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In many, perhaps all, countries there can be tension between the Executive and the courts. Thankfully it seldom reaches the level described in one of the Ugandan cases in our Law Reports section. The death in April of Mike Campbell reminds us of conditions in Zimbabwe: he won from the SADC Tribunal a declaration that the seizure of his land by the Zimbabwe Government was illegal, but that ruling was defied and Mr Campbell has now died from the injuries he received during violent attempts to 'persuade' him to withdraw his claim.

The more normal level of tension between politicians and judges has been evident recently in the United Kingdom. There has been a certain amount of 'court-bashing' there in recent months.

One expression of it was in reaction against a decision of the Grand Chamber of the European Court of Human Rights *Hirst v United Kingdom (No 2)* (2005) that the ban on prisoners exercising the right to vote in UK elections was a breach of the European Convention. The then UK Government took no steps to amend the law to accord with the judgment and in November 2010 in *Greens v United Kingdom* the court gave the UK six months to introduce legislative proposals to bring the law in line with the Convention. The Prime Minister said that he was physically sickened, and the House of Commons voted by 234 to 22 in favour of a motion 'That this House notes the ruling of the European Court of Human Rights in *Hirst v the United Kingdom* in which it held that there had been no substantive debate by members of the legislature on the continued justification for maintaining a general restriction on the right of prisoners to vote; acknowledges the treaty obligations of the UK; is of the opinion that legislative decisions of this nature should be a matter for democratically-elected lawmakers; and supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand'.

The UK Supreme Court has also recently ruled that sex offenders in England and Wales can appeal against having to register with the police for life, arguing that this has to be the case under the European Convention on Human

Rights. The Prime Minister found this decision 'offensive' and confirmed that a commission looking into a British Bill of Rights would be set up soon. Whether that might mean the UK denouncing the European Convention is unclear; such a step would be a very grave one.

The issue surfaced again over the practice of the English courts in granting 'super-injunctions' which prohibit the disclosure of the (presumably discreditable) details of the applicant's private life and even of the granting of the injunction. Politicians have rushed to the media to say that 'Politicians and not judges should make the law'. Defenders of the common law tradition were not best pleased. And too many critics confused two issues. One is the balance the courts struck between the right to privacy and the right to freedom of expression; it is entirely proper to debate whether the courts got it right. But the other is whether the courts should have decided such a matter at all. Here the legislature had enacted two rights with no indication of the priority either might have; the courts had to decide the cases brought before them, and cannot fairly be criticised for doing so.

Human rights feature prominently in this issue of the *Journal*, which sadly contains many examples of those groups of people desperately in need of the protection of the courts and of human rights provisions: children trafficked and abused; prisoners tortured and widows. We cannot claim that it makes cheerful reading but it does underline again and again the importance of the Rule of Law, such a key principle of the Commonwealth.

That principle will no doubt be much discussed at the triennial meeting of Commonwealth Law Ministers due to take place in Sydney in early July. The CMJA's own conference will be held in Kuala Lumpur immediately afterwards, and as is our custom we include an essay on the courts system of our host country in this issue. It draws attention to the distinct secular and religious courts found in Malaysia, a feature which echoes the conference theme exploring issues of diversity.

THE MALAYSIAN LEGAL SYSTEM: A TALE OF TWO COURTS

Yvonne Tew BA, LL.M, Attorney-at-Law New York Bar, Doctoral Candidate in Law, University of Cambridge

The Federal Constitution of Malaysia was crafted during the birth pangs of the nation in 1957 and provides the framework for Malaysia's modern legal system. The Federation of Malaya emerged from British colonialism to achieve independence on 31 August 1957 and was joined six years later by the Borneo states – Sabah and Sarawak – and Singapore to form the new nation of Malaysia. Singapore left Malaysia in 1965 to become its own sovereign nation, and the current Federation of Malaysia comprises the Peninsula, Sabah, and Sarawak. Malaysia was born in a climate of multicultural compromise as a constitutional monarchy governed by secular laws. Islam was acknowledged as the religion of the Federation, according to article 3(1) of the Federal Constitution, 'but other religions may be practised in peace and harmony in any part of the Federation'.

The Malaysian court system is based on the UK legal system familiar to those from common law jurisdictions, but it also incorporates distinct characteristics in the form of Islamic religious courts and two separate High Courts for the Peninsula and for the Borneo states. The judiciary in Malaysia can be assessed according to its external relationship with the other branches of government as well as its own internal dynamics with the different court systems. The external aspect is its relationship with the other two branches of government, i.e. the executive and the legislature. The internal aspect relates to the relationship of the civil courts with the religious Syariah courts – a relationship that has raised jurisdictional issues in certain areas, such as apostasy.

External Relationship: The Vesting of Judicial Power

The relationship between the courts and the executive and legislature in Malaysia has been a delicate, and sometimes tense, one. The Westminster style model on which the Malaysian government is based has meant that

in practice there is no strict separation of powers between the executive and legislature, where members of the executive (the Prime Minister and Ministers) are also members of Parliament. The judiciary is hugely significant in checking a powerful executive and legislature. In line with this, article 121(1) of the Malaysian Federal Constitution, before it was amended in 1988, 'vested' judicial power in the High Courts and such inferior courts as might be provided by federal law.

The Constitutional Amendment Act 1988 passed during the administration of Malaysia's fourth Prime Minister, Mahathir Mohamad, amended article 121(1) by removing the terms 'judicial power' and 'vested'. Article 121(1) now specifies instead that the courts 'shall have such jurisdiction and powers as may be conferred by and under federal law.' The 1988 Act was passed following increasing tension between the Mahathir executive and the judiciary after the judiciary had struck down several decisions made by the executive (see A Harding, 'The 1988 Constitutional Crisis in Malaysia' (1990) 39 ICLQ 57). The 1988 Amendment was one development in several events that eventually led to the removal of the head of the judiciary, the Lord President Tun Salleh Abas, and two other Federal Court judges at the height of the 1988 judicial crisis – an event that has been criticised heavily as a constitutional crisis and unwarranted intrusion on judicial independence.

The court has so far not dealt directly with the issue of whether the exclusive vesting of judicial power in the ordinary courts has indeed been removed by the amendment. Andrew Harding in *Law, Government and the Constitution in Malaysia*, pp. 135-36, argues that the intention to vest judicial power in the judiciary can be implied from other provisions of the Constitution and that the amendment must be given a restricted meaning. The Malaysian judiciary has adopted a restrictive approach toward the protection of individual

rights and a generally pro-Executive approach after 1988, but the causes for this are broader than the amendment of article 121(1). The constitutional crisis in 1988, culminating in the removal of the Lord President, has led to an undermining of public confidence in the judiciary and a perceived judicial reluctance to challenge Executive power.

A Tale of Two Courts: Civil Courts and Syariah Courts

The internal relationship of the civil courts with the Syariah courts has also raised issues related to the jurisdiction of both courts and the position of Islam in the Constitution. The civil and Syariah courts exist in a dual court structure produced following Malaysia's independence in an effort to ensure that there would be a federal secular legal system in the form of the civil courts, as well as a religious forum for Muslims under which to dispense Islamic personal and family law.

Civil Courts

Malaysia's civil court structure is largely based on a court structure familiar to those from common law jurisdictions. It consists of the Subordinate Courts and the Superior or Appellate Courts. The Superior Courts are made up of the High Court of Malaya, the High Court of Sabah and Sarawak, the Court of Appeal, and the Federal Court.

The Federal Court is the highest and final court of appeal. It has *appellate* jurisdiction to hear appeals from the Court of Appeal; *original* or federal-state jurisdiction over whether a federal or state legislative body has legitimately made a law within its power; *referral* jurisdiction to determine constitutional questions referred to it by another court; and *advisory* jurisdiction to give an advisory opinion on any question referred to it by the Yang di-Pertuan Agong (His Majesty) concerning the effect of any provisions of the Constitution. Prior to 1 January 1985, appeals could be made to the Judicial Committee of the Privy Council. After the abolition of Privy Council appeals, however, the Federal Court became the final court of appeal in the country. The Federal Court consists of a Chief Justice, the head of the Malaysian judiciary; the President of the Court of Appeal; the two Chief Judges of the High Courts in Malaya and Sabah and Sarawak; and, at present, four other Federal Court judges.

The Court of Appeal was created in 1994 to act as an appellate court to hear appeals against decisions of the High Courts. It has only appellate jurisdiction. The creation of the Court of Appeal in 1994 reinstated a three-level system of appeal, lost with the abolition of appeals to the Privy Council, and provided necessary relief for the Federal Court.

There are two High Courts of co-ordinate jurisdiction and status: the High Court of Malaya for the states of Peninsular Malaysia and the High Court of Sabah and Sarawak for the Borneo states. There is a Chief Judge that heads each High Court. The separation of the two Courts is partly for practical reasons as the principal registry of the High Court of Malaya is in Kuala Lumpur and the registries for the Borneo states are in the respective states. The independence of the High Court of Borneo is also important symbolically and as matter of principle for the Borneo states, which remain keen to have their own High Court. Both High Courts have general supervisory and appellate jurisdiction, and have unlimited civil and criminal jurisdiction.

The Subordinate Courts consist of the Sessions Court, the Magistrates' Court and the *Penghulu* Court in Peninsular Malaysia. The Sessions Court and the Magistrates' Court have general jurisdiction in both civil and criminal matters. The Sessions Courts have criminal jurisdiction over all offences not punishable by death, and civil monetary jurisdiction over claims between RM 25,000 and RM 250,000 (£1 sterling equals approximately 5 ringgits; \$US1 3 ringgits). Magistrates' Courts deal with minor civil and criminal cases. It may hear disputes for civil claims below RM 25,000 and has criminal jurisdiction over offences that are punishable by a maximum term of imprisonment that does not exceed 10 years or by fine only. The Magistrates' Courts may also hear appeals from the *Penghulu* Courts. These rural courts are presided over by the *Penghulu* or village headman and are meant for informal settlement of small village disputes.

Syariah Courts

In Malaysia, the civil and Syariah courts exist side by side in a dual court structure. The civil courts were established as federal courts to deal with federal matters, whereas the Syariah courts are provided for in the Federal

Constitution as state courts that can be established to deal with matters of Islamic law. The understanding of the Syariah courts as subordinate to the civil courts has arguably been altered following the introduction of an amendment to article 121(1A) of the Constitution following the Constitutional Amendment Act 1988. Article 121(1A) now provides that the civil courts 'shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.'

The question of whether the Syariah Court has jurisdiction over any particular matter is therefore significant: once an issue is within the jurisdiction of the Syariah Court, by definition, the civil courts' jurisdiction is excluded. It is unclear whether the civil High Courts continue to have the power to intervene as a matter of judicial review. The view that article 121(1A) does not exclude the supervisory review power of the High Court is supported by several commentators, such as Andrew Harding (*Law, Government and the Constitution of Malaysia*, 136-7 (1996)), Thio Li-Ann (in an essay in *Constitutional Landmarks in Malaysia: The First 50 Years*, 197 at 202), and the Malaysian Bar Council (in its Amicus Brief in *Lina Joy*) who argue that article 121(1A) simply states the obvious, i.e. that each court deals with matters within its own jurisdiction, but it does not transfer additional powers to the *Syariah* courts. Another view is that the very objective of the amendment was to prevent the High Court from having the power of judicial review over the *Syariah* Court as had happened in certain family law cases: see, e.g. Hassan Saeed, in *Freedom of Religion, Apostasy and Islam* (2004) 149 at 150.

The judicial trend recently has appeared to lean towards the latter view. In *Subashini Rajasingam v Saravanan Thangathoray* ([2007] 7 CLJ 584), a case concerning the custody of children when one parent had converted to Islam, the demarcation between the civil and *Syariah* courts was interpreted to mean that the *Syariah* courts 'are not lower in status than the civil courts . . . they are of equal standing under the [Federal Constitution]' (at [23]). This clear separation between the civil and *Syariah* courts appears to have resulted in an either/or jurisdictional relationship: a matter is either within the jurisdiction of the civil court or the *Syariah* court; it cannot be under both.

The general jurisdiction of the *Syariah* Court is expressly provided for in the Federal Constitution under article 74(2) and List II, Schedule 9. *Syariah* courts have jurisdiction over 'Islamic law and personal and family law of persons professing the religion of Islam', which includes, *inter alia*, matters such as betrothal, marriage, divorce, legitimacy, dowry, maintenance, adoption, succession, and religious endowments. This is consistent with the idea that the *Syariah* courts are meant to be state courts established to deal with Islamic law 'only over persons professing the religion of Islam' according to List II, Schedule 9. State legislatures are then meant to specify the jurisdiction of the *Syariah* courts of their particular states, within the general jurisdiction laid down by the Federal Constitution.

Conversion Cases: A Matter for the Civil or *Syariah* Courts?

Conversion cases in general have raised particular complexities in navigating jurisdictional issues. Difficult issues include the conversion and custody of minors by one parent who has converted, such as in the *Subashini* case above; posthumous disputes regarding whether the deceased had converted to Islam for burial purposes; and apostasy cases. Apostasy cases, in particular, lie at very heart of the jurisdictional complexities arising from the relationship between the civil and religious courts because it concerns the sensitive issue of Muslims who wish to leave the religion, compounded by Malays being constitutionally defined as Muslims under article 160 of the Federal Constitution: "Malay" means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay customs...".

The 2007 case of *Lina Joy* ([2007] 3 All Malaysia Reports 693) is an illustration of this. *Lina Joy* was a woman born to a Malay-Muslim family who had converted from Islam to Christianity and had applied to have this officially recognised as her legal status in order to marry her Christian fiancé. The Federal Court, in a two to one judgment, ruled that Muslims who wish to convert out of Islam could not do so without a certificate of apostasy from the *Syariah* Court. Such a condition creates a situation of practical impossibility for a Muslim who wishes to convert: no *Syariah* court has ever granted

such an order of apostasy to a living person; indeed, apostasy is regarded as an offence by the Syariah courts in certain states.

As a result, Lina Joy continues to be officially recognized as Muslim by the State and cannot marry her non-Muslim fiancé as Muslims cannot enter into marriage with non-Muslims under Islamic law and the civil law in Malaysia only covers marriages between non-Muslim persons. The decision throws into sharp focus the tension between article 11 of the Federal Constitution, which guarantees ‘the right to profess and practice [one’s] religion’, and article 3, which declares Islam as the religion of the Federation of Malaysia.

Apostasy is not listed in the Constitution as a matter under the purview of the Syariah Court. Many state laws deal with conversion into Islam, but not conversion out of Islam. In states where express provision regarding apostasy had *not* been made in the state laws regulating the Syariah courts, the crucial question was whether the jurisdiction of the Syariah Court over apostasy in that particular state could be *implied*. There have been two lines of cases dealing with this matter. The first approach affirms that the Syariah Court has no jurisdiction without express jurisdiction from the written laws of the state or Parliament; by definition, the Syariah Court owes its existence to such statutes. This was the approach adopted in *Ng Wan Chan v Majlis Ugama Islam* ((1991) 3 MLJ 487) and *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang* ((1996) 3 CLJ 23).

The second line of decisions expands the jurisdiction of the Syariah Court significantly by finding that ‘the jurisdiction of the Syariah courts to deal with the conversion *out* of Islam, although not expressly provided for in the State Enactments, can be read into them *by implication* derived from the provisions concerning conversion *into* Islam’, as was decided in *Soon Singh v Pertubuhan Kebajikan Islam Malaysia* ((1999) 1 MLJ 489, 502). The Federal Court’s decision in *Soon Singh* is based on the assumption that Syariah courts are the most appropriate forum for the determination of a Muslim’s apostate’s conversion out of Islam as it ‘involves inquiring into the validity of his purported renunciation out of Islam under Islamic law...’ (at 502). The Federal Court in this case refused to consider the appli-

cant’s right to religious liberty under article 11(1) on the basis that the issue was not properly raised before the Court.

The stage was set in *Lina Joy* for a clarification of the constitutional and jurisdictional issues at stake. Significantly, it pointedly raised the precise question of whether a Muslim convert’s fundamental religious liberty under the Constitution had been infringed under the implied jurisdiction approach, which the court had been able to avoid in *Soon Singh*. The majority opinion affirmed the implied jurisdiction approach taken in *Soon Singh*, agreeing that since matters on conversion into Islam are under the jurisdiction of the Syariah courts, conversion out of Islam should also fall under the same jurisdiction by implication.

The Federal Court’s response is significant for two distinct, but interrelated, reasons. First, the majority held that jurisdiction of the Syariah court regarding apostasy need not be expressly laid out in the state laws. Richard Malanjum, Chief Justice of Sabah and Sarawak and the only non-Muslim on the bench, argued in a powerful dissent that implied jurisdiction ‘must be limited to those matters that are incidental to a power already conferred or matters that are necessary for the performance of a legal grant’ (at para [82]). Syariah Court jurisdiction over apostasy falls under neither of these categories and is unwarranted, particularly since ‘there must be as far as possible express authorization for curtailment or violation of fundamental freedoms’ (at para [82]). There is an intrinsic difference between allowing jurisdiction for conversion *into* Islam and conversion *out* of Islam, which the doctrine of implying the latter from the former ignores entirely.

Secondly, and crucially, the majority’s interpretation of the right ‘to profess and practice’ one’s religion under article 11(1) of the Constitution leaves the content of the right devoid of the freedom to choose one’s religion. The Federal Court concluded that forcing apostates to go through the Syariah court system in order to convert is not an infringement of the individual’s constitutional right because ‘[i]f a person professes and practices Islam, it would definitely mean that he must comply with Islamic law which has prescribed the way to embrace Islam and converting out of Islam’ (at [17.2]). According to the Chief

Justice, ‘one cannot renounce or embrace a religion at one’s own whims and fancies’ (at [14]). This restrictive interpretation of a ‘person [who] professes and practices Islam’ effectively makes the definition dependent on third party affirmation, rather than on individual freedom of conscience.

Lina Joy represented a crucial juncture in clarifying where the line should be drawn between the jurisdiction of the civil court and Syariah court. The Federal Court’s decision effectively shifted responsibility for the substantive issue of allowing conversion out of Islam to the Syariah Court. Jurisdictional complexities should not obscure the fact that constitutional issues remain in the ambit of the civil courts, and that proper engagement with these issues is required to provide meaningful protection of these fundamental constitutional rights.

Conclusion

The Malaysian legal system is a relatively young one, barely over half a century old. The courts have had to deal with complex issues arising out of an evolving legal system over the past 50 years, but there remains much to be developed. The next generation of the Malaysian judiciary will need to continue to decide and clarify issues that will invariably arise over the coming years. In order to do so, an independent and impartial judiciary is vital: meaningful development of the legal landscape is dependent on respect for the separation of powers on the part of the other branches of government as well. The evolution of the legal landscape as Malaysia moves forward in the 21st century will hopefully be guided by an approach that is true to the spirit of the Constitution and the safeguarding of the fundamental liberties enshrined therein.

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.

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LETTERS TO THE EDITOR

Have you an opinion about the articles we are publishing? Why not send us your feedback in the form of a letter to the Editor?

CHILD TRAFFICKING: A SCOTTISH PERSPECTIVE

Professor Rebecca MM Wallace, Director and Research Manager and Karen Wylie, Research Associate at the Centre for Rural Childhood, Perth College University of the Highlands and Islands. A revised version of a paper from the CMJA Triennial Conference in the Turks and Caicos Islands 2009.

Introduction

'Justice for the Next Generation' was the theme of the Commonwealth Magistrates' and Judges' Association 15th Triennial Conference, devoting two days to children and the law in sessions held in conjunction with UNICEF. At that stage the Conference focused on a wide range of issues as they affect children. Keynote speeches, seminars and workshops put issues of juvenile justice, legal protection, children caught up in military conflict, child labour and exploitation, slavery and trafficking under the spotlight. The possible options for tackling, redressing and relieving the problems faced by children were also addressed. One panel concentrated on child trafficking and identified instances of good practice as candidates for incorporation when policies are being developed for combating trafficking, as well as assisting the victims.

However, before putting policies in place it is necessary to have an evidence base as to the extent of the problem being confronted. Figures relating to human trafficking are often bandied around with trafficking in humans regularly cited as the third largest global criminal activity after trafficking in drugs and arms. However, behind these vague statistics and generalised statements lie the victims of severe violations of their human rights. Those being exploited are often children under the age of eighteen years.

The following draws upon findings of a research project carried out in 2010 by the Centre for Rural Childhood Perth College UHI for Scotland's Commissioner for Children and Young People, Tam Baillie. The project was conducted over a period of six months throughout June to December of 2010. Professor Wallace led the Research Team of which Ms Wylie was a member and they are the co-authors of the final report. The research was designed to provide an insight into the nature and extent of child trafficking into and

within Scotland; to investigate the levels of awareness of trafficking issues among relevant professionals; how such instances of child trafficking have been identified, if they have indeed been identified; and how they have subsequently been dealt with by the relevant services.

Child Trafficking in Scotland: The Project

At this juncture it should be noted that the study was not intended to be exhaustive, providing a full picture, but rather a qualitative assessment highlighting some discernible trends in child trafficking and offering an estimation of its nature and extent. The covert nature of trafficking makes it notoriously difficult to quantify with any exactitude and, as came out of the research findings and the associated literature review, there remains debate and confusion over what it is being quantified. Similarly what is presented here is an overview of the findings with particular reference to those which have a general application, whereas those of a particular Scottish application are not spelt out in the same detail. Although the findings represent the Scottish picture, child trafficking is a matter of universal concern as no country is immune be it as a source, transit or destination. Also as will be highlighted the literature review illustrated that what was reflected in the academic writings is borne out on the ground.

The methodology employed was a mixture of desk based and empirical research involving three principal strands of data collection: a web-based survey, face to face semi-structured interviews and a literature review. The research team sought to ensure a wide geographical input and representation from a variety of child care professions, including those in social work, health, education, law enforcement and the voluntary sector. The web survey received 876 responses, and 41 individuals were inter-

viewed. Those initially interviewed were known to have experience of, or expertise in, the field of child trafficking. Further interviewees were either suggested by the first tranche of interviewees or had identified themselves via the web survey as being willing to participate in an interview.

The literature review provided an analysis of the international, regional and national legal framework, articles and policy documents as well as the contextual background. Much of the available literature concentrates on human trafficking as opposed to child trafficking. Indeed an understanding of the more general issues, debates and solutions suggested is necessary because many of these are as relevant to child trafficking as that of adults. However children are not 'mini adults' and child trafficking is not simply a sub category of human trafficking. The particular needs and situations of children need to be viewed through a child-friendly lens.

What became very apparent in the literature review, and was reinforced in the interviews, is there exists considerable definitional confusion as to what constitutes trafficking and as to whether it should be seen through a transnational crime control prism or rather from a human rights perspective. The impact of this has been that the focus has been not on assisting and protecting the victims of trafficking, but instead viewing them as part of the problem.

The Legal Framework

History documents attempts to restrict the movement and exploitation of people for the profit of others, for example the 1815 Declaration Relative to the Universal Abolition of the Slave Trade. However the primary legal tool designed to combat human trafficking is the United Nations Convention against Transnational Organized Crime (UNTOC) adopted by General Assembly Resolution 55/25 of 15 November 2000. The Convention is supplemented by three Protocols targeting specific areas and manifestations of organised crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

Together these Protocols are known as the Palermo Protocols.

At the regional level there is the Council of Europe Convention on Action against Trafficking in Human Beings of 16th May 2005 (CoE Convention) and an EU Directive (Directive 2011/36/EU of the European Parliament and of the Council of 5th April 2011 on preventing and combating trafficking in human beings and protecting its victim, and replacing Council Framework Decision 2002/629/JHA, OJ L 101/1 15.4.2011). Confusion regarding definition and the appropriate approach to be adopted can be readily explained as traditionally human trafficking has been characterised as a transnational crime. What has been hailed as the 'first globally legally binding instrument with an agreed definition on trafficking in persons' is found in article 3 of the Palermo Protocol on Human Trafficking accompanying the aforementioned UNTOC:

- (a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) 'Child' shall mean any person under eighteen years of age.

Essentially trafficking pursuant to this definition encompasses three components: the act

i.e. *what* is done; the means i.e. *how* it is done; and the purpose, or *why* it is done. Arguably though this approach and these instruments, emanating as they did from the UN Office on Drugs and Crime, overly emphasised issues of border control and irregular immigration. As a consequence this generated a tendency to regard those trafficked as being part of the problem, as opposed to being victims of human rights violations in need of assistance and protection. This criticism has led to a more human rights based approach with greater focus on the victim being adopted with a commensurate shift from what was primarily known as ‘the 3 Ps’ (Prevention, Protection and Prosecution) (more recently ‘punishment’ and ‘promotion’ (of international cooperation) have been added, leading some to now speak of ‘the 5Ps’) to include ‘the 3 Rs’ (Rehabilitation, Reintegration and Redress). This move can also be seen in the evolution of the legal instruments, with the CoE Convention being commended for the provisions it offers for victim support and protection, and thus its human rights based approach.

As already alluded to, there is still terminological and methodological confusion regarding human trafficking. A contentious issue for instance is what constitutes human smuggling as opposed to trafficking. The legal difference between the trafficking and the smuggling of migrants focuses on the notion of consent. Smuggled migrants are perceived as having agreed to their illegal transport and entry into another country, whereas those trafficked have been coerced or deceived. Smuggled migrants are vulnerable to exploitation but this is not a prerequisite factor, whereas trafficking is always exploitative. However reality does not comply with legal niceties but rather is messier and neat legal distinctions between trafficking and smuggling are often hard to apply, especially as smuggling can also employ exploitative measures, such as involving violence or exorbitant fees for travel.

However in cases where the victims of trafficking are children evidence of coercion or deception is not required, as children are considered unable to give informed consent to being smuggled due to their relative immaturity and perceived greater vulnerability. *Prima facie*, this provision appears to offer extra protection in that it removes a potential hurdle

to child trafficking being proved. However, this raises problems relating to agency and a child’s ability to choose to leave his/her country of origin, which could be an apparently rational and desirable route to education or employment opportunities. Denying a child agency is also problematic for any human rights based approach which must involve the children’s participation and the right to be heard in decisions affecting them.

As was evident in the other aspects of the research and although this might seem on the face of it to be a theoretical debate, these conceptual and definitional confusions have repercussions on the ground, as was confirmed in the research findings. Interviewees and web respondents were uncertain of their own ability to recognise child trafficking, and this suggests some children in need of assistance and protection are perhaps being overlooked. In the Scottish case, the greatest levels of awareness tended to be concentrated in the main urban centres, Glasgow, Edinburgh, Dundee and Aberdeen, and the Central Belt. This however, compounds the perception that child trafficking in Scotland is an urban problem and not one faced by the geographically large, rural regions, e.g. the Highlands and Islands.

The majority of those interviewed in rural areas were confident that child trafficking did not take place within their areas, but if it did, they would be able to identify it and had sufficient child protection procedures in place to deal with any cases. This self-assurance was rooted in the conviction that their knowledge of their own communities, along with the alleged difficulty of remaining anonymous in a relatively small population, would result in any child being brought into the area coming to the attention of the local communities.

More research would need to be undertaken however, to determine whether there genuinely is no problem of child trafficking within these rural communities or if this confidence is misplaced and vulnerable children are slipping through the safety net.

Indicators of Trafficking

What the literature reflects is that child trafficking is a complex phenomenon and there is no typical victim who fits a ‘classic model’ of trafficking. In an attempt to alert relevant

persons to the possibility of children being trafficked the use of indicators has been encouraged. Such indicators have been compiled by a number of international organisations, for example the International Labour Organisation and the European Commission have devised indicators for adults trafficked for sexual exploitation and for forced labour, and parallel ones for children (International Labour Organisation and the European Commission (2009), *Operational indicators of trafficking in human beings*). In the UK context the Government has included a list of indicators in its document on safeguarding children who may have been trafficked (Department for Children, Schools and Families (2007), *Working Together to Safeguard Children – Safeguarding Children who may have been Trafficked*) and the Scottish Government has incorporated the indicators into its guidance adapted for application in Scotland (Scottish Government (2009), *Safeguarding Children in Scotland who may have been Trafficked*).

The web-based questionnaire sought to assess the level of knowledge through specifying certain indicators that might serve as alerts to a child being trafficked whereby one question provided respondents with a series of indicators of child trafficking. The participants were asked whether any of these applied to any children they had encountered. These indicators were: appears to be in Scotland illegally; has his/her journey/visa arranged by someone other than self or family; is accompanied by an adult who insists on remaining with the child at all times; has a prepared story very similar to that given by other children; does not appear to have money but does have a mobile phone; is unable, or reluctant to give details of accommodation; receives unexplained or unidentified phone calls whilst in placement/temporary accommodation; shows signs of physical or sexual abuse and/or has contracted a sexually transmitted infection or has an unplanned pregnancy; has a history with missing links and unexplained moves; is one among a number of unrelated children found at one address; is required to earn a minimum amount of money every day; or has limited freedom of movement. Of the 800 respondents who answered this question 551 respondents (68.9%) could not apply any of the indicators to children they had come

across. The survey revealed that awareness of child trafficking in Scotland varies considerably, compounded not least the confusion over terminology.

Knowledge of ‘child trafficking’, what it means and entails, and what indicators would be applied to identify it, was patchy. Interviewees were aware that trafficking involves movement and exploitation although remained uncertain as to the specific indicators, the range of experiences of exploitation and contexts in which trafficking occurs. Initially the majority of interviewees expressed trafficking as being for sexual exploitation and involving the international, long distance movement of young people, in other words, non-UK citizen children. This is in line with the web respondents’ most often cited indicator being a child appearing to be in the country illegally. Asked expressly about internal trafficking all interviewees were receptive to the idea that it occurs, although candid that it might be something they had overlooked.

Training

A means of raising awareness is through training. Those participating in the web survey were asked as to the level of training they had received on the issue of child trafficking whereas the interviewees were asked to gauge the appropriate level of support required for practitioners. Of the 800 web survey responses to this question the majority (648, 81%) had not received any training on the issue of child trafficking. Those who had received most training came from the law enforcement sector, 62.2% of whom had received training, and the United Kingdom Border Agency (UKBA), all of whom had received training. This is perhaps not surprising given that the UKBA will be dealing with children, whether as unaccompanied asylum seekers or otherwise, on an everyday basis. The sector in which there had been no training received was business, but this should be read with the caveat that there were very few responses from this sector.

The lack of training provision was emphasised by interviewees but the overriding message to be extrapolated is that such training should not just be rolled out across all stakeholders but should be targeted to ensure that the training is commensurate with the need of the relevant professional. The interviews underscore a general consensus that training should be

carefully designed and should focus on trafficking indicators for those who would be most likely to encounter a trafficked child, e.g. social workers, health workers, education providers or police officers.

What this means is that not everyone needs to become an expert on all aspects of trafficking, but rather should have the awareness and competency to recognise the risk signs and know what to do and with whom to raise concerns.

Several of the interviewees touched on the importance of the method of delivery and of any training being readily accessible and cost effective. This highlights that training does not come without an investment of resources and in times of constraint such training would come at the cost of something else. The issue of competing demands was a recurring theme throughout the interviews. From the interview responses it would appear the most efficient, 'streamlined' training would be to equip those likely to encounter at risk children with indicators, thus providing them with an identification tool. Accordingly, one of the Commissioner's recommendations from the Report is that appropriate training for relevant staff, as well as encouragement for general public awareness campaigns, should be implemented and continuously supported.

Age Assessment

One group of children of particular concern identified was those within the 16-18 age bracket. There is no definitive scientific method of assessing a child's age, and thus no uniform policy internationally regarding age assessment has been established. This has led to some concern that States may be eager to classify trafficked individuals as adults in order to diminish some of their responsibilities to offer assistance. So Gallagher argues that '[t]he regime created by the two [Palermo] protocols (whereby trafficked persons are accorded greater protection and therefore impose a greater financial and administrative burden on States Parties than smuggled migrants) creates a clear incentive for national authorities to identify irregular migrants as having been smuggled rather than trafficked.' (Gallagher, A. (2002), Trafficking, smuggling and human rights: tricks and treaties, *Forced Migration Review*, Issue 12, January, pp. 25–28, on p. 27.) This issue is particularly problematic

when the trafficked individual appears within the asylum system and either has no, or holds fake, documentation.

This is particularly worrying given that the majority of cases in which there have been concerns of trafficking in Scotland have involved young people in their teens. One non-governmental organisation (NGO) noted it was rare to encounter children under the age of 14 years. Age assessment can be a polemic issue, as is reflected in both the literature review and the interviews. Although all the legislation and policies relating to child trafficking emphasise the benefit of the doubt should be given to the young person, the recurring view was those in the 16 – 18 age group had an uphill struggle to be accepted as children, and are sometimes put in a position of having to prove their age to an authority figure who is expressing doubt as to the age claimed.

The UK National Referral Mechanism

The CoE Convention makes reference to 'competent authority', i.e. public authorities which may have contact with trafficking victims. The UK for its part when it indicated that it would sign the Convention also stated it would establish a National Referral Mechanism (NRM) to identify victims of trafficking. This it did in April 2009 designating the United Kingdom Human Trafficking Centre (UKHTC) and the UKBA to be the Competent Authorities to which suspected cases of trafficking should be referred.

Cases of suspected trafficking when the victim is British and there are no outstanding immigration issues are referred to the UKHTC. The UKHTC refers cases to the UKBA when, along with the concerns related to trafficking, there are also additional questions over the individual's immigration status. In the case of a child, a referral form has to be completed by what is known as a First Responder which is then assessed by the Competent Authority. First Responders include the police, local authorities, the NHS and others deemed to have expertise in trafficking issues, such as Migrant Helpline. The UKBA can also be a First Responder.

The NRM has come in for considerable criticism and critics have described it as being 'not fit for purpose' (Anti-Trafficking Monitoring

Group (2010), *Wrong Kind of Victim? One year on: an analysis of UK measures to protect victims of trafficking*). Detailed consideration of the NRM falls outside the scope of this article but the main criticisms are that as a procedure it is cumbersome, protracted and overly bureaucratic. Additionally in the case of children, they are not consulted prior to being entered into the system, whereas adult victims of trafficking must consent to being referred to the NRM, which again raises questions surrounding agency and the ability of children to make informed decisions.

Accordingly what emerged was a questioning of the validity of referring a child to the NRM as it arguably offers no real benefit to the child. If a child was found to be a victim of trafficking s/he would be granted discretionary leave to remain in the UK for one year. If however the child is an unaccompanied asylum seeker and claims asylum, indefinite leave would be granted until the age of seventeen and a half years. Anomalies such as these have led to a number of persons calling for the appointment of a Human Trafficking Rapporteur with a specific portfolio for children and young people. The Commissioner's recommendations are in line with this call, and in the first instance support the appointment of a UK Rapporteur but, in the absence of that, a recommendation is made to the Scottish Government to appoint a Rapporteur who would report directly to the Scottish Parliament.

Statistics and Profiles

Of course the popular expectation is that a report on the nature and extent of child trafficking should provide statistics. Admittedly figures can inform the debate but they should not be seen as the 'be all and end all'. However, that said, the UKBA Office for the Scottish region did provide statistics relating to NRM referrals of children it received covering the time period of April 2009 – August 2010, during which time that Office had received 14 cases. At the time of writing the Report, 4 of these cases had been deemed to be instances of child trafficking.

The gender profile of the UKBA's 14 cases comprised 3 males and 11 females. Three of the children were Chinese; 2 Somali; 2 Malawian; and one child came from each of the following countries: Burundi, Chad, Nigeria, Sierra Leone, South Africa, Uganda and Vietnam. In

10 of the cases the nature of the exploitation was sexual; in 4 cases it was forced labour; there was one case of domestic servitude (in one case both sexual exploitation and domestic servitude were alleged). The majority of the cases involved children between the ages of 14 – 18, although one child was only 2 years old and another was aged 4.

Data was also obtained from the Child Exploitation and Online Protection organisation (CEOP), which calculated that covering the period between March 2007 and February 2010, seventeen children were trafficked into Scotland. A breakdown of these figures illustrated initially a preponderance of females, although this is now being offset by an increase in the number of males. It also endorses the fact highlighted in the literature review, that although sexual exploitation remains a primary purpose for child trafficking, the forms of exploitation are becoming more diverse and extend beyond sexual exploitation.

The analysis of the web survey responses supports the suggestion that the number of actual referrals of suspected child trafficking cases may be only the tip of the iceberg and that potential child victims of trafficking may have slipped through the net and remained unidentified. The difficulty in compiling precise statistics is related to the definitional confusion still apparent over what types of movement and exploitation are covered by the term 'trafficking' and so who should be included in any count. As to profiling the 'typical' trafficked person identified in Scotland, recognition was given to the fact that there is no archetype, and a number of countries now seem to be the source, including China, several African states, Afghanistan and recent accession countries to the EU.

Better identification and data collection are obviously necessary, but must be coordinated at local, national and international levels. Establishing a clearer picture of the patterns of child trafficking in Scotland, or elsewhere, will assist in the design and provision of services for those in need or at risk. It would also provide the information that would allow for the appropriate engagement with source countries in any preventative measures.

Prosecuting Child Trafficking

Notwithstanding the focus on transnational crime a recurring criticism reflected in the liter-

ature review and by interviewees was the absence of successful prosecutions. In the UK there have been relatively few prosecutions for human trafficking and at the time of the Report there had been none in Scotland. Trafficking legislation has been characterised by some as being too unwieldy and demanding an unrealistic burden of proof. Against this legislative background, rather than proceed with trafficking charges, some jurisdictions have attempted to convict traffickers on related crimes, such as immigration charges or living off immoral earnings. This however is problematic both in practical terms and those of perception. In the first case, if charged with a related offence, those convicted could receive a relatively short prison sentence and be released before their victims (who may have been witnesses in the prosecution) have had an opportunity to resettle, or be granted asylum. The other disadvantage of not prosecuting trafficking cases but related criminal activities, is that it perpetuates the belief that trafficking does not happen here, and as such the authorities do not need to treat tackling it as a matter of importance.

The position in the UK is that there is no overarching legislation, but trafficking for sexual exploitation is criminalised under sections 57-59 of the Sexual Offences Act 2003 in England, Wales and Northern Ireland and section 22 of the Criminal Justice (Scotland) Act 2003, and section 24 of the Asylum and Immigration Act prohibits trafficking for labour exploitation. This Act applies to the whole of the UK, immigration being a reserved matter and not devolved. These Acts cover internal trafficking as well as trafficking into the UK, and carry a maximum of 14 years imprisonment.

Criminal Justice and Licensing (Scotland) Act 2010 addresses domestic servitude and encompasses slavery, servitude and forced labour and makes provision for a maximum sentence of 14 years imprisonment. Similar legislation applies in England and Wales, the Coroners and Justice Act 2009.

Some countries have adopted legislation specific to human trafficking. Canada for example has amended its Criminal Code to introduce a human trafficking offence specifically addressing child traffickers. This carries a minimum sentence of five years imprisonment

for anyone convicted of child trafficking in Canada. This will be raised to a minimum of six years imprisonment for cases with aggravating factors. In Ireland the Criminal Justice (Human Trafficking) Act 2008 criminalises not only those who traffic people by bringing them into the country against their will, but also outlaws the use of forced labour in Ireland.

Pursuant to Article 4 of the EU Directive, Member States are required to take the necessary measure to ensure that any offence defined by the Directive is punishable by a maximum penalty of at least 5 years. To some extent this resonates with the judgment of the European Court of Human Rights in *Rantsev v Cyprus and Russia*, Application no 5965/04, 7 January 2010, which declared States, both of origin and destination, to have an obligation to protect against and to investigate allegations of human trafficking.

Interestingly in this context, the Directive extends the definition of ‘exploitation’ to include begging (Art 2(3)) and provides for the first time a definition of a position of vulnerability (Art 2(2): ‘a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved’).

Obviously it was outside the remit of the Report to evaluate the effectiveness of legislative provisions but it is certainly recommended that a comparative study of legislation is called for to assess the relative effectiveness of domestic legislation in tackling human trafficking.

Interviewing Children

A particular issue that arose repeatedly was that of the number and different formats of interviews children can often experience throughout the identification process. This is usually the result of different services and individuals having to interview the child. However, better implementation of a multi-agency approach could reduce the potential harm to the child, particularly if it was underpinned by the UNICEF Guidelines on interviewing trafficked and abused children.

These Guidelines recognise it is seldom possible to obtain all the necessary information in one interview. However, in consideration for the well being the child and to ensure the information is complete and truthful, the interviewer should expect to conduct a number

of interviews over a period of time for each topic. What is essential is that interviews should always be conducted and informed by the core ethical principles of best interests of the child, *viz*, that they are child-friendly; they are premised on informed consent; and they do no harm.

In the Scottish context it was suggested there could be more trained workers, including interpreters, capable of implementing a Joint Interview Teams (JIT) programme, allowing for case conference style meetings similar to those used by the Children's Hearing System in Scotland, minimising the number of times a child will be interviewed. This was addressed by the Commissioner in his recommendations.

Guardianship

The strategy of assigning a guardian to each alleged child victim of trafficking found favour throughout the literature and among the interviewees. Such an individual would act on behalf of the child to ensure s/he receives appropriate accommodation and care and would be responsible for dealing with all the agencies handling a child's case. Ideally, in a multi-agency approach, the guardian would be the child's single point of contact navigating what can be a complicated, and confusing, network of services and procedures. One promising practice on the Scottish scene is the guardianship project currently being piloted by the Scottish Refugee Council and the Aberlour Child Care Trust. One of the Commissioner's recommendations is that cognisance be given to the outcome of the evaluation of this pilot project and, if positive, the scheme should be extended. What it does highlight is the need for there to be a 'friendly adult' advocating for a suspected child victim of trafficking, every step of the way.

Conclusion

What is self-evident is that child trafficking exists in Scotland as elsewhere; it is complex and has many manifestations; and there is no 'silver bullet' solution. It must be borne in mind that trafficking should not be thought synonymous with migration, leading to the danger of even legitimate migration being viewed as suspicious. There is a need to tackle trafficking at its source, and this demands long term development programmes which seek to address the structural inequalities that make some people and groups more vulnerable to trafficking than others. In addition to establishing and coordinating education and livelihood programmes in the source countries, destination countries must examine, strengthen and uphold their own policies and frameworks to eradicate exploitation in the labour market, and other environments attractive to traffickers.

Any efforts at combating human trafficking require international cooperation from which no state can abdicate responsibility. There is still work to be done to raise awareness of the issues surrounding child trafficking. However one positive outcome of the Scottish project is that a number of respondents commented that participating in the survey made them appreciate their lack of knowledge, and that completing the questionnaire in itself was an exercise of awareness raising. For the best interests of the child to be realised, source, transit and destination countries must all work together to eliminate the harm caused to those who have been and are susceptible to such exploitation as trafficking. This demands coordinated action at national, regional and international levels if the hope of justice for the next generation, as was expressed at the CMJA Conference, is to become reality for this vulnerable group.

TORTURE AND DEATH IN CUSTODY: LEGALISING TORTURE IN THE AGE OF TERRORISM

T.R. Andhyarujina, Senior Advocate, Supreme Court of India, former Solicitor-General of India. A paper from the 2011 Commonwealth Law Conference.

Torture is prohibited under international law and the domestic laws of most countries in the 21st century. It is considered to be a violation of human rights, and is declared to be unacceptable by Article 5 of the UN Universal Declaration of Human Rights. Signatories of the Third Geneva Convention and Fourth Geneva Convention officially agree not to torture prisoners in armed conflicts. Torture is also prohibited by the United Nations Convention Against Torture, which has been ratified by 147 states.

National and international legal prohibitions on torture derive from a consensus that torture and similar ill-treatment are immoral. Despite these international conventions, organisations that monitor abuses of human rights (e.g. Amnesty International, the International Rehabilitation Council for Torture Victims) report widespread use condoned by states in many regions of the world. Amnesty International estimates that at least 81 world governments currently practice torture, some of them openly.

Recently in his memoirs called *Decision Points*, former President George W. Bush defended the use of ‘Enhanced Methods of Interrogation’ like water-boarding to extract information from suspects claiming that these interrogations had saved thousands of lives by preventing the attacks on multiple targets in America and Britain. Asked whether he personally authorised the use of this method of interrogation Bush replied ‘Damn right’. He said there was no option when the suspect had information about another attack but refused to divulge it. President Bush said that the information so obtained helped break up plots to attack on American diplomatic facilities abroad, Heathrow airport and Canary Wharf in London and multiple targets in the United States.

The plea of compelling necessity for torture in interrogation of terrorist suspects has been the

most consistent excuse in the age of terrorism. One powerful argument has been in what is called the Ticking Bomb Situation (TBS). The compelling factor in TBS was put to a state advocate by an Israeli Judge, Justice Heshin. The judge asked:

Supposing a bomb was planted inside a multiple storey building in the heart of Tel Aviv and it was to explode in two hours and it was impossible to evacuate people in the building. What must be done in such a situation when the suspect knows the location of the bomb he asked the advocate?

The advocate pleaded helplessness and refused to admit that it would be permissible to use force in such a situation. Thereupon the judge responded

This is the most extreme immoral position I have ever heard, a thousand people are about to die and you propose to do nothing.

It is in such TBS that legality and considerations of human rights against torture seem to break down. Torture seems to be the only way to extract information from the terrorist suspect to save many innocent human lives.

But this justification for the use of torture inevitably extends beyond the TBS as is evident from President Bush’s statement where extreme necessity is pleaded to save innocent lives. This extension is called ‘the slippery slope of torture’. Any system that allowed torture in tightly controlled situations would risk eroding into wider use. This danger was noted by Amnesty International in its report on torture. It said ‘From the point of view of society, the argument of torturing ‘just once’ does not hold. Once justified and allowed for the narrower purpose of combating political violence, torture will almost inevitably be used for a wider range of purposes against an increasing proportion of the population’.

In recent times the notorious torture-related 'slippery slope' case has been the torture of Iraqi detainees by US soldiers at the Abu Gharaib detention centre in Iraq. The methods employed were intimidatory and sexually vulgar.

Circumventing the prohibition against Torture.

Various ways to circumvent the prohibition against torture have been formulated. One ingenious argument is that certain operations on the suspect do not fall in the strict definition of Torture in the International Convention against Torture 1984. Article 1 of the Torture Convention states

'For the purpose of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession...'

Claiming to avoid pain and suffering the interrogator resorts to methods which are cruel, inhuman and degrading but not torture. This was the legal justification made in the closely guarded secret Memos of 'Enhanced Interrogation' of suspects after 9/11 issued in August, 2002 by Jay Bybee, the then Assistant Attorney-General of United States of America and John Yoo, Deputy Attorney-General during the Bush period of US Presidency.

These 'Torture Memos' as they came to be known were revealed for the first time by the President Barack Obama in April, 2009 as he wanted to move beyond the 'dark and painful chapter in our history'. According to these Memos, cruel inhuman or degrading treatment is not torture: it is only extreme forms of severe pain, serious physical injury which come under the definition of Torture under the Convention such as organ failure, impairment of bodily function etc. which can be considered as torture.

Not surprisingly these Torture Memos rely upon the decision of the European Court of Human Rights in the case of Ireland v UK 1976 which was concerned with the interrogation methods employed by the British forces in the interrogation of IRA suspects in Northern Island in 1971. The Court held that five techniques of wall-standing, hooding, subjec-

tion to noise, deprivation of sleep, deprivation of food and drink were not torture though they fell in the category of inhuman treatment. The Court said

'Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/ or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.'

The four Torture Memos from the Bush administration set out in chilling detail the kind of techniques used by the CIA against suspected Al Qaeda operatives and other held after the 9/11 attacks :-

Water-boarding: Detainee placed on a board with his head lying downwards. The memos say: 'A cloth is placed over his face on which cold water is then poured for periods of at most 40 seconds. This creates a barrier through which it is either difficult or impossible to breathe. The technique thereby induces a sensation of drowning'.

Walling: The detainee is slammed into a wall. 'Walling is performed by placing the detainee against what seems to be a normal wall but is in fact a flexible false wall.' The false wall exaggerates the sound, making the contact apparently sound worse than it is.

Sleep deprivation: The CIA was authorised to deny detainees sleep for up to 180 hours. 'Generally, a detainee undergoing this technique is shackled in a standing position with his hands in front of his body, which prevents him from falling asleep.'

Nudity: 'Nudity is used to induce psychological discomfort and because it allows interrogators to reward detainees instantly with clothing for co-operation'.

Insect: In the 2002 memo, the justice department gave the go-ahead for the CIA to play on the fears of Abu Subaydah, an alleged Al Qaeda member, a charge he denies. 'You would like to tell Subaydah that you intend to place a stinging insect in

the box with him. You would, however, place a harmless insect in the box.’ CIA officials say that the technique was never used.

Slaps: ‘With the facial slap or insult slap, the interrogator slaps the individual’s face with fingers slightly spread.’

Water dousing: Aim is to weaken resistance by making the detainee cold but stopping short of hypothermia.

Food deprivation: ‘Dietary manipulation involves substituting a bland, commercial liquid meal for a detainee’s normal diet. The CIA causes a formula for calorific intake that will always be set at or above 1,000 kcal/ day.’

Cramped confinement: Detainees put in uncomfortably small containers; this was judged unsuccessful, as it offered detainees a temporary safe haven.

These methods were used against 28 terror suspects. Khalid Shaikh Mohammed, the 9/11 planner was water boarded 183 times and barraged with a variety of rough interrogation techniques 100 times in two weeks before a doctor stopped it. Abu Subaydah an alleged senior Al-Qaeda Commander was water boarded 83 times before he revealed large amount about Al-Qaeda’s structure as well as the location of Ramsan Sheikh who he called the logical planner of September 11 attacks.

Rationalisation of Torture in Israel

Israel has rationalised the use of torture, as it is one nation which has been subjected to the continual acts of terrorism. Between 1987-1989 the Landau Commission headed by retired President of the Supreme Court Moshe Landau legalised certain methods of extracting information from suspects. The Landau Commission recommended that when interrogating suspected terrorist the interrogators could use non-violent psychological pressure of an intense and prolong interrogation with a moderate measure of physical pressure but such pressure must not reach physical torture, ill-treatment or severe harm which would deprive the suspect of his human dignity. The Commission’s opinion was that it was permissible to use this pressure to get any information not necessarily restricted to the TBS situations. The methods considered were shaking,

‘shabeh’ a combination consisting of isolation, sleep deprivation and inflection of physical pain. Other methods included forcing the interrogee to stand rather than to sit, stretch positions, slaps, kicks and beating. Only in one single case the Israeli agents were charged and convicted of excessive use of force. The Supreme Court of Israel not only allowed the system to operate for 12 years but approved these methods in specific cases until its well known decision in *Public Committee Against Torture in Israel v State of Israel* (HCJ 5100/94).

The Supreme Court, whilst holding that the Landau methods were illegal for want of legislative authority, said in now famous words:-

‘This decision opened with a description of the difficult reality in which Israel find herself. We conclude this judgement by revisiting that harsh reality. We are aware that this decision does make it easier to deal with that reality. This is the destiny of a democracy – it does not see all means as acceptable, and the ways of its enemies are not always open before it.

A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.’

This rhetoric hides the fact that judgment in effect legalised post facto torture. The Supreme Court ruling in the Israel Torture case prohibited authorising officials to torture absent legislation and therefore no regulations may be issued no methods may be developed and no prior authorisation is permitted for interrogations involving torture or other internationally prohibited ill treatment. However, if an interrogator did torture a terrorist in a TBS ‘the ‘necessity defence’ in the Israel Penal Code is likely to be open to him in prosecutorial or judicial proceedings ex post facto. The Court instructed the Attorney General to elaborate further on this availability, which he duly did, and a new model emerged.

Following the Supreme Court ruling in 1999 Israel has adopted Defence of Necessity (DoN)

model. This has been an operation in Israel presently. Thousands of Palestinians have been arrested by the Israeli security forces since the Supreme Court ruling and have been interrogated on grounds of necessity.

Torture authorised by warrants

Professor Alan M. Dershowits of the Harvard Law School is the leading protagonist for legalising torture by requiring that the acts of torture would be regulated by some kind of warrant with accountability standards and limitations. He argues that the need for information outweighs the moral and ethical arguments against torture. His view is propounded as follows:

'I am generally against torture as a normative matter, and I would like to see its use minimised. I believe that at least moderate forms of non-lethal torture are in fact being used by the United States and some of its allies today. I think that if we ever confronted an actual case of imminent mass terrorism that could be prevented by the infliction of torture we would use torture, (even lethal torture), and the public would favor its use. That is my empirical conclusion. It is either true or false, and time will probably tell.'

I then present my conditional normative position, which is the central point of my chapter on torture. I pose the issue as follows: If torture is in fact being used and/ or would in fact be used in an actual ticking bomb mass terrorism case, would it be normatively between or worse to have such torture regulated by some kind of warrant, with accountability, record-keeping, standards, and limitations.'

Dershowits proposes limiting torture to methods which are 'nonlethal' and 'do not leave any lasting damage'. He suggests by way of example the use of a sterilised needle inserted in the finger nails to produce unbearable pain without any threat of health or life or a dental drill through an unanaesthetised tooth. Under the 'torture warrants' model, interrogators believing they are facing a TBS would apply to judges, who would decide whether this is in fact the case, and accordingly whether torture may be applied. Fashioned on legal provisions and practices governing search warrants, such a model would be based on

principles of issuance by an independent authority, specific authorisation; and reasonableness. Such warrants grant the officials concerned immunity from prosecution, which would mean that officials may torture even innocent persons with impunity.

According to Professor Dershowits the warrant requirement if properly enforced would reduce frequency, severity and duration of torture. He admits that the major downside of any warrant procedure would be its legitimisation of a horrible practice, but in his view it is better to legitimate and control a specific practice that will occur, than to legitimate a general practice of tolerating extra-legal actions, so long as they operate under the table of scrutiny and beneath the radar screen of accountability.

Conclusion – Prohibitions without sanctions

Torture is banned by international covenants and domestic laws in most countries. Nevertheless, it is carried out and is even justified as President Bush and his administration did. The reality is that in the age of terrorism, the acts of torture on individuals will be undertaken and justified in the larger interest of protecting innocent lives. A BBC poll in 2006 held in 25 nations gauged support for torture. An average of 59% of people worldwide rejected torture. However there was a clear divide between those countries with strong rejection of torture (such as Italy, where only 14% supported torture) and nations where rejection was less strong. Often this lessened rejection is found in countries severely and frequently threatened by terrorist attacks. Eg, Israel, despite its Supreme Court outlawing torture in 1999, showed 43% supporting torture, but 48% opposing, India showed 37% supporting torture and only 23% opposing.

Is there not some method of punishing the perpetrators of torture who justify it by legal casuistry? When revealing the shocking Torture Memos, President Obama excused the actual operators of these methods and said they would not be prosecuted as had they followed the memos which were authored by legal advisors. With regard to those who formulated these legal decisions President Obama was more guarded: 'I would say that that is going to be more of a decision for the Attorney-General within the parameters of

various laws and I don't want to pre-judge that'. As yet no prosecution of the authors of these 12 memos has taken place. It is ironical that Mr Jay Bybee, the then Assistant Attorney-General was rewarded by being appointed a Federal Judge of US Court of Appeals 9th Circuit, and John Yoo, the then Deputy Attorney General now teaches Law in California University.

In March 2009 Spanish Judge Baltasar Garçon famous for his assumption of universal

jurisdiction in matters of human rights as in the case of Pinochet, considered whether to charge Bybee and five other officials of the George Bush administration but on April 17, 2009 Spain's Attorney-General issued a non-binding recommendation against the investigation.

What then is the value of legal prohibitions against torture, one may ask?

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WIDOWS RIGHTS ARE HUMAN RIGHTS

Karen Brewer, Secretary General, CMJA. This paper is based on presentations made at the CMJA conference in Brighton in September 2010 and the Commonwealth Law Conference, Hyderabad, February 2011. Dr Brewer is also a Trustee of Widows Rights International.

Introduction

Over the last thirty years, since the adoption of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) in 1979, the international community has made great strides to improve the status of women around the globe. Article 55 of the UN Charter provides for the ‘universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion’.

These rights are also included in CEDAW, the Declaration on the Elimination of Discrimination against Women (1967), the Declaration on the Elimination of Violence against women (1993) and all other human rights treaties.

Article 2 of CEDAW puts a duty on states to ‘agree to pursue by all appropriate means and without delay a policy of elimination of discrimination against women’. Article 1 of CEDAW defines discrimination as being

‘...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedoms in the political, economic, social, cultural or any other field.’

However, despite all the international treaties and laws, in many countries a woman continues to be seen as receiving her status from her relationship with the man in her family, be they a father, brother or husband. The well-being of a woman continues to be tied to her marital status whether she is single, divorced or widowed.

One group of women has suffered more than most and these are widows. They face discrimination across the globe, irrespective of cultures, religion, ethnicity or whether they live in developed or developing countries. A recent

study estimates the numbers of widows around the world to be in the region of 245 million, half of which live in poverty. It is a fallacy to believe that all widows are looked after by their sons or daughters. Between 15 and 20% of widows are under the age of 45. Many have young families to look after, or are caring for elderly parents. For example, in Nepal, Woman for Human Rights found that 67% of widows were between the ages of 20-30. Widows are excluded from communities and may suffer from harmful, degrading traditional practices.

Widows in conflict situations

We are all aware that conflicts across the globe have had a detrimental effect on the development of women’s rights and have largely contributed to the creation of widows. In Kabul, it is estimated that there are about 50,000 widows and in Iraq there are between one to three million widows out of a population of 27 million. Widows are often the target of sexual abuse being deemed ‘fair game’ by soldiers seeking the spoils of war and are easy targets as they have no protection.

War has other economic, social and legal implications especially when husbands are declared missing in action. The widow’s right to inherit or receive a pension as a war widow may be affected by the lack of proof of death. The widow and her children may not be able to provide the vital paperwork needed to register children as legitimate or for schooling.

Despite the fact that the UN Security Council has passed numerous resolutions on Women, Peace and Security (Resolution 1325, 1820, 1889, and 1890), widows have never been specifically mentioned. As a consequence very little data, except anecdotal, has been gathered on the situation and the number of widows affected by conflict. Widows are usually unrepresented in peace-building processes even though they constitute the majority of any displaced populations. The UNHCR

Handbook on Voluntary Repatriation, section 6.2, states that:

‘Special attention needs to be paid to the question of access to land for residential and agricultural use by returnee women heads of households. If the local legislation or traditional practice does not grant returnee women the same rights to land as returnee men,..... In any case, UNHCR has to closely monitor the handling of returnees’ access to land and to ensure, if necessary through intervention, that returnee women have access to land on the same footing as returnee men’.

In Rwanda, the newest member of the Commonwealth, 10 times more widows survived the genocide because the *genocidaires* targeted able-bodied men and boys. One study found that in a sample of 1,125 widows in Rwanda, 805 were traumatised in some shape or form and 67% had been infected with HIV/AIDS from violent abuse.

In addition to those who have been declared missing, there are the ‘disappeared’ of the world. The Association of Parents of Disappeared Persons, an organisation of the relatives of the disappeared in Kashmir, claims that about 10,000 people have been subjected to enforced disappearances by state agencies, mostly taken by armed personnel. Of the disappeared, they say between 2,000 and 2,500 people were married, and almost all were males. Their widows are unable to claim pensions or to remarry as there is no official confirmation of the death of their husbands.

Disregard of the rights of widows

There is evidence that even in countries where there is no conflict and despite all the international and national provisions protecting the rights of women, the rights of widows, as women and members of the human race are disregarded.

The UN Declaration of Human Rights states in Article 2 that

‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

The rights include: the rights to equality before the law and to equal protection (art 7); the

right to equality with respect to marriage (art 16); the right to own property (art 17); and the right to an adequate standard of living, including the right to adequate housing (art 25). These rights are further and more explicitly articulated in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Penelope Andrews in her article on ‘Transitional Perspectives in Women’s Rights’ (Interights Bulletin 14 (2004)) points out that ‘Almost always, in regarding women’s rights, the question of culture, or rather cultural concerns become crucial in discussing the appropriate status of women’. The preservation of cultural practice is often used to justify the status quo though it is recognised that culture is not static but evolves.

Since the 1990s, most countries which have amended their constitutions have made efforts to incorporate non-discrimination principles. In some states, such as Uganda, the constitution provides in art 55 that ‘laws, cultures, customs or traditions which are against the dignity and welfare and interests of women or which undermine their status are prohibited by this constitution.’

However, the enforcement of these constitutional or legislative provisions remains inadequate and more often than not customary law and traditional practice prevail. Widows continue to be excluded from communities and may suffer from harmful, degrading traditional practices. They may not be able to inherit land, may be forced to marry, may be subjected to inhumane and degrading mourning rights or abuse.

Violence against widows

General Recommendation No. 19 of the Committee on the Elimination of Discrimination against Women, states:

‘Gender-based violence against women is ‘violence that is directed against a woman because she is a woman, or violence that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.’

‘Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention.’

We are all aware of the Hindu practice of sati (the burning of widows) which is the most extreme form of violence against women and which has now been banned in India. Although it was abolished officially in 1829, the practice of sati still exists in some parts and violence against widows is prevalent in many parts of India. It is estimated that there are over 35 million widows (2001 figures) in India. When a Hindu woman becomes a widow, she traditionally only wears white. In the past, her hair would be completely cut off and she would not be allowed to wear jewellery or cosmetics.

Many modern Hindu families do not adhere to these older customs, but widows are still often considered inauspicious. In Eastern India, young married women who are unable to have children and then become widowed are sometimes deemed to carry a contagious disease and anyone associated with them are also considered to be tainted. Those who remain in the village may suffer rape or mental torture sometimes at the hands of other female relatives. Widows are often regarded as having the ‘evil eye’ and many are abandoned at temples where they have to eke out a beggar’s life. They are very vulnerable, especially the younger ones, to sexual exploitation. HelpAge International research has revealed that over 500 older women, mostly widows, are killed every year following accusations of being witches. In one case in Uganda, an illiterate housewife and mother of 4 children was accused of helping to kill her husband to acquire his property. She was branded a ‘witch and a harlot’ and was told by her husband’s relatives that since she killed their son, she would not inherit any property.

In other parts of the Commonwealth there are mourning rites which are equally humiliating and degrading to widows. In some cases these rites are considered a test of the loyalty of the wife. Widows may be forced to drink the water their dead husbands have been washed in and may be forced to sit with their husband’s dead body for days on end. They may be forbidden

from washing for several days or even months; be forced to sit naked on a mat. Many customs cause serious health hazards. The lack of hygiene results in scabies and other skin diseases; those who are not allowed to wash their hands and who are made to eat from dirty crockery may fall victim to gastroenteritis and typhoid. Widows who have to wait to be fed by others become malnourished because the food is poorly prepared and there is not enough of it as they are the last to receive food.

Widows are forced to undergo life-threatening cleansing rites in the misguided belief that when a husband dies, the wife has to be ‘purified’. In some cases the cleansing rites involve forced sexual contact with a male relative of the husband or a ‘professional cleanser’, this in itself can lead to other traumas for the widow, who may be infected with HIV/AIDS or even suffer an unwanted pregnancy and increase the ostracisation already felt by the widow in question. A widow cleanser in Malawi explained that the ‘tradition dictates that he sleep with the widow, then with each of his own wives, and then again with the widow, all in one night. He admitted that he never uses condoms and acknowledged that he may be infecting hundreds of women, or even himself. A Kenyan widow cleanser expressed equal disregard for condom use. He said that the widows ‘wouldn’t really be cleansed if the condom was there. Even women who are aware of the risk of HIV infection may submit to cleansing rituals because of community pressure.

These practices constitute human rights violations and compound the physical and emotional trauma that the death of a loved one already brings.

Widows may lose their place in society ie: they are often excluded from politics or positions of power, they are denied access to medical care and become socially and financially isolated. In Swaziland, custom dictates that a widow must mourn at least six months, during which time she is forbidden to leave her home and prevented from working to support her children. In Lesotho the mourning period is one and half years and widows cannot leave their houses or stay out at night.

The children of widows can suffer exclusion, having to abandon schooling to help their mothers financially, having to work at early

ages and sometimes, in the case of girls, they are forced into early marriage, prostitution or worse to help the family make ends meet or because they cannot turn to their fathers to protect them from 'sexual predators'.

Widows may lose their rights to custody of their children. In one case in the Cameroon, a widow saw her two sons taken away. When the widow finally managed to get help from a local charity, it was discovered that one of her sons had become severely disabled after the people he had been sent to had physically abused him by kicking him in the knee-caps for helping himself to food when he was hungry.

Dowries/Bride Prices and dependency

The continued practice of dowry payments for brides affects widows. Historically dowries in some parts of the Commonwealth were a woman's safety net in case the husband died. This is no longer the case and dowry prices have become a way of 'buying' a bride and subjecting her to little more than slavery. Having been 'bought', it is implied that a woman is nothing without a man to support her, that she makes no contribution to the household and therefore is not entitled to any benefit when her husband dies.

Unfortunately, our social structures still in part reflect that patriarchal view with women continuing to be 'dependent' on their husbands – for tax benefits, health insurance and income – and ultimately this leaves the women in a weakened position if the husband dies. The situation is exacerbated if a young girl leaves her education to get married as when she is widowed she often lacks the necessary skills and education to gain an adequate livelihood. Even those who had a comfortable life end up with a lower standard of income not to mention the emotional trauma that widows suffer on the death of their husbands. In the UK, for example, the bureaucratic hurdles involved in settling an estate (in relation to tax and probate) when someone dies can be traumatic for someone who has just lost a loved one and who cannot afford to appoint a lawyer to deal with such issues.

Inheritance rights

By virtue of its General Comment no 28 (entitled 'Equality of rights between men and women') on Article 3 of the ICCPR, the Human Rights Committee placed an obliga-

tion on States to act to ensure women's inheritance rights:

'States Parties [to the ICCPR] must also ensure equality in regard to the dissolution of marriage, which excludes the possibility of repudiation..... Women should also have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses.'

However, General Recommendation No. 21 on 'Equality in marriage and family relations' points out that:

'There are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased's property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention [CEDAW] and should be abolished.'

In Nepal, when a woman's husband dies, the loss is acute. They are considered as single women again and they are not allowed to wear jewellery or bright colours, especially red; they are not to eat meat or seasoned food; not allowed to participate in celebrations; and often not even allowed to touch other people. Their increased dependency on living relatives makes them more vulnerable to, and often the victims of, verbal, physical and sexual abuse and frequently their property and inheritance rights are violated.

In 1976, the Supreme Court of Nigeria in the case of *Yusufu v Okhia* dismissed the customary right of a male relative to inherit the wife of the deceased under the levirate system. This tradition was in direct contradiction with widow's and gender rights. At the time customary law stated that marriage continued even after the husband had died until the proper burial rites were performed. If the widow failed to undertake the burial rites, she was eligible to be 'inherited' by any male relation of the deceased. The original suit was

brought against the widow by the brother of the deceased. The local Court ruled in his favour and the widow appealed to the Supreme Court who voted in favour of the widow of this case banning widow inheritance from continuing in Nigeria.

In the Upper East Region of Ghana, the widow is confined for 4 days with a rope around her neck, chest and days, to signify commencement of the rites. The widow is banned from talking to any man and if she does, she will be coerced to marry him when the rite is over. She is however allowed to communicate with all her children, regardless of sex. She is not allowed to eat from the same pot or drink from any family vessel. After 4 days, the widow is bathed with certain herbs amidst singing and drumming. In addition, she is forced to choose to marry any of her late husband's brothers, in accordance with customary requirements. Failure to do so, subjects her to abuse and being labelled a witch, thief, prostitute, or murderer.

Land Rights

In 2005, the United Nations Commission on Human Rights, adopted the resolution on 'Women's equal ownership of, access to and control over land and the equal rights to own property and adequate housing'. The Commission also urged state parties to

'ensure that women are accorded full and equal rights to own land and other property, and the right to adequate housing, including through the right to inheritance, and to undertake administrative reforms and other necessary measures to give women the same right as men to credit, capital, appropriate technologies, access to markets and information.'

General Recommendation 25 states:

'States parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination – committed by public authorities, the judiciary, organisations, enterprises or private individuals - in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies. Secondly, States parties' obligation is to improve the de facto position of women through concrete and effective

policies and programmes. Thirdly, States parties' obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.'

In Resolution 16/210 (2006), the UN General Assembly

'Urges States to design and revise laws that ensure that women are accorded full and equal rights to own land and other property, including through inheritance, and to undertake administrative reforms and other necessary measures to give women the same right as men to credit, capital and appropriate technologies and access to markets and information.'

However, in many countries, the inheritance laws still favour the patrilineal system. In the 1990s, a number of countries enacted legislation to reform inheritance of land and property so as to enable women to inherit land and property. There were reforms in Ghana, Malawi, Tanzania and Zambia to name but a few. However, discrimination persists when it comes to the practice. Widows continue to be excluded from inheriting land and property and in some cases they are forced to leave their homes by their husband's relatives who lay claim to the property. This has devastating consequences especially in communities which depend on agriculture to survive.

Even in those countries that have matrilineal societies where land rights may be inherited by women, such as in the South Pacific, for example, discrimination still persists as Sue Farran explains in her study of Human Rights in the Pacific: 'This is because the management of land and decisions relating to it are invariably the preserve of men...' Land held in custom cannot always be transferred, 'even if a deceased makes a will, this may be challenged on the grounds that it goes against custom or that it makes insufficient provision for certain members of the family'.

In some parts of India, widows encounter problems of directly managing inherited land due to gender segregation in society (such as purdah) or their duties in relation to childcare. This is compounded by the high rate of illiteracy of women in India. The fact that male members

of the family control agricultural technology also disadvantages women farmers and increase their dependence on male intervention. Often added to this is the threat and practice of violence by male relatives and others interested in acquiring a widow's land, or pressure to sharecrop their land, usually at below market rates.

In countries where sharia law is practiced, according to the Centre on Housing Rights and Evictions, Islamic scholars explain that the reason why in most cases, males inherit twice as much as women, is because of their duty to maintain their families by paying for education medical and other expenses. Any financial contribution a woman makes to her family is considered superfluous. This combined with the social stigma and family pressure can result in widows giving up the property to male relatives. Women are often threatened with being ostracised and disowned by their families if they do not sign over their rights. In many cases, there is a fear that a widow will marry again and take the property with her to her new husband's family. This would remove the property from the 'family'.

Other Property Rights

Widows have been evicted from their communities and stripped of their belongings. The Solomon Island case of *Sasango v Beliga* ([1987] SBMC 5) illustrates how precarious it can be. In this case, a widow who had seven children sought the return of custom property, including pigs, shell money and porpoise teeth from her late husband's brothers. The widow claimed that some of the shell money and the porpoise teeth were her own personal property and others had been held on trust by her husband for the children. The brother of the deceased claimed the right to the property and as successor to his brother in custom. The court did not deny this custom but on the facts of this case held that it could not extend to the personal property of the wife or to the property held on trust of the children where the wife was awarded custody of the children.

In Swaziland, the increasing numbers of women widowed by HIV/AIDS and in need of family property on which to raise their children is on the increase. Those who were married through customary law, about 80%, are still considered minors under their parents' tutelage until they go to their husband's home. At the death of the husband the property is

inherited by the husband's family. Widows are often left destitute, thrown out of the village and the whole family suffers.

According to Dora Kanabahita Byamukama, although widows' rights were specifically provided for under the Succession Act of 1906 and the Succession (Amendment) Decree of 1972 of Uganda, many widows continue to be deprived of their property despite the 1995 constitutional provisions. Following a challenge in court of the Act, in 2007, certain sections of the Act were impugned and declared unconstitutional.

Uganda is not unique in this area, many other countries rely heavily on antiquated inheritance, succession or marriage laws to disinherit women. Although people have been encouraged to make their wills, many widows, especially in the poorer communities, find themselves having to contend with intestacy laws some of which date back to the colonial era. In many cases where a couple has married according to customary law, statutory protections do not always apply. In Rwanda, to date the Inheritance and Succession Law does not apply to those married under customary law. In Zambia, although the Intestate Succession Act provides that property is divided between the widow and the children, if the land is custom land then the land is deemed to be part of the property of the family.

Polygamous marriages and the effect on widows

Paragraph 38 of General Recommendation 25 to the CEDAW Convention provides:

'States parties are reminded that temporary special measures should be adopted to accelerate the modification and elimination of cultural practices and stereotypical attitudes and behaviour that discriminate against or are disadvantageous for women.'

General Recommendation 21 provides:

'Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriage ought to be discouraged and prohibited.'

Due to the complexity of the legal systems, inheritance issues from polygamous marriages

can be convoluted due to the complexity of the legal systems especially when men are allowed to marry their different wives under different legal systems (customary or statutory) or marriages are not registered. If one widow has been married under the civil/statutory law, then that widow is more likely to inherit, thus disenfranchising all other widows in the polygamous marriage.

Widows of polygamous marriages risk the same treatment as widows of monogamous marriages in that they may be forced off their husband's land and may find themselves more prone to infections from HIV/AIDS as husbands with the disease will spread the infection to all their wives.

Vanessa van Struensee points out that prosecutions are rare and courts are often hostile towards widows attempting to raise the issue. Some lawyers advocate for equal protection of all widows of polygamous marriage whatever the regime they have been married under. Others support the imposition of a monogamous regime and the banning of polygamy all together. Despite the fact that General Recommendation 21 (above) urges the prohibition of polygamy, this continues to be the tradition in many communities.

In April 2005, the United Nations Commission on Human Rights adopted a resolution entitled 'Women's equal ownership of, access to and control over land and the equal rights to own property and to adequate housing', urging States Parties to:

'Ensure that women are accorded full and equal rights to own land and other property, and the right to adequate housing, including through the right to inheritance, and to undertake administrative reforms and other necessary measures to give women the same right as men to credit, capital, appropriate technologies, access to markets and information.'

This Resolution also affirms that discrimination against women with regard to having access to, acquiring and securing housing, land and other property constitutes a violation of their human rights to protection against discrimination. Furthermore, it draws the link between the lack of respect for women's rights to housing and land, and their vulnerability to domestic violence and HIV/AIDS.

The impact of HIV/AIDS

At their 45th session, in 2005, the Commission on the Status of Women concluded inter alia that:

'Full enjoyment by women and girls of all human rights, civil, cultural, economic, political and social, including the right to development which are universal, indivisible, interdependent and interrelated is of crucial importance in preventing further spread of HIV/AIDS. The majority of women and girls do not enjoy their rights. ... Poverty, negative and harmful traditional and customary practices that subordinate women in the household, community and society render women especially vulnerable to HIV/sexually transmitted infections'.

Today almost 40% of people living with HIV/AIDS (PLHIV) are women, a large number of whom have only had one partner, usually the husband. Current inheritance laws leave nearly half of these women without the economic means to support themselves and their children when the husband dies. One of the striking features of the HIV/AIDS epidemic is the increase in the number of young widows. There has also been an increase in the numbers that are dependent economically on their birth families after the death of their spouses. Many women are forced to leave the marital home upon being diagnosed HIV positive or after their partners have died of AIDS. Of these widows, 90% no longer live with their husband's families after the death of their husbands, only 9% receive financial support from their husbands' families, and nearly 79% are denied a share of their husbands' property.

Of the 10 of PLHIV case studies documented by Solidarity and Action Against the HIV Infection in India (SAATHI) in their analysis of the Indian Legal System and the Issues of People Living with HIV, nine were of women, seven of whom were widows of men who died of AIDS. All the women were infected with HIV by husbands. All the women, some with children, were evicted from their marital homes when their husbands died, and were economically dependent on their birth families. Some of them were entitled to land or shops that were in the husband's name, but had no access to them, and no papers to prove their rights. In one case, although the woman and

her husband had bought the land in their joint names and had papers to prove it, the in-laws had forcibly occupied the land, and constantly threaten the widow with violence. In December 2009 the Calcutta High Court settled a property dispute in favour of an HIV-positive widow whose husband had run a transport business with his brothers. The latter had denied the widow a share in the business as she had been diagnosed HIV- positive. SAATHII assisted the widow to take her case to court and the Justice Shankar Prasad Mitra passed an order entitling the widow to her husband's share of the company. This decision has been described as setting 'a new bench mark,' both because of the outcome of the case and the speed with which a settlement was achieved

In *G v New India Assurance Co Ltd* (Bombay High Court, 16 January 2004), the petitioner was a widow who had applied to the defendant company for employment after her husband died while in employment with the company. The company stated that she was medically unfit following a medical fitness report that found she was HIV positive. Justice Banerjee observed that the law courts could not be mute spectators where relief is denied to an employee's family on account of the death of the bread winner. He further ruled that a person cannot be denied employment only on the ground that they are HIV positive.

The 53rd session of the Commission on the Status of Women urged governments to:

'Develop multisectoral policies and programmes and identify, strengthen and take all necessary measures to address the needs of women and girls, including older women and widows, infected with or affected by HIV/AIDS, and those providing unpaid care, especially women and girls heading households, for, inter alia, social and legal protection, increased access to financial and economic resources including microcredit and sustainable economic opportunities.....'

Forced Marriages

In a number of countries, customary law demands that widows (especially young widows) should marry one of the brothers of the deceased or one of his male relatives or someone nominated by them under the levirate

system or widow inheritance which is still prevalent today amongst many societies around the world. Traditionalists have argued that the custom offers the widow and her children assurance of security and protection. However, as the practice is compulsory it is a form of gender-based discrimination and sexual abuse. Refusal often leads to persecution (regular beatings or emotional blackmail), but agreement may also bring other traumas into the life of the widow when she becomes little more than a slave for the rest of the family especially if the person is being married into a polygamous family.

Both the UNODC Model Law against Trafficking in Persons and the Supplementary Convention on the Abolition of Slavery include provisions against forced or servile marriage.

Although succession laws are supposed to protect widows from being inherited as mere chattels, widow inheritance is a practice that still exists in many communities around the Commonwealth. Although succession law protects widows, widow inheritance is a practice that still exists among many communities in Kenya but has been abandoned to a large extent over time. Where it continues to exist (e.g. in the Kisa community), it is with the consent of the widow. Refusal to marry has led in some cases to disinheritance or widows being kicked out of the matrimonial home. The Luo people, again from Kenya, have for hundreds of years observed the custom of widow inheritance. The younger brother of the dead man inherits the widow and provides her with security, financial support and parental care for her children. For members of the Luo community, inheritance is a way of continuing life in the home of the deceased - where the widow and her children remain. Widows who are kicked off their husband's property for refusing to marry again, can find redress through the courts but many remain ignorant of their rights and aren't able to protect themselves from a life of poverty.

So what is being done?

On a local level, it falls mainly to charitable and non-governmental organisations to deal with the consequences of such abuse as the cases rarely get to court because widows are unaware of their rights under the law or are too traumatised or frightened to protest. Cases rarely get to court because widows are

unaware of their rights under the law or are too traumatised or frightened to protest. Some of these charities provide access to training so that widows can gain new skills, provide homes so that widows and children have shelter and cows so that they have access to food for their families by selling milk at the markets. They also work with local community leaders to increase awareness of the rights of widows but there is still a lot of work to do.

Most governments still ignore the issue mainly because there is a lack of data available, except anecdotal, as to the status of widows and their struggle remains invisible. The census records do not provide enough statistical data. Preconceptions persist in male dominated governments. For example the Nepalese government in December 2009, proposed giving a fee of US\$ 670 to any man who would marry a widow. The women's rights organisations of Nepal protested against this proposal which constituted little more than a state dowry and in the end the proposal was shelved.

Constitutional and Legislative Provisions

Despite the fact that it is recognised that sustainable development and the reduction of poverty can only be achieved by empowering women and ensuring their rights, the multiplicity of legal systems practiced in many post colonial nations has created complex and confusing legal regimes which hinder the development of widows' rights.

Despite the fact that the UN has made it clear that universal human rights (including women's rights) take precedence over customary law and most constitutions since the 1990s have included anti-discrimination measures to enhance equality between men and women, discrimination in the law and in practice still persists

International Provisions

The only international convention which specifically targets the rights of widows is Article 20 of the Protocol to the African Charter on Human and People's Rights which states:

'State parties shall take appropriate legal measures to ensure that widows enjoy all

human rights through the implementation of the following:

- a) That widows are not subjected to inhuman, humiliating and degrading treatment;
- b) That a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and the welfare of the children;
- c) That a widow shall have the right to remarry, and in that event, to marry a person of her choice'.

It is important that other regional, Commonwealth declarations and international conventions incorporate similar protocols and specifically put in place criminal penalties for inhuman, degrading and life-threatening mourning rites and for any traditional cultural practice which restricts the liberty, mobility and financial independence of widows.

At their 15th Session in 2010, the UN Human Rights Council called upon States to fulfil their obligations and commitments to revoke any remaining laws that discriminate on the basis of sex and remove gender bias in the administration of justice, taking into account that those laws violate their human right to be protected against discrimination. It was also decided to establish, for a period of three years, a Working Group of five independent experts on the issue of discrimination against women in law and practice.

Judicial officers and lawyers have an important role to play. To date, very few cases have come to court and the perpetrators very often escape punishment. More often than not this is because widows are not aware of their rights or because they have suffered too much violence already. It is essential that all members of society are treated equally whatever the marital status of the person in question. Better understanding is required of the violence endured, the humiliation experienced and the vulnerability and poverty suffered by widows so that when cases do come to court, widows are given the same rights as all human beings. The legal, cultural and social status of widows should be mainstreamed in all discussions on the status of women.

LAW REPORTS

We publish in this issue of the *Journal* notes of three cases which raise issues of judicial independence. *The State of South Australia v Totani* deals with the exercise of federal jurisdiction by the courts of the various Australian States, so at first sight may seem to be only of interest to Australian constitutional lawyers. In fact the High Court of Australia had to ask itself what were the characteristics of a court, for only a body with those characteristics could exercise the jurisdiction. On the facts it held that the operation of South Australian law as to declared organisations and control orders made against members of such organisations meant that the outcome of a case was determined by the Executive; a court which was reduced to being a tool of the Executive could not be regarded as a proper court.

The other cases both come from Uganda. In many countries judges are expected to preside over commissions of enquiry set up by the

Government to investigate and report on matters of major public interest. That takes them away from the normal work of a judge, but draws upon their judicial skills. *Muhwezi v Attorney General* shows the limits to what a serving judge may be asked to do. There an appointment as Inspector General of Government, essentially an investigatory and prosecutorial function, was held incompatible with judicial office.

Dr Besigye, a leading Opposition figure in Uganda, is often in the news. As this issue was being prepared for the press he was arrested several times in very controversial circumstances. In *Besigye v Attorney General* the Constitutional Court describes the grievous assault on the fundamental principles of the Rule of Law by the Ugandan Government. It makes very sad reading.

THE STATE OF SOUTH AUSTRALIA v TOTANI

11 November 2010

HIGH COURT OF AUSTRALIA [2010] HCA 39 French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ

In 2008, the legislature of the State of South Australia enacted the Serious and Organised Crime (Control) Act 2008. Section 10 enabled the Attorney-General for South Australia to make a declaration in respect of an organisation on the basis that its members were involved in serious criminal activity and that it represented a risk to public safety and order in South Australia. Of this declaration, French CJ said ‘Such a declaration is administrative in character. It has no text or content but does have legal consequences.’ In the instant case, the organisation was the Finks Motorcycle Club. One such consequence was that the Magistrates Court of South Australia was obliged by section 14 of the Act on an application by the Commissioner of Police to make a control order against a member of a declared

organisation. A control order placed restrictions upon the freedom of association and communication of the person to whom it applied and others who might wish to associate or communicate with him or her.

The Full Court of the Supreme Court of South Australia, by majority, held the provision in section 14 and a control order made under it, invalid. The majority judgement said

‘...it can be seen that the process of depriving a person of their right to and freedom of association on pain of imprisonment for up to five years, although formally performed by a State court which exercises federal jurisdiction, is in fact performed to a large extent by a member of the Executive Government in a manner

which gives the appearance of being done by the court. But the process is devoid of the fundamental protections which the law affords in the making of such an order, namely, the right to have significant and possibly disputed factual issues determined by an independent and impartial judicial officer and the right to be informed of and to answer the case put against the person.'

The majority held 'that the unacceptable grafting of non-judicial powers onto the judicial process in such a way that the outcome is controlled, to a significant and unacceptable extent, by an arm of the Executive Government destroys the court's integrity as a repository of federal jurisdiction'.

The State of South Victoria appealed to the High Court of Australia which, also by a majority, dismissed the appeal.

FRENCH CJ reviewed the history of the court system in Australia and in particular the exercise by State courts of federal jurisdiction. The exercise by the State courts, of which the Magistrates' Court was one, rested on three assumptions. The first was the universal application throughout the Commonwealth of the rule of law, an assumption upon which the Constitution depended for its efficacy. The second was that the courts of the States were fit, in the sense of competent, to be entrusted with the exercise of federal jurisdiction. The third assumption was that the courts of the States continued to bear the defining characteristics of courts and, in particular, the characteristics of independence, impartiality, fairness and adherence to the open-court principle. This formulation was deliberately non-exhaustive. An important element, however, in the institutional characteristics of courts in Australia was their capacity to administer the common law system of adversarial trial. Essential to that system was the conduct of trial by an independent and impartial tribunal.

'At the heart of judicial independence, although not exhaustive of the concept, is decisional independence from influences external to proceedings in the court, including, but not limited to, the influence of the executive government and its authorities. Decisional independence is a necessary condition of impartiality.

Procedural fairness effected by impartiality and the natural justice hearing rule lies at the heart of the judicial process. The open-court principle, which provides, among other things, a visible assurance of independence and impartiality, is also an essential aspect of the characteristics of all courts, including the courts of the States.'

This led, in His Honour's view to a number of conclusions, including:

'A State legislature cannot confer upon a court of a State a function which substantially impairs its institutional integrity and which is therefore incompatible with its role as a repository of federal jurisdiction';

'State legislation impairs the institutional integrity of a court if it confers upon it a function which is repugnant to or incompatible with the exercise of the judicial power of the Commonwealth'; and

'The institutional integrity of a court requires both the reality and appearance of independence and impartiality.'

The Act offended against these principles and was to be declared invalid.

GUMMOW J, CRENNAN AND BELL JJ (in a joint judgment) and KIEFEL J gave concurring judgments.

HAYNE J, also concurring, referred to an important element in the reasoning of the court below, that the Attorney-General's findings were unreviewable and so binding on the court. The conclusion that the decision of the Attorney-General to declare an organisation to be a declared organisation was unreviewable could not be accepted. A declaration was open to challenge by means of judicial review. His Honour admitted that the forensic difficulties of mounting such a challenge 'would be very large', especially as not all of the information before the Attorney-General could be inspected by the party seeking judicial review. But the decision was examinable for jurisdictional error, or for want of procedural fairness.

However, that did not determine the outcome of the appeal:

'The fact that a relevant obligation finds its immediate origin in a court order is an unremarkable consequence of the exercise

of many forms of judicial power. But the creation and imposition of that obligation depends, in every case, upon the court's ascertainment of rights or liabilities, or upon its determination that the order will conduce to future conformity with rights and liabilities. When a court awards judgment for damages, or other forms of final relief, it does so as a remedy for a breach of rights. When a court punishes a person convicted of crime, it does so in consequence of adjudication of guilt for past acts. When a court orders an injunction, it does so to prevent future contravention of existing rights. And ... when a court makes an order to prevent future wrongdoing, it does so on its assessment of the connection between the order proposed and past or future conduct of the person to be restrained, or on its assessment of the connection between the order and a combination of past and possible future acts. Section 14(1) of [the Act] does not operate in any of these ways.'

The courts were not to be used as an arm of the Executive to make unlawful the association between individuals when their associating together was not otherwise a crime, where such prohibition was to be imposed without any determination that the association of the particular individuals had been, would be, or even might be, for criminal purposes. What section 14(1) did was to permit the Executive to enlist the Magistrates Court to create new norms of behaviour for those particular members who were identified by the Executive as meriting application for a control order. They were to be subjected to special restraint, over and above the limitations that the Act imposed on the public at large, not for what they had done or might do, and not for what any identified person with whom they would associate had done or might do, but because the Executive had chosen them. That function was repugnant to the institutional integrity of the Court that was required to perform it.

HEYDON J dissented. In *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 601 [42] McHugh J had said:

'That which judges regard as repugnant to the judicial process may be no more than a reflection of their personal dislike of legislation that they think unjustifiably affects long recognised rights, freedoms and judicial procedures. State legislation that requires State courts to act in ways inconsistent with the traditional judicial process will be invalid only when it leads to the conclusion that reasonable persons might think that the legislation compromises the capacity of State courts to administer invested federal jurisdiction impartially according to federal law. That conclusion is likely to be reached only when other provisions of the legislation or the surrounding circumstances as well as the departure from the traditional judicial process indicate that the State court might not be an impartial tribunal that is independent of the legislative and the executive arms of government.'

In a long and detailed judgment His Honour held that in this case that conclusion could not be reached. The Magistrates Court did not sanction the merits of the Attorney-General's decision to make a declaration, any more than the courts that apply drug legislation sanction the merits of the decision by the executive or the legislature that a particular drug is dangerous a topic on which opinions can differ widely. The courts must act on the relevant decision unless it is set aside as being beyond jurisdiction, but that does not mean they give the decision their imprimatur. Unless the Constitution rendered all preventive (as distinct from punitive) measures invalid, which was not a proposition for which any argument or authority could be or was advanced, it was not an objection that a particular defendant to control order proceedings has not committed any crime. This possibility was inherent in the notion of preventive justice.

MUHWEZI v ATTORNEY GENERAL

14 May 2010, [2010] UGCC 3, [2010] 5 LRC 436

CONSTITUTIONAL COURT OF UGANDA, Mukasa Kikonyogo DCJ, Mpagi-Bahigeine, Twinomujuni, Byamugisha and Kavuma JJA

Three of the petitioners were at the relevant time ministers in the Uganda Government; the fourth was private secretary to the President. They were charged with various offences of abuse of office, theft, embezzlement, causing financial loss, making false documents, forgery and uttering false documents, all in connection donor funds being administered by the Ministry of Health. The charges were preferred after the Inspector General of Government had made a report to the President implicating the four petitioners in the misuse of the funds. It was the Inspector General who had investigated the case on the orders of the President and it was her office that conducted the prosecutions.

The Court was asked to hold the trial of these offences unconstitutional. It declined to do so, although it found for the accused persons on one issue, the only issue dealt with here. This was whether the appointment of the Inspector General from the judicial bench contravened the Constitution.

At the time of her appointment as Inspector General, Mwendha J was a judge of the High Court and retained her judicial office. Her powers as Inspector General included the power to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or public office. It was argued that she could not perform her role as an independent judge and at the same time investigate, arrest, prosecute, a role that put her office under the executive arm of government.

The Court held that the Constitution of Uganda made provision for the separation of powers. It was a fact that the three organs of state were not rigidly separated in functions and powers. However, the Constitution provided for the strict separation of powers between the judiciary on one hand and the executive and the legislative on the other hand. The separation is embedded in the doctrine of the independence of the judiciary in art 128 of the Constitution and other constitutional provisions contained in Chapter 8 thereof.

In considering whether the appointment of Mwendha J to the post of Inspector General contravened the doctrine of separation of powers, the Court referred to a decision of the Constitutional Court of South Africa in *South African Association of Injury Lawyers v Heath*. A serving judge had been appointed head of a special investigating unit with extensive powers to investigate allegations of corruption, maladministration and unlawful or improper conduct damaging to state institutions. The South African court judged it undesirable to lay down rigid tests for determining whether or not the performance of a particular function by a judge was or was not incompatible with the judicial office. Ultimately the question was one calling for a judgment to be made as to whether or not the functions that the judge is expected to perform are incompatible with the judicial office, and if they are, whether there are countervailing factors that suggest that the performance of such functions by a judge will not be harmful to the institution of the judiciary, or materially breach the line that has to be kept between the judiciary and the other branches of government in order to maintain the independence of the judiciary.. In appropriate circumstances judicial officers could no doubt preside over commissions of inquiry without infringing the separation of powers; the performance of such functions ordinarily called for the qualities and skills required for the performance of judicial functions. But a judicial officer could not be a member of a legislature or cabinet, or a functionary in government, such as the commissioner of police; these functions were not appropriate to the central mission of the judiciary.

Applying this approach the Constitutional Court of Uganda held that the functions and powers of the Inspector General were incompatible with those of a judicial officer. The appointment was a gross violation of the provisions of the Constitution on the separation of powers and the independence of the judiciary and so was null and void.

BESIGYE v ATTORNEY GENERAL

12 October 2010

CONSTITUTIONAL COURT OF UGANDA, *Mpagi-Bahigeine, Engwau, Twinomujuni, Byamugisha and Nshimye, JJAA*

THE COURT in a unanimous judgment set out the facts as recited in an affidavit by counsel who had represented the petitioners throughout what the court described as events which were ‘quite involved, long and dramatic’. The following is a summary of that affidavit.

The petitioners were arrested at various times accused of being members of the shadowy People’s Redemption Army. They were charged with treason and concealment of treason and committed to the High Court to stand trial. That treason trial commenced on 4 April 2006 and was still in progress. Several co-accused were discharged under an amnesty.

On 16 November 2005, bail applications were made to the judge then presiding over the treason trial and conditional bail was granted. Those granted bail were not released because armed men from the Joint Anti-Terrorism Task Force Urban Hit Squad, a security agency of the Government of the Republic of Uganda, invaded the High Court and prevented the bail formalities being completed and took the petitioners back to Luzira Maximum Security Prison.

On 24 November 2005, the State commenced proceedings before a General Court Martial charging the petitioners with terrorism and the unlawful possession of firearms.

The Uganda Law Society brought a public interest petition and on 31 January 2006 the Constitutional Court held that the trial of the petitioners in the General Court Martial contravened the Constitution: *Constitutional Petition No18 of 2005, Uganda Law Society v Attorney General*. Despite the orders of that Court the petitioners remained in prison and were regularly remanded in custody by the General Court Martial.

When the treason trial commenced in the High Court, the petitioners were always brought to the High Court in extraordinarily tightened security and the roads around and leading to the High Court would be sealed off by the

police who would turn away ordinary court users as well as the petitioners’ families and friends.

On 15 May 2006 the petitioners the Constitutional Court in *Constitutional Petition No 12 of 2006* seeking, *inter alia*, orders of relief in respect of the continued detention of those petitioners who had been granted bail. On 2 June 2006, the State dropped the terrorism charges in the General Court Martial but preferred a fresh charge of unlawful possession of firearms. The charge sheet in these Proceedings had the defects that the Constitutional Court held rendered the earlier proceedings unconstitutional and also purported to charge the petitioners with an offence that was not defined in 2001 when it was allegedly committed.

On 12 January 2007 the Constitutional Court delivered its judgment: the continued detention of those who had been granted bail was unconstitutional and the continuation of the treason trial whilst the illegal detention continued was also unconstitutional. The Court also ordered that the petitioners be released on bail forthwith. The Prisons Service disregarded a production warrant and did not produce the petitioners to the Constitutional Court. The State through the Solicitor General refused to approve the decree drawn by counsel on the basis of the Constitutional Court judgment. Further High Court production warrants issued on 15, 16 and 17 January were similarly ignored. On 17 January 2007, the Assistant Commissioner of Prisons in response to a High Court summons appeared and said that the Prisons Service was still consulting with the Solicitor General as to whether to comply with the production warrants of the High Court.

On 24 January 2007, the Attorney General and the Director of Public Prosecutions filed an application seeking a review of the November 2005 order of the High Court granting bail. The judge adjourned the application and remanded the petitioners in custody. On a

further adjournment in March bail was granted, counsel for the applicants being unable to cite any legal provision under which a respondent to a civil application might be remanded in custody. The petitioners were then taken to the Criminal Registry of the High Court to have their bail papers processed but an armed siege of the Registry ensued, with heavily armed security personnel taking control of the corridor leading to the Registry and deploying within the Registry itself and elsewhere in the Court premises. At no time were the bailed petitioners or their counsel, who were present, told of why they were being re-arrested or where they were to be taken. The security personnel simply insisted that they had orders not to permit the petitioners to go out on bail as ordered by the Court.

An emergency meeting in the Chambers of the Deputy Chief Justice ended with senior members of the Judiciary giving direction to end the situation. In fact additional security personnel with dogs arrived. Eventually the bailed petitioners were escorted by the Principal Judge, the Chief Registrar and senior Registrars to be handed over to their Counsel and sureties. The petitioners were then beaten up by security personnel and driven away in a police van. Several of the petitioners were transferred to provincial courts and charged with murder.

THE COURT heard evidence from three witnesses, who gave 'a harrowing account of the arrest and detention of the petitioners, their struggle to obtain bail from the High Court the General Court Martial and the Constitutional Court, their experience with two military sieges of the High Court and their still pending trials in some of those courts'. The evidence was largely unchallenged. The Court accepted the account as given on behalf of the petitioners.

The Court held that the security personnel's conduct towards the petitioners in and around the High Court of Uganda on 1 March 2007 contravened a number of Articles of the Constitution, following on this matter the decision it had given in 2006 after the earlier invasion of the court premises. The Court found that not only were the petitioners severally beaten and tortured but their lawyer was also badly beaten to the extent that amount to torture. 'In our view, the petitioners had gone

to court to seek justice but instead they were subjected, in court premises, inside the Temple of Justice, to humiliating, cruel and degrading treatment that is prohibited by articles 24 and 44(a) of our Constitution.'

That conduct was clearly a negation of the petitioner's right to bail and the right to be presumed innocent till they were proved guilty or they plead guilty. They were denied in the process the right to a fair trial guaranteed under the Constitution. Further the acts of the State on 1 March 2007 at the premises of the High Court grossly interfered with the exercise of judicial power in contravention of article 126 and 128 of the Constitution.

The Court further held that acts of charging people in different courts with offences which arise out of similar facts, was unconstitutional as denying the right to a fair hearing.

The Court said that the brutal siege of the High Court building violated all the cardinal principles enshrined in the Constitution such as the right to a fair trial, the presumption of innocence, the separation of powers and judicial independence.

'In fact it almost tore the 1995 Constitution into shreds. The judiciary protested vehemently. The legal profession joined the judiciary in protesting the discretion of the Temple of Justice. Numerous legislators, the press, Civil Society and academia expressed in one way or the other their shock and disgust over the Siege of the High Court which was in fact the second such a Siege in only two years. The issue raised by these events is whether the petitioners will ever be able to receive a fair trial on the charges which are still pending in the Magistrates Courts and the High Courts of this country? Can any trial resulting from tainted proceedings as has been described in this petition be fair within the meaning of article 28 and 44(c) of the Constitution? The petitioners believe that the events of 1 March 2007 which included the shedding of blood in the premises of the High Court, brutal assaults on prisoners who had been released on bail, violent arrest and manhandling prisoners as they were thrown on lorries as if they were sacks of potatoes, unlawful confinement of the Deputy Chief Justice, the Principal

Judge and other frightened Judges and Registrars who were confined and besieged for over six hours in the High Court buildings and the unrepentant attitude of the Executive Arm of this Republic, all point in one direction that they will never receive a fair trial from the legal system of this country for the offences now pending against them.

We have anxiously examined the evidence from which petitioners draw this conclusion. We have painfully arrived at a similar conclusion that no trial arising from proceedings bearing a history like the one described in this petition can ever be said to be fair within the meaning of articles 28

and 44 of the Constitution of Uganda of 1995.'

The Court ordered a stay of all criminal proceedings in all the courts and a direction to each of the courts before which proceedings were pending to discharge the petitioners. ...

This court cannot suction any continued prosecution of the petitioners where during the proceedings, the human rights of the petitioners has been violated to the extent described above. No matter how strong the evidence against them may be, no fair trial can be achieved and any subsequent trials would be a waste of time and an abuse of court process.'

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