously, there will be a tendency to place the further evidence within the pre-existing mental structure. Particularly may that be so where the material presented is voluminous, the whole history of the relationships between the parties is explored, at least to some extent, and where the material is supplied and the hearings take place over a period of more than six months.'

In all the circumstances, the Court of Appeal had no option but to allow the appeal.

BOOK REVIEWS

Without Prejudice: CEDAW and the determination of women's rights in a legal and cultural context

Edited by Meena Shivdas and Sarah Coleman, published by the Commonwealth Secretariat, 2010. ISBN 978-1-84929-013-5 (paperback), 978-1-84859-061-8 (downloadable e-book)

198 pages. Price: £25.00

With this book, the Commonwealth Secretariat continues to advance knowledge and understanding of the rights of women with a view to encouraging Commonwealth countries to comply with their international obligations under the UN Convention on the Elimination of All Forms of Discrimination (CEDAW). This publication is divided into four distinct parts, providing not only a useful analysis of the current situation across the Commonwealth but supplying practical ways in which CEDAW should be implemented. Despite the fact that most countries of the Commonwealth have acceded to CEDAW, implementation continues and discrimination persists.

The first part sets out the Background, outlining the importance of the CEDAW convention. Prof Christine Chinkin points out the developing importance and standing of the CEDAW convention in shaping anti-discrimination principles across the globe whilst Indira Jaising outlines the core provisions of the Convention and the interaction between rights and culture which are then examined in detail in Part II 'Reconciling Culture and the Law'.

The norms of culture and religion have had a tendency to perpetuate patterns of behaviour which favour patriarchal values and disadvantage women both at a domestic and international level. There continues to be a conflict between acceptance of customary law and practice and compliance with national and international principles of non-discrimination. Religion has also a tendency to complicate the issue with the right to religious freedom being opposed in some circumstances to the duties to eliminate discrimination against women. In some cases it is the women themselves who have promoted traditional practices that

continue to subjugate women and in some circumstances subject them to inhumane practices. But the preservation of cultural practices is no excuse to discriminate. In the hierarchy of principles – the elimination of discrimination and equality are more important than the preservation of outdated customary practices, some of which have been enshrined in customary law although history demonstrates that by their very nature, customs are not static. Access to land property, reproductive rights and the right to be free from domestic violence are paramount to improving the status of women across the Commonwealth.

The question of how CEDAW has been integrated into domestic laws across the Commonwealth is also examined and examples of how gender, culture and the law co-exist in Nigeria, South Africa and East Africa are outlined in different articles and the authors of the different articles examine the specific problems in countries with pluralistic legal systems.

The impact of CEDAW on family law and the discrimination that women still face in trying to obtain adequate child support in the Caribbean demonstrate that discrimination is not only a women's issue but has a wider impact. The thorny question of inheritance and succession rights of widows is discussed in detail in the chapter on Women's dignity and rights with specific reference to the position across the Pacific but discrimination in relation to inheritance and succession law touch other parts of the Commonwealth.

Part III of this publication outlines the efforts the Commonwealth already made to develop understanding of the international norms relating to women's issues as well as general human rights knowledge across the Commonwealth. The CMJA has itself contributed to the development of these seminars and conferences and to the principles contained therein. The book also provides some interesting examples of case law.

Part IV contains personal reflections by eminent women movers and shakers. Farida

Shaheed, first UN Special Rapporteur on Cultural Rights points to the fact that CEDAW is not only a rights convention but also a development convention. It has been widely recognised that women play a significant role in the development of any nation and if their

rights are denied, development is all the poorer for this.

Dr Karen Brewer

DOROTHY WINTON TRAVEL BURSARIES FUND

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- to disseminate information and literature on all matters of interest concerning the legal process within the various countries comprising the Commonwealth.

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