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# COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION

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This editorial is being written a few weeks after the conclusion of the Commonwealth Heads of Government meeting in Perth. There is no doubt that CHOGM made progress in strengthening the structures of the Commonwealth, adopting many, but by no means all, of the recommendations of its Eminent Persons Group. But there must be disappointment at the outcome of the meeting in terms of the Rule of Law.

In its Communiqué, CHOGM made the right noises. It urged members 'to consider becoming parties to all major international human rights instruments; to implement fully the rights and freedoms set out in the Universal Declaration of Human Rights ... as well as those human rights treaties to which they are a party; to uphold these rights and freedoms; ...to continue to support the work of National Human Rights Institutions; and to promote 'tolerance, respect, understanding and religious freedom which, inter alia, are essential to the development of free and democratic societies'. There were other specific references to legal co-operation, notably in respect of people smuggling and human trafficking and in improving gender equality and the empowerment of women.

All these words are welcome, but it seems that the response of CHOGM to human rights issues in terms of action was less than adequate. The Eminent Persons Group in their report noted the criticism that the Commonwealth Ministerial Action Group, which is required to consider serious or persistent violations of the rule of law and of human rights, had only shown real interest, and responded, when there had been a coup d'état or a military seizure of power in a member state. This has led to unfavourable comparisons with the period when the Commonwealth led the world struggle to achieve the rule of law, respect for human rights, and the end of apartheid in South Africa.

The Eminent Persons Group believed that there was a significant gap that should be filled promptly. The gap was twofold: first, the need for full-time attention to be paid to determining when serious or persistent violations of the Commonwealth's political values, particularly infringements of human rights, may have started to occur; and second, the need for exploration and analysis to advise both the Secretary-General and CMAG when serious or persistent violations persisted despite the Secretary-General's 'good offices' interventions.

To fill this gap, the Group recommended that the office of Commonwealth Commissioner for Democracy, the Rule of Law and Human Rights should be created, with responsibilities, inter alia, to advise, after thorough investigation of the facts, when a state is violating core Commonwealth values, particularly human rights, in a serious or persistent way, indicating approaches for remedial action. In so doing the Commissioner would draw on the work and knowledge of the various Commonwealth civil society organisations and professional networks to establish a pan-Commonwealth system to detect human rights violations, threats to religious freedom and other impending difficulties so that they can be pre-empted or quickly resolved.

In its response, CHOGM agreed to strengthen (in unspecified ways) the role of CMAG 'in order to enable the Group to deal with the full range of serious or persistent violations of Commonwealth values' but the proposal for a Commissioner ran into difficulties. The Secretary-General and CMAG are 'to further evaluate relevant options relating to' the proposal and to report back to Foreign Ministers at their September 2012 meeting in New York.

So all is not lost on the Commissioner proposal, but there is clearly a reluctance on the part of some member states to allow their human rights records to be monitored and possibly criticised. The Financial Action Task Force had great success in 'naming and shaming' states whose legislation on money-laundering was inadequate. Groups of states (the EU is another example) are much less willing to 'police' their own members. The Commonwealth is, of course, not just a human rights organisation, but bodies like the CMJA must continue to stress the primary importance of human rights and the Rule of Law.

As Sir Philip Bailhache, the CMJA's Executive Vice-President, reminds us in a paper published in this issue, the Commonwealth (Latimer House) Principles, agreed by CHOGM at an earlier meeting in 2003, speak of the duties of the three branches of government. They are 'the guarantors, in their respective spheres, of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability'.

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## WHY CAN'T WE BE FRIENDS? SHOULD JUDGES BE ON FACEBOOK?

*Justice John Z Vertes, Senior Judge, Supreme Court of the Northwest Territories, Canada.  
A paper from the CMJA Conference in Kuala Lumpur, July 2011.*

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Every guide to judicial conduct throughout the common law world has a canon addressing judicial demeanour. Essentially these express the fundamental notion that a judge should, at all times, act in a manner that promotes public confidence in the integrity, independence and impartiality of the judiciary and caution judges to avoid impropriety or even the appearance of impropriety.

The *Bangalore Principles of Judicial Conduct* of 2002 contains the following admonitions on conduct and propriety:

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

The Canadian Judicial Council's *Ethical Principles for Judges*, published in 1998, contains the following statement on integrity:

Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary.

To like effect, the *Guide to Judicial Conduct*, published by the Judges' Council of England and Wales in 2004, advises as follows:

3.1 A judge should strive to ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants, in the impartiality of the judge and of the judiciary.

The highest standards are expected of a judge both on and off the bench. As many

commentators have noted, public confidence in the judiciary is the cornerstone of judicial independence. Thus, any conduct in or out of court that demonstrates a lack of integrity poses the danger of undermining that confidence. The standard of behaviour to be expected from judges was aptly described by Gonthier J. when delivering the judgment of the Supreme Court of Canada in *Re Therrien*, [2001] 2 S.C.R. 3 (at paras. 110-111):

*Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law...*

*The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens.*

The fact that a judge must exercise greater restraint and decorum than other members of society is commonly accepted. The question becomes how far a judge must distance himself or herself from the common activities of society. This question takes on a whole new dimension with the advent of computer technology and the Internet. Technology provides great benefits, but it also brings significant new challenges that impact judicial ethics. And yet, notwithstanding its significance, the ramifications of technology for the judiciary have been little examined.

How does technology, and specifically social networking via the Internet, affect the scope and substance of acceptable out-of-court behaviour of judges? That is the subject of this paper.

### The Challenge of Social Networking

Social networking sites (such as Facebook, MySpace, LinkedIn, Twitter, etc.) are extremely popular. It is estimated that Facebook is used by 450 million people worldwide. In Canada, 77% of Canadians have social media accounts. MySpace has some 125 million users worldwide while LinkedIn claims over 50 million. These sites are also used by businesses and increasingly by lawyers for marketing and client development. A 2009 survey by LexisNexis Martindale-Hubbell in the United States revealed that 86% of attorneys between the ages of 25 and 35, and 66% of those age 46 or older, belonged to on-line social networks.

Social networking sites allow users to upload profiles, post comments, join 'networks', and add 'friends'. Of course, a 'friend' on a social network site may or may not be a friend in the traditional sense of the word. Anyone who sets up a profile page can request to become a 'friend' (or some similar designation) of any of the millions of users on the site. There could be hundreds of millions of 'friends' on a site. A 'friend' can become a 'friend' of a 'friend' and so on. Some 'friends' do not know each other except for their presence on the social network. Being a 'friend' gives opportunity for social interaction on the network. A 'friend' can interact with another 'friend' by posting updates, by sharing photographs, by sending messages, or by chatting on-line. And, unless privacy controls are used, interaction with one 'friend' can be viewed by all 'friends' in the network.

These sites can be a great way to network, communicate and advertise. But they also carry risks.

Unlike traditional, written communications that provide an opportunity for reflection between the time a message is written and the time it is sent or published, electronic communication is instantaneous. The opportunities for a judge to engage in spontaneous and ill-considered communications that may reflect badly on the judiciary are thus correspond-

ingly greater. In addition, information conveyed via the Internet is potentially accessible by anyone around the world, including litigants, lawyers, jurors, witnesses, and members of the public who may misapprehend the meaning or motives behind a judge's communications. Maintaining the privacy of internet communications is far more difficult than for traditional communications. This only increases the likelihood that seemingly secure information will become known. Information published by a single website can quickly be disseminated across the Internet, making the retraction of problematic communications next to impossible.

Some of the dangers specific to social networking sites were highlighted in a recent article from an American law journal:

*This alluring new world has demonstrated many pitfalls. Initially, very few people used the privacy settings that were available to them. They simply left them at the default settings, meaning that everything they posted was wide open to anyone. And let's face it, if your 'friend' on Facebook chooses to cut and paste elsewhere some very unseemly language you posted, your privacy settings are all for naught. Additionally, the terms of use, which most people do not read, give the sites enormous power over how your postings may be used. It is enough to give a cautious person a serious case of the willies.*

Compounding the dangers, social networks have begun to attract, in a major way, folks who want to use them to spam, to control networks, to attract Internet users to sites which will download malware, and even to use photos of your family and friends to peddle their products. Imagine the surprise of the husband who found a photo of his wife in a Facebook 'hot singles' ad, with her image used without her knowledge or consent. The advertiser had merely lifted her attractive photo from a Facebook page.

Hackers have shown increasing interest in these sites as well (never a good omen for sites that once seemed fairly innocent). By using the sites' features that allow the downloading of content from third-party sites, the networks have left huge security holes for hackers to exploit.



One of the big risks is, of course, privacy. A key danger is that while one may have a fair bit of control over one's own page, one has no control over what others say or do. For example, someone could upload a photograph of someone else and then tag it so that the name is then searchable. Recently, in Toronto, it was discovered that there was a Facebook fan page devoted to a family court judge that the judge had nothing to do with. Some 214 'fans' of the judge, including one who appeared as a litigant in the judge's court, follow the Facebook postings that link to the judge's writings and media appearances. This was a case where the 'fans' were trying to do something positive but there is nothing to stop an angry litigant from creating a Facebook group to organize negative information about a judge.

In 2007, the respected Australia High Court Judge Michael Kirby became the victim of a malicious identity theft when strangers set up a fake MySpace site in his name that contained sordid sexual material. Undoubtedly anyone with good sense and any knowledge of the judge would dismiss such scandalous information. But such an incident reinforces the dangers of this type of media.

This case highlights the other obvious risk, that being identity theft. A Facebook profile can contain a virtual gold mine of personal information. And, as the list of features and applications available to users of social networking sites have grown, so too has the volume of information about the users and their friends. Hackers have been known to attack popular Facebook applications and even Twitter and make off with hundreds and thousands of personal documents containing credit card information, accounts and security codes.

In 2009, the Privacy Commissioner of Canada conducted an in-depth investigation into Facebook's privacy practices and found that Facebook breached Canadian privacy laws in a number of respects. There were insufficient safeguards to prevent third parties (such as advertisers) from getting unauthorized access to users' personal information; Facebook did not ensure that users gave meaningful consent for disclosure of their personal information; Facebook kept information from accounts deactivated by users indefinitely; and,

Facebook allowed users to post personal information about non-users without consent.

In Canada, there are no guidelines for judges on the use of social networking sites but the Canadian Judicial Council has published a bulletin, authored by Martin Felsky, entitled *Facebook and Social Networking Security* (November, 2009). Mr. Felsky, a court technology expert, offers some worthwhile advice regarding the limited protections offered by Facebook:

*Because Facebook makes no sense without sharing, there are basic bits of information about yourself that must be considered public, and you have the limited ability to control who sees what. However, the controls are confusing, counter-intuitive and for many users too complicated to implement effectively.*

The Canadian Judicial Council has also published a guide on the use of Skype, one of the voice over internet services available, also authored by Mr. Felsky, entitled *Is Skype Safe for Judges?* (July 2010).

## **Judicial Conduct**

Very little has been written to date regarding the ethical boundaries to a judge's use of social networking sites. There have been no cases from the Canadian judiciary where such use has been the subject of a conduct investigation. There are, however, numerous examples from the United States where several states have issued advisory opinions.

In New York, a judge sought an advisory opinion after receiving an invitation to join a social network. In concluding that a judge may join and make use of an internet-based social network, the opinion recognized that judges may have legitimate reasons for social networking, such as staying in touch with family and colleagues, reconnecting with old classmates, and, more often than not, monitoring the use of the network by the judge's children. They warned that a judge should consider whether online relationships (such as with an attorney) rise to the level of close personal friendships requiring disclosure or recusal. The committee also cautioned judges to employ an appropriate level of prudence, discretion and decorum in using this technology, and to stay abreast of new features on networking sites that may present

additional issues requiring further guidance. The committee emphasized that it was proper for a judge to participate in social networking sites only if the judge otherwise complies with the Rules Governing Judicial Conduct.

In Florida, the ethics committee concluded that a judge may post material on the judge's social networking site if the publication of these materials does not otherwise violate the Code of Judicial Conduct. The committee concluded, however, that a judge may not designate lawyers as 'friends' or permit a lawyer to designate the judge as their 'friend'. The committee reasoned that this practice would 'lend the prestige of the judicial office' to those lawyers designated as 'friends' and may give the impression that they were in a special position to influence the judge. There was a strong minority dissent on the committee who argued that social networking sites have become so ubiquitous that the term 'friend' on these sites merely identifies a person as a contact and not a 'friend' in the traditional sense.

In South Carolina, an ethics advisory opinion addressed a magistrate's enquiry as to the propriety of designating several law enforcement officers and employees of the magistrate as 'friends' on his Facebook site. The committee concluded that the magistrate may do so as long as they do not discuss anything related to the judge's position as magistrate. The committee quoted from the South Carolina Code of Judicial Conduct to the effect that 'complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives. Allowing a Magistrate to be a member of a social networking site allows the community to see how the judge communicates and gives the community a better understanding of the judge.'

In Kentucky, the ethics committee concluded, as in New York, that the mere designation of a 'friend' on a social networking site does not, in and of itself, indicate the degree of a judge's relationship with that person. Such terms as 'friend', 'fan' and 'follower' were thought to be terms of art used by these sites and not used in their ordinary sense. Thus the listing of lawyers as 'friends' by a judge on his or her site does not violate the Code of Judicial Conduct and specifically does not convey the impression

that they are in a special position to influence the judge. The committee cautioned, however, that, as with any public media, social networking sites are fraught with peril for judges and that its opinion should not be construed as explicit or implicit approval for judges to participate in such sites in the same manner as members of the general public.

Similarly, in Ohio, an ethics panel under the supervision of the state Supreme Court held that a judge may be a 'friend' on a social networking site even with a lawyer who appears as counsel in a case before the judge. As with any other action a judge takes, a judge's participation on a social networking site must be done carefully in order to comply with all ethical rules in the Code of Judicial Conduct. A judge should disqualify himself or herself from a proceeding when the judge's social networking relationship with a lawyer creates bias or prejudice concerning the lawyer or a party. There is, in the panel's view, no 'bright-line rule'; not all social relationships, online or otherwise, require a judge's disqualification. This opinion, unfortunately, did not address the questions of fairness that are triggered when one lawyer is a 'friend' and the other is not, or when a lawyer is 'defriended' or 'blocked' on the judge's online page.

### Disciplinary findings

There have also been some specific disciplinary findings involving the inappropriate use of social networking sites.

In North Carolina, a district court judge was publicly reprimanded for making Facebook posts about a child custody case being tried before him. He also had *ex parte* communications with counsel for one of the parties who was a Facebook 'friend' of the judge. To make matters worse, the judge conducted independent research into a party's business through the Internet and did not disclose this to the parties or their counsel. This unfortunate episode came to a halt after the judge issued his ruling and the losing side brought a motion for a new trial and the judge's disqualification, both of which were granted. The North Carolina Judicial Standards Council concluded that 'the judge's actions constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.'



In Georgia, a judge resigned after newspaper accounts revealed inappropriate contacts between the judge and a litigant using a social networking site and e-mail. Apparently the judge made initial contact on Facebook with the female litigant and then developed a relationship with her.

What all of these instances demonstrate is that the basic rules governing judicial conduct still apply, whether one is writing a letter or posting a picture on a Facebook site. Engaging in *ex parte* communications with counsel on one side of a case is improper whether done with or without a computer. The fundamental duty to act with integrity and propriety applies whether in cyberspace or here on earth.

### Guidelines

There can be no doubt that the proliferation of social networking sites has transformed electronic communications and social interactions. Judges, as human beings, and in many cases human beings highly engaged in the activities of their societies, are just as inclined to make use of these sites as others. But, judges do not have the same latitude in their personal lives as others. They therefore cannot approach their use of technology in the same manner as others.

The boundaries of acceptable out-of-court judicial behaviour are defined by broad generalizations. It is only when a judge becomes the subject of some type of disciplinary or conduct review that certain practices are identified as being beyond the limit (such as in the American examples). There is always a tension between the duty of judges to act with restraint and the need to not become isolated from the society in which they work.

Canada's *Ethical Principles for Judges* is typical of other guidelines in remarking on the need to maintain contact with the community (at p. 15):

*Judges, of course, have private lives and should enjoy, as much as possible, the rights and freedoms of citizens generally. Moreover, an out of touch judge is less likely to be effective. Neither the judge's personal development nor the public interest is well served if judges are unduly isolated from the communities they serve. Legal standards frequently call for the*

*application of the reasonable person test. Judicial fact-finding, an important part of a judge's work, calls for the evaluation of evidence in light of common sense and experience. Therefore, judges should, to the extent consistent with their special role, remain closely in touch with the public.*

This commentary, however, is closely followed by the admonishment that judges must accept restrictions not imposed on others:

*A judge's conduct, both in and out of court, is bound to be the subject of public scrutiny and comment. Judges must therefore accept some restrictions on their activities – even activities that would not elicit adverse notice if carried out by other members of the community. Judges need to strike a delicate balance between the requirements of judicial office and the legitimate demands of the judge's personal life, development and family.*

These constraints on one's freedom of action can rightly be viewed as aspects of a judge's duties that one swears to observe by accepting the appointment to judicial office. The duty to act with restraint and to avoid conduct that would undermine the dignity and image of the office is an aspect of the need to maintain judicial independence and impartiality. This was also explained by Gonthier J., of the Supreme Court of Canada, in *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267 (at para. 107):

*The duty of judges to act in a reserved manner is a fundamental principle. It is in itself an additional guarantee of judicial independence and impartiality, and is aimed at ensuring that the public's perception in this respect is not affected. The value of such an objective can be fully appreciated when it is recalled that judges are the sole impartial arbiters available where the other forms of dispute resolution have failed. The respect and confidence inspired by this impartiality therefore naturally require that judges be shielded from tumult and controversy that may taint the perception of impartiality to which their conduct must give rise.*

So, bearing in mind these principles, and knowing the potential perils posed by social networking sites, it is surprising that most

jurisdictions have not adopted at least some explicit guidelines for judges' activities on these sites. It is fair to say that prohibiting judges from participating on social networking sites at all would be a far-reaching intrusion into their private lives. But, surely some guidelines would be warranted for those judges who may be unsure or unaware of exactly what they can do and what should be avoided.

### The Ohio guidelines

One of the few jurisdictions where guidelines have been issued is Ohio where the Board of Commissioners on Grievances and Discipline, under the supervision of the Supreme Court of Ohio, issued specific advice on the use of social networking sites as part of the opinion mentioned earlier. The guidelines start with the general advice that 'as with any other action a judge takes, a judge's participation on a social networking site must be done carefully', and that following the guidelines 'will require a judge's constant vigil'.

The Ohio guidelines, while not pretending to be exhaustive, contain the following points:

1. A judge must maintain dignity in every comment, photograph, and other information shared on the social network. Displaying anything that is contrary to the dignity of the office would be imprudent and improper.
2. A judge must not foster social networking interactions with individuals or organizations if such communications will erode confidence in the independence of judicial decision-making. A judge must not convey the impression that any person or organization is in a position to influence the judge and, just as important, must not permit others to convey that impression. For example, frequent and specific social networking communications with advocacy groups interested in matters before the court may convey such an impression.
3. A judge should not make comments on a social networking site about any matters pending before a judge, not to a party, not to counsel, not to anyone. Most rules or guides to judicial conduct warn that a judge must avoid initiating, receiving, permitting or considering *ex parte* communications. Even if, when circumstances require, *ex parte* communications are simply for administrative purposes and do not deal with substantive issues in the case, it would be prudent to avoid any such case-related communications on a social networking site since it creates the possibility of improper *ex parte* exchanges. If a judge receives an *ex parte* communication, the judge should reveal it on the record to the parties and their counsel.
4. A judge should avoid making comments on a social networking site about any matter in any court. Judges are admonished to avoid comment about cases that might be construed as affecting the outcome or impair the fairness of the hearing of a particular case. In other words, it is not the province of a judge to comment on the work of another judge (that's the exclusive domain of appellate courts).
5. A judge should not view a party's or witness' page on a social networking site and should not use social networking sites to obtain information regarding the case before the judge. This is a corollary to the rule that a judge should not conduct independent investigations into the facts of a case. The ease of finding information on a social networking site should not entice the judge into investigative activities, or into merely indulging idle curiosity, respecting cases before the judge.
6. A judge should recuse himself or herself from a proceeding when the judge's social networking relationship with a lawyer creates bias or prejudice, or the appearance of bias, in the case. While the existence of a friendship or social relationship with a lawyer is not necessarily a disqualifying factor, it is always a matter of perception. This is no different than the rule already contained in many ethical canons. It is just a new technological variation on it. For example, the Canadian Judicial Council's *Ethical Principles* document contains the following guideline (at p. 52):  
With respect to friends or relatives who are lawyers, the general rule relating to conflicts of interest applies, i.e., that the judge should not sit where a reasonable, fair minded and informed person would have a reasoned suspicion that the judge would not be impartial.
7. A judge must not give legal advice to others on a social networking site. The wisdom of this should be self-evident.

8. A judge should be aware of the contents of his or her personal social networking page, be familiar with the site's policies and privacy protocols, and be prudent in all interactions on the site.

While there is room for legitimate argument over the articulation of some of these guidelines — in particular the question of the propriety of judges 'friending' lawyers — they can at least provide helpful guidance in this sensitive area. Technology certainly gives us many challenges but it also offers many benefits. Social networking appears to be here to stay so the judiciary should realistically assess the risks it poses and deal with them in light of established rules of conduct.

There is no reason to invent a new set of ethical rules to address the issues raised by this new technology. It is a matter of recognizing how our established and well-accepted rules apply to this area. As stated by Professor Karen Eltis of the University of Ottawa in a recent paper on the impact of technology:

*The Internet age, with its promise and hurdles, cannot bypass the judiciary, and*

*reflection must ensue to ensure that the benefits of technology are harnessed towards the better administration of justice rather than subverted for undermining public confidence or further curtailing necessary judicial activities.*

Although advances in science and technology do, without question, at times cry out for revisiting outdated constructs, too often has it become almost instinctual to seek out 'new and improved' standards, whereas reverting to existing frameworks — informed but not necessarily transformed — by technological change and enlightened by comparative inquiry is more apropos.

To revert back to the question posed at the beginning of this paper — how does this new technology affect the scope and substance of acceptable behaviour of judges — the answer would be that it is really up to the judge, being aware that there are few protections for one's on-line activities, to exercise that sense of restraint and decorum that should be the hall mark of all of a judge's actions, whether in the virtual world or the real one.

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.

### CALL FOR CONTRIBUTIONS

Have you dealt with an issue/ a case which other members of the CMJA might find of interest?

Have you ever thought of writing a piece for the Journal on a topic close to your heart?

Have you spoken at a seminar/meeting recently and would like to share your presentations with others in the CMJA?

Why not send us an article? The Editorial Board is seeking articles on issues affecting judicial officers across the Commonwealth.

Contributions, ideally no more than 6,000 words should be sent to the Editor c/o the CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX or by email: [info@cmja.org](mailto:info@cmja.org).

### 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?

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# THE COMMONWEALTH'S CONTRIBUTION TO THE DEVELOPMENT OF INTERNATIONAL FAMILY LAW

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*The Rt. Hon. Lord Justice Thorpe, Head of International Family Justice, England and Wales.  
A paper from the CMJA Conference, July 2011.*

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First we must establish what is international family law and who makes it. I consider only global and not regional law makers. The net of the Commonwealth jurisdiction is far flung, reflecting its origin in what was once, and briefly, an empire. Only three of the fifty-four Commonwealth Member States are in Europe, where the European Union is an ambitious law maker. The primary creator of global international family law is the Hague Conference. For over a hundred years the Hague Conference has fashioned Conventions which seek to ease problematic areas of private international law. The cornerstone of the Hague Conference's construction on the field of international family law is the 1980 Abduction Convention. It was the product of injustice and despair created by cross border parental child abduction, which in turn was the product of the new-found mobility, and the resulting mixed marriages, which had its beginnings with the troop movements of World War II.

When the Hague Conference creates a Convention it offers a treaty which States may wish to ratify, thus creating rights, remedies and responsibilities inter se. The Hague Conference is the mid-wife who assists negotiating Member States to bring a Convention into the world of private international law. Whether it will thereafter thrive by subsequent ratifications is unpredictable. If it does not then the creative work of the Conference and the negotiating States will have been labour in vain. Happily no Convention has proved more successful than the 1980 Abduction Convention. Now eighty-five jurisdictions have ratified and are operating the Convention. This multitude reflects a decade of steady growth and there is great potential for further growth in the decade ahead amidst the hundred plus states which have yet to ratify. By way of instance there is a strong possibility that the Japanese ratification will be achieved before the end of this year.

## **The importance of the Hague community**

Now why should we as judges regard the expansion of the Hague community of nations as an achievement for humanity, and its continuing expansion as a high priority? Surely it is because as jurists we all believe that where there is a wrong there should be a remedy. Imagine that you have met at university a young man from another nation, let's call it Ruritania. You have married in love and then fifteen years down the line the relationship founders. You have the care of the two children, he sees them every weekend, he returns the children home on Sunday evening. One Sunday evening he does not come, the children do not come. You live through forty-eight hours when you know not where they are. You then receive an email telling you that they have gone to Ruritania.

If Ruritania is a Member State operating the Convention you have only to activate the legal processes at the end of which lies the remedy of a return order.

If Ruritania is not a Member State then as a mother you are facing the real possibility that you will not see your children again during their minority or until they elect to contact you. That is an horrific scene and that is why the expansion of this Convention is so vitally important.

## **A Commonwealth response**

So what can we as Commonwealth Judges do to shrink those regions where there is no remedy for the left behind parent? Let me start with the declared policy of the Commonwealth. At the meeting of law ministers in Harare in 1986 the policy was agreed in the following terms:

*Ministers were concerned that international child abductions by a parent were increasing. They reaffirmed a belief that the Hague Convention offers an effective international mechanism for ensuring the*

*return of the child abducted in violation of custody rights and that this should serve as the basis for expanding Commonwealth co-operation in this area.*

Now let us consider statistics, which hardly seem to substantiate that stated policy. It is surprising that only sixteen of the Commonwealth jurisdictions have so far ratified the Convention. After all we all apply common law principles either wholly or partially within our jurisdictions. Why should we not reverse the ratio: thirty-eight in and sixteen out seems more plausible to me than sixteen in and thirty-eight out. From where would the growth come? Of the fifty-three African jurisdictions only five are party to the 1980 Convention, if Mauritius and the Seychelles are excluded. Of those fifty-three jurisdictions sixteen, again excluding Mauritius, are Commonwealth jurisdictions. If Zimbabwe has ratified why not, for example, Ghana, Nigeria, Zambia, Kenya, Uganda and Tanzania?

Within the Caribbean the Bahamas are in, as is Trinidad & Tobago. Why not Jamaica, Barbados and Guyana? In addition to having relationships between themselves these States have relations with their English speaking neighbours from North America and then the United Kingdom.

There are many potential additions in the Asia Pacific region, although relevant factors such as location and population might render some ratifications largely symbolic.

In South East Asia, India's possible ratification is a matter of record. In December 2006 the Government announced its intention to ratify and in due course a draft bill was circulated. Despite the recommendation and endorsement of the Indian Law Commission in 2008 the necessary legislative Act to bring the Convention within India's domestic law has faltered. Might India's ratification encourage other jurisdictions of the sub-continent to follow?

### **What judges can do**

Of course the decision to ratify is for the executive, the Government in power, and not the judiciary. It is a policy decision that must reflect the traditions and the aspirations of the State. It must also balance the resource implications, such as the cost of setting up and

operating the effective Central Authority mandated by the Convention. It must evaluate the capacity of judicial and other authorities to achieve the standards necessary to deliver the Convention's objectives.

However Commonwealth judges can influence Commonwealth law ministers by emphasising the need for a legal remedy to right the wrong of abduction. Last week I took the opportunity offered me by the Commonwealth Secretariat to address the triennial meeting of the Commonwealth Law Ministers in Sydney. My presentation was supported by interventions from South Africa, Trinidad & Tobago and the United Kingdom. That support was valuable to me in that it came from diverse jurisdictions - a European jurisdiction with great experience and expertise in the practical operation of the Convention, an African jurisdiction whose contribution is crucial and a much smaller jurisdiction of the Caribbean.

I urged not only ratification of the 1980 Convention but also the 1996 Child Protection Convention, which is on the threshold of wide adoption.

### **Judicial network**

Besides the Conventions themselves, the Commonwealth judiciary do have an important opportunity to support the development of a more effective international family justice system. In our Common Law tradition judicial deployment is for the judiciary and not for the executive. Thus Chief Justices of our Commonwealth jurisdictions have the power to appoint a judge to the International Hague Judicial Network.

The Network was one of the innovations agreed at the De Ruwenberg Global Judicial Conference in 1998. It is the structure within which judicial activism has flourished. Judicial Activism requires direct judicial communication and collaboration in cross border cases. The Network judge in each jurisdiction facilitates and encourages the collaboration. This judicial initiative was approved and adopted by the 4<sup>th</sup> Special Commission in The Hague in 2002. At the 5<sup>th</sup> Special Commission in 2006 Member States agreed that an Expert Group should compile a Good Practice Manual to guide judges in the process. At the first stage of the 6<sup>th</sup> Special Commission last month the Guide submitted



by the Experts was approved for publication. I would also emphasise two of the Resolutions which emerged from that session of the Special Commission.

*Resolution 66: the Special Commission emphasises the importance of direct judicial communication in international trial protection and international child abduction cases.*

*Resolution 64: the Special Commission welcomes the extraordinary growth in the International Hague Network of Judges, Member States who have not yet designated Hague Network judges are strongly encouraged to do so.*

That is the will of the international community.

Now here is another paradox. It is a few Commonwealth judges that have led the way in promoting judicial activism and the growth of the Hague Judicial Network. Yet whilst there are seventy judges in the Network representing forty-five jurisdictions only seven Commonwealth jurisdictions have officially appointed a sitting judge to the Network. There are therefore nine Commonwealth jurisdictions that have signed the Convention but have yet to nominate a Network judge. I am convinced this is not a matter of opposition but of priority. The large responsibilities which Chief Justices bear preclude awareness of such a specialist development. I hope that this paper will alert them to the need to nominate. Furthermore nomination is not confined to States that have already ratified the Convention. Both Pakistan and Egypt have nominated Network judges and my collaboration with Mr Justice Jilani in Islamabad has been particularly fruitful in contributing to the resolution of very difficult Anglo/Pakistani cases.

We are assembled in this wonderful country of Malaysia which also fosters side by side the traditions of the common law and of Islamic law. I must therefore not conclude without paying tribute to the efforts of The Hague Conference to develop understanding and co-operation between Islamic and non-Islamic jurisdictions. The programme that it has developed is known as the Malta Process, since all three of the Judicial Congresses have been generously hosted by the Government and Judiciary of Malta. This is symbolic given

Malta's central place in the Mediterranean and the great part that Islam has played in Malta's history. Chief Justice De Gaetano contributed to these conferences and it is good to see here Chief Justice Camillieri, his successor.

## Conclusion

First, I dedicate this paper to the Chief Justices of the Commonwealth appealing to them to encourage their Governments to ratify the International Family Law Hague Conventions of 1980, 1993, 1996 and 2007.

Second, I appeal to them to nominate officially a sitting judge to the International Hague Judicial Network.

Third, I would ask them to support the work of the Hague Conference to develop collaboration between Islamic and non Islamic jurisdictions.

Fourth, I would encourage them to send a judge to the second stage of the 6<sup>th</sup> Special Commission which will commence on 24 January 2012.

Finally, I would draw their attention to what I believe to be an important innovation which we have made in London: that is to create a Standing Conference of specialist family judges within the Commonwealth and common law worlds to meet every three years to discuss the development and the operation of international family law.

The first Conference was held in Windsor in 2009 and some of today's audience were there. The next will take place in Hong Kong commencing 28 August 2012. Again I would encourage Chief Justices to ensure that a judge from their jurisdiction attends and contributes to the work of the Commonwealth/Common Law Standing Conference.

It is a rare opportunity for me to speak so plainly to such a relevant audience as a conference of the Commonwealth Magistrates and Judges Association. I am a relatively new member of the Association but I have the greatest admiration for the work that it is doing and I believe passionately that the development of international family law that will be fit for future purpose is a huge opportunity, and perhaps a huge responsibility, for the common law jurisdictions of the world. If you think of the fifty-four jurisdictions of the Commonwealth, if you add in the fourteen



United Kingdom overseas territories, if you add in the three crown territories of the United Kingdom, if you add in the common law jurisdictions that are no longer members of the Commonwealth (there the great pillar is the United States of America but you have also to add the Republic of Ireland, Israel and Hong Kong), you are approaching eighty jurisdictions or roughly half the number of jurisdictions in the world. We have the opportunity to build on our common traditions, including our recognition of the vital importance of judicial independence, integrity and the rule of law. At the same time we might build from our diversity, because we are not a regional group like the states of

Europe or states of South America. We truly encircle the globe and within our midst are all faiths and customs. It seems to me that in terms of international family law we see a sleeping giant which must be awakened to ensure the creation of ever clearer measures, not of national law which serves only those within the boundaries of the State, but of international law that is applicable within domestic courts throughout the world. That must be our goal and we can achieve it. Look back to see how much has been achieved in the twenty-five years since the 1980 Convention came into effective force in the mid 1980's. So let us take the next twenty-five years as a challenge to achieve as much or even more.

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# LEGAL PLURALISM: THE UGANDAN EXPERIENCE

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*The Hon Justice Benjamin J Odoki, Chief Justice of Uganda. An edited version of a paper given at the CMJA conference in Kuala Lumpur, July 2011.*

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Legal pluralism is the existence of multiple legal systems within one geographic area. It is when in a social field, more than one source of 'law', more than one 'legal order', is observable that the social order of that field can be said to exhibit legal pluralism. It is particularly prevalent in former colonies where the law of a former colonial authority may exist alongside more traditional legal systems. Although it is by no means only found in former colonies as former colonial powers also grapple with similar issues especially in light of big migrations whose cultures and values have to be accommodated and reflected in a nation's legal system.

In Uganda, as a former British colony, the English legal system and laws are predominant and its legal system is therefore mainly based on the English common law system. The laws applied by the Courts include written law, the Common Law and doctrines of equity. It is also based on the African customary law as stipulated in the Judicature Act. The customary laws applicable are derived from the mores, values and traditions of indigenous ethnic groups. Within legal pluralism, it is therefore inevitable that there will be competing claims of authority between the various norms and legal systems. Uganda has tried to remove this uncertainty by declaring that these 'customary laws' are only applicable in so far as they are not repugnant to natural justice, equity and good conscience and are not in conflict with any written law or the Constitution. Uganda's legal system has had to take into account the many different tribes, religions and cultures that exist within its borders and hence develop a legal system that is respectful of this diversity. The quintessential underpinning of legal pluralism is diversity, and this is reflected in Uganda's legal system that takes cognisance, not only of customary and common law, but also reflects Hindu and Muslim beliefs especially in the fields of personal law including marriage, divorce, and succession. Thus, there are laws dealing with

civil marriages, Christian marriages, marriage by Hindus and marriage by Muslims. There are also laws governing customary marriages.

This paper discusses the concept of legal pluralism with particular reference to the Uganda Legal System. It identifies and discusses key issues relating to the clash of competing interests, values and norms, the need to develop rules for choosing between the various competing interests and norms, the question of opting out of one legal regime, the issue of internal conflict of laws and the choice of law and the effectiveness of customary and religious Courts in delivering justice.

## Customary Law courts

Prior to Uganda's independence, the British recognized the traditional Kingdoms and chiefs and allowed them to exercise judicial power in their courts under the dual system of courts. Under the dual system of courts there were African Courts for natives administering customary law and Subordinate Courts for non-Africans administering general or English law. However, the two systems were integrated into one legal system in 1962 following Uganda's independence. This meant there was one system of courts for all persons in Uganda and that customary law was administered by general courts. In 1986, when the National Resistance Movement (NRM) took power after an armed struggle against the government, it set up the Resistance Committee Councils and Courts at the village, parish, and sub-county levels. These courts were later renamed Local Council Courts (LCCs). LCCs were set up to provide 'grassroots' justice as part of the struggle against a government that was seen as oppressive. They were an attempt to de-formalize or 'popularize' the administration of justice and were hailed as both an attempt to bring justice closer to the people and to 're-connect people to their customary traditions.'

Today in matters of customary law, people can choose to take their civil matters to the

customary tribunal or to the formal court system, as both LCCs and the magistrates' courts have unlimited first instance jurisdiction in matters of customary law. The LC courts have jurisdiction to hear among other things, land matters relating to customary tenure, disputes involving children and other family matters. Their jurisdiction is limited only to civil cases. This has led to an intertwining between the customary and formal system that has made it virtually impossible to distinguish between the two. Although in practice, poor people are more likely use customary tribunals, as they are unable to afford to take their matters to the formal judiciary.

Since the written law including the Constitution, is still the paramount body of law, the LCCs can only apply the customary law in so far as it does not conflict with the written law. This has led to several conflicts especially in regard to the status of women as certain provisions within some written laws are viewed as being contrary to customary laws and norms. But the Constitution ordains that any custom which is inconsistent with the Constitution is void.

The LCCs have been successful for several reasons. Their inexpensive nature makes them a more realistic option for the generally less economically able people who use them the most. Their geographic proximity, the simplicity and familiarity of the language used, speed with which cases are dealt with, their relevance due to the fact that they are more in tune with the realities on the ground as opposed to written law which is sometimes archaic. Another important element is that of restorative justice since fines and compensation will go to the aggrieved party unlike those imposed in a formal court where they go to the state. It should be noted that customary law is also enforced in ordinary courts, particularly Magistrates' Courts, especially in personal matters and land. But their formal nature means that the process is slow, expensive and not easily accessible.

### Issues

One of the unavoidable elements of legal pluralism is that if the underlying norms and processes of the sources are inconsistent, there will be a clash. In Uganda, attempts to pass the Domestic Relations Bill highlighted a clash between state and religious law that led to an

extensive dialogue with various parties in an attempt to resolve it. This legislation was seen by many groups as an opportunity to provide women with some meaningful protection, but it raised the issue of which law should have primacy and overall authority. The most vocal opposition stemmed from the Muslim community that took issue with the Bill's provision on polygamy. According to the proposal, a husband would have to seek the permission of his first wife before taking another. There were protests from Muslims in the country who saw this as an 'attempt to re-write the Koran'. The proposed law also, on the issue of inheritance, stipulated that a woman should be given a fair share of her husband's wealth. The Muslim community also rejected this, noting that the Koran stipulates what women may inherit if their husband dies.

It also presented an example of a clash *within* competing versions of each type of normative ordering which is common around the world in that the Constitution allows for the freedom to practise one's religion but it still places restrictions on *how* one can practise their religion which sometimes conflicts with the principles of the religion.

Legal pluralism also raises the issue of whose interests are then put forward as authority over others. This is particularly important when exploring how much influence vulnerable and minority groups have over the laws that are presented. An example is the issue of women's rights. The proposed Domestic Relations Bill had been presented as an opportunity to offer some concrete protection to women against domestic violence but when it came against strong opposition, it was shelved to avoid this clash with sectors that had opposing ideas.

There is also the issue of dealing with internal conflict of laws and devising choice of law rules. The rules of choice of law in private international law may not necessarily be applicable.

### Effectiveness of the courts

As previously noted, customary courts have been effective in bringing justice closer to the people in a less formal setting. While they have many advantages, they also have some weaknesses that prevent them from operating in a more effective manner. First of all, as the

LCCs are part of the executive branch and officers often sit on the tribunals while simultaneously holding executive local government positions, it creates a real risk of political manipulation and at the very least the lack of perception of impartiality. This combined with a lack of sufficient training, resources and supervision creates a situation where justice may be compromised. Another more worrying aspect is the lack of uniformity in the application of the law. Often the concept of 'customary law' as interpreted by the courts reflects the public opinion of the areas concerned and sometimes it merely reflects the opinion of the more vocal and politically active section of the community. It makes the administration of the law more difficult and harder to ensure it is being practised in a manner that is not 'repugnant to natural justice, equity and good conscience.' in the words of the Judicature Act. Moreover, codification of customary law has not been promoted and therefore, there is always the need to prove a custom once challenged. Some have argued that customary law should be allowed to die a natural death.

There is no doubt that there still is and will always be tension between the various legal regimes operating within Uganda. One of the main reasons is that while the legal system which is mainly based on common law, which has its origins in England, is sometimes very removed from the lives of the ordinary citizen, their lives are more likely to be primarily guided by their religion and local customs. While defining Sharia law, Justice Umar Faruk Abdullahi explains that Sharia can mean different things depending on how you look at it. 'One concept is that, for a Moslem, Sharia law is generally regarded as a way of life; which means it covers the whole spectrum of a Moslem's life from cradle to grave. The other concept is that Sharia law is such volume of legal norms that governs the life of a Moslem in his dealing with other people, be they Moslems or non-Moslem, as well as the State.' It means that though the Constitution states that any law that contradicts it is void, if a Moslem believes a certain right has been declared as 'law' by the Quran, they will in most cases adhere to the Islamic law rather than the Constitution, thus giving it priority over the Constitution. One way in which this issue could be solved would be the

implementation of Qadhis courts which would have the power and legitimacy (conferred by the Constitution and Moslem population) to decide on issues of Muslim personal law. The Ugandan Constitution allows for the establishment of Qadhis courts by Parliament (Art 129) but this has never been implemented.

### Does Legal Pluralism Allow for Opting Out?

One of the principles of legal pluralism that has been stated as providing adequate protection and accommodation of citizens rights is the option to 'opt-out' of one legal system for another. In reality, it is a lot more complicated. The Marriage Acts are the clearest examples that highlight the existence of a pluralistic legal system in Uganda. They recognise five types of marriage: civil, Christian, Hindu, Muslim and customary marriages. While the civil and customary marriages are open to all, the religious marriages necessitate that the couple be persons who profess the religion. It thus means that in reality one cannot 'opt-out' without having to renounce their religion. Before that can happen, there are many social and legal barriers to overcome that make it virtually impossible.

In Kenya in 1986-7, this issue played out in the courts in the S.M Otieno case. S.M Otieno was a leading criminal defence attorney from the Luo tribe, who died without specifying how and where he was to be buried. His wife had begun making funeral arrangements for his burial in Karen, a suburb of Nairobi where he lived, when members of his clan intervened claiming they had the right under Luo customary law, to bury him in his birthplace which is his real 'home'. The dispute was litigated in three different courts. First, his widow, Wambui Otieno, obtained an order *ex parte* entitling her to bury the body in Karen. Mr Justice Shields reaffirmed his order denying that the clan had *locus standi*. His main reason was that the deceased was a metropolitan and cosmopolitan lawyer who had evolved or opted out of Luo customary law. The advocate for the clan appealed to the Court of Appeal, who quashed the order and referred the matter back to the High Court. After a trial lasting sixteen days, involving complex issues of both fact and law, Mr Justice Bosire found in favour of the clan on the basis that the deceased

intended to be buried in his ancestral 'home'. After a further three months, Court of Appeal found for the clan and dismissed the appeal by a 2-1 majority. This case highlighted the complexity inherent in diverse communities. This case highlighted the clashes of interest and values not only between customary and

'colonial' law but also between rural and urban values, gender equality, patriarchy, individualism and communitarianism, tradition and modernization, and between different tribes.

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# THE IMPLEMENTATION OF LATIMER HOUSE PRINCIPLES

*Sir Philip Bailhache, Executive Vice-President, CMJA. An edited version of an address given at the CMJA conference in Kuala Lumpur, 2011.*

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It is an honour for me to address this gathering of colleagues and friends on a subject which is a hardy perennial amongst topics for discussion at CMJA conferences. It is a hardy perennial because there is probably no other topic that goes to the heart of Commonwealth principles in quite the same way. I appreciate that delegates, who are themselves hardy perennials, will know the history of Latimer House but for those of you who have not attended a CMJA conference before it is worth spending just a few minutes clearing the fog on the origins of the Principles.

## Some history

It was in June 1998 that a group of 60 invited representatives of four Commonwealth organisations, the Commonwealth Lawyers' Association, the Commonwealth Legal Education Association, the Commonwealth Parliamentary Association, and the CMJA gathered at Latimer House in Buckinghamshire in order to draft some guidelines on best practice in relations between the three branches of government, the legislature, the executive and the judiciary. I was one of the representatives of the CPA as I then held the office of Bailiff of Jersey and was, I think, regarded as a constitutional curiosity in that the Bailiff straddles two branches of government, the legislature (of which he is the Speaker) and the judiciary (where he is the Chief Justice). There is a long history to that, but it is not relevant this morning. The broad purpose of the colloquium was to forge some guidelines so that there would be a benchmark of principles that could be invoked by parliamentarians, lawyers, judges, magistrates and members of civil society in the event of any breach of those principles. After five days of intense discussions a document emerged which became known as the Latimer House Guidelines on parliamentary Supremacy and Judicial Independence.

Those Guidelines were later approved by the four Commonwealth associations and submitted to Commonwealth Law Ministers. In that forum the Guidelines were subject to further intense scrutiny and amendment before they were considered and adopted under the name of the Commonwealth (Latimer House) Principles by the Commonwealth Heads of Government in Abuja in 2003. The Principles are expressed to have this objective –

*to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth's fundamental values.*

## Some key Principles

The Principles contain some fine words about the duties of the three branches of government; they are

*the guarantors, in their respective spheres, of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.*

And, from the perspective of judges and magistrates, there is this important paragraph on the Independence of the Judiciary –

*An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice.*

The Commonwealth is of course very good at promoting high sounding declarations of principle. If all the countries of the Commonwealth practised what is preached in the Harare Principles, or indeed the Latimer House Principles, the world would be a much better place. But most people, most magistrates and judges, and indeed most governments operate at a lower level, where practical



problems tend to make the rhetoric of international agreements and universal declarations appear remote, and even irrelevant.

The Latimer House Guidelines thrashed out on 1998 were intended to provide basic guidelines that could more easily be related to problems arising in practice in the relationships between parliaments, governments, and the judiciary.

For the individual it is what happens on the ground that matters. It does not help the individual citizen in dispute with his government, or one of its agencies, that the government in question is a signatory to a declaration of high sounding principles. What matters to him is whether the judge or magistrate is impartial, free of political or improper influences, and competent. What matters on the ground is whether the court operates with reasonable efficiency so that everyone who should be there is there at the appointed hour. What matters is whether there is confidence that the magistrate or judge has not taken a bribe; what matters to the magistrate is whether he or she has been paid; whether the rates of pay and working conditions are reasonable and appropriate to the magistracy; and whether there is appropriate security for magistrates and judges so that they feel safe, and whether there is respect for the system. What ultimately matters is whether the government and/or the military in fact obey the orders of judges and magistrates.

The Latimer House Principles lay down some simple rules against which countries can test their own constitutions and working practices. In Edinburgh in 2008 a group of judges, lawyers and parliamentarians tried to go further and to lay down some agreed actions which could be taken to bring the Latimer House Principles down to the level of practical implementation. In Edinburgh I was present as a representative of the CMJA. The Edinburgh Plan follows the important African initiative taken at Nairobi in 2005 when the Plan of Action for Africa was drawn up. The general movement is towards looking at practical steps that can be taken, and for which individual magistrates can press.

The Principles do not purport to provide a solution to every problem arising between judges and the executive. But they are a

building block, and every judge and magistrate should have a copy of this small booklet published by the Commonwealth Secretariat and the 4 Commonwealth associations. Of course the relevance of the Principles will be more marked in some parts of the Commonwealth than in others; and in some countries the Principles, or parts of the Principles will be of greater relevance to Chief Justices than to judges and magistrates going about their daily work. But all judges need sometimes to reflect upon the basics.

### **Impartiality and independence**

For example, we all like to think that we are impartial judges. But every judge has his or her prejudices. We are all the product of our education, upbringing and training. Our experiences of life have shaped the way we think and react to different situations. It is in my view futile to pretend that judges do not have predispositions and prejudices. No judge is a colourless empty vessel waiting to be influenced by what he or she hears in court. Indeed sometimes our experiences make us better able to appreciate the situations in relation to which we are called upon to judge. The key to impartiality in the judgment seat is to recognize what prejudices we might have, and to be prepared to put them aside and to allow one's judgment to be shaped by the arguments that we hear. In particular it is important not to allow oneself to form an unchangeable view on reading the papers. Sometimes the papers are misleading. I cannot count the number of times I have gone into court feeling that a particular outcome was the right one, only to have that preconception turned upside down by the way in which a witness gave his evidence or by the arguments of counsel. All judges and magistrates in Jersey swear an oath on taking up appointment which includes the words 'that you will administer justice to all manner of persons without favour or partiality', and I imagine that a similar oath is taken in all parts of the Commonwealth. If the rule of law is to prevail, judges and magistrates must apply the law without favour or partiality, i.e. impartially.

Next, can we ask ourselves if we are truly independent? The independence of the judiciary is a gem that has many facets and I should like to speak on a few of them. Judicial independence means first of all that the judge

or magistrate should be personally independent. Consultation with fellow judges may sometimes take place but the decision is that of the judge herself on the facts of the particular case. The judge is personally responsible for any judgment that is given.

The judiciary should of course be free from interference or undue pressure by the executive. This is fundamental to the rule of law. Judges should never be placed in a position where their conduct of judicial proceedings can be influenced directly or indirectly by the executive. And no one is above the law. As Dr Thomas Fuller famously said in 1733, 'Be you never so high, the law is above you.' Thus, if a Minister unlawfully sells planning permission for cash, he does not escape justice because he is a Minister. More prosaically, if a parliamentarian collects a parking ticket for parking his car unlawfully, he does not escape the fine merely because he is an MP. Unless you have some sovereign immunity, whatever your social or political standing in society, you are subject to the same laws and to the jurisdiction of the same courts.

Freedom from pressure by the executive does not mean that we are immune from criticism, but it does mean that the executive should recognize the domain of the judiciary and keep away from it. No government minister likes a ruling being made against him but it is his duty to accept it. I am glad to say that, on the whole, the executive in my jurisdiction is respectful of the domain of the judiciary. Of course the media sometimes criticize particular rulings, but in general in moderate and appropriate terms. We have not experienced the pressure either from the executive or aggression from the media that is occasionally seen in the UK where individual judges have been attacked as being unduly lenient or wrong in some other way.

## Judges and the media

Relations with the media are sometimes a difficult area. The Latimer House Guidelines state:

*Legitimate public criticism of judicial performance is a means of ensuring accountability' and 'the criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.*

But what about illegitimate criticism? Here the Guidelines are silent. Too often, perhaps, the judiciary is silent in the face of public attacks. The House of Lords Select Committee has gone on record as saying that the judges in the UK are unduly diffident about talking to the media. In my own jurisdiction it is rare for the Bailiff or the Magistrate to speak to the media about something that is of public concern, or of concern to the media, which is much the same thing. Most Chief Justices will rightly be reluctant to engage too often with the media. Judges should be judged on their performance in the courtroom and not as media performers. But on the other hand, if we think that judicial independence is important, as it is, there may be a need to explain ourselves a little more to the public. It has often been suggested that a short note for the media from the judge should accompany a judgment on some matter of public importance explaining in simple terms what the ruling is all about. If that is done, there is no excuse for bad reporting.

But the principle goes wider than that. Certainly in my own jurisdiction, there is widespread public ignorance about the way in which the courts operate, and the functions of different kinds of judges. In the UK I understand that consideration is being given to training a small number of judges to communicate with the media on issues where it seems desirable for the judiciary to explain itself. There is obviously a balance to be struck in maintaining public confidence between over familiarity with the media and standing completely aloof. In this era of instant communications and influential social networks it seems to me that there is a case for greater engagement than has been the case in the past. It would be interesting to know how different jurisdictions represented here deal with the media.

## Codes of conduct

Codes of ethics or conduct for the judiciary are encouraged both by the Plan of Action for Africa and the Edinburgh Plan. In Jersey our Judicial Association adopted a Code of Conduct in 2007. It is very short; and is in fact based upon the Maltese Code. It is printed in a small booklet which is given to all members of the judiciary on appointment. It contains practical guidance as to the conduct of one's private financial affairs and involvement in

business activities. It is published on a judicial website and is available for anyone to see. Litigants and the public know the standards we have set ourselves. As Chief Justice I found it helpful in resolving complaints of minor judicial misconduct. These codes do, however, need to be kept under review so that they can be adapted in the light of experience. They are an easy way in which any judicial officer can check whether something that he or she wants to say or do might bring the judiciary into disrepute, or affect the confidence of the public. As a broad rule of thumb, it seems to me that a code should be subject to review every 5 years or so.

### Financing and resourcing the courts

Another important aspect of judicial independence lies in the ability of courts to manage their own finances. The Latimer House Guidelines provided that sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. The Principles adopted at Abuja provide, rather more prosaically, that ‘adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought’. It is a pity that ‘sufficient and sustainable’ should have been diluted to ‘adequate’, and that the word ‘undue’ should have been included, but that is where we are. In my own jurisdiction, the Departments of the Judiciary Law provides, in relation to staff, that ‘a sufficient number shall be appointed to ensure the service of the [departments]’. As a minimum, therefore, the Latimer House Principles adopted at Abuja mean that judges and magistrates should be adequately resourced and paid. We cannot expect to be paid as if working in the private sector, and the honour of serving as a judge or magistrate, and the prospect of a reasonable pension, are of course important factors. But judges and magistrates are human and, if the judiciary is to perform to the highest standards, the salaries must bear some reasonable relationship to what good lawyers can earn in private practice in their own jurisdiction. Singapore is perhaps unusual in making a generous relationship with private sector earnings a feature of judicial and other public sector salaries.

So far as judicial establishments are concerned, my own firm view is that control of the judicial budget by the judiciary is critical for ensuring both that courts are not squeezed financially and that improper pressures are not brought to bear by the executive. Parliament sets the figure, and in my jurisdiction the Treasury is obliged to consult with the Bailiff on the funding for the courts before the budget is put before Parliament. But once voted, it falls under the control of the Court Service. This does not mean that each judge has to worry about how to pay for his books. But it does mean that money is allocated by our Court staff who are ultimately accountable to the Chief Justice. It also means that our administrative staff develop a loyalty to the Courts rather than to the Government. They are civil servants with all the terms and conditions of service of the civil service, but they are accountable to the judges and magistrates. There is, as a result, an *esprit de corps* amongst all the judges and staff which makes working life in the judiciary a pleasurable experience. I warmly recommend it.

The provision of adequate resources for the judiciary includes in my view an adequate sum for judicial training. Training is not specifically mentioned in the Principles but the Latimer House Guidelines lay down that a ‘culture of judicial education should be developed’. No one would, I think, disagree with that as an objective, and it is a pity that it was omitted from the Principles. The Guidelines provide that ‘Training should be organised, systematic and ongoing and under the control of an adequately funded judicial body’. Very often small jurisdictions will have no law school or university, and professional development and the training of the judiciary will be a problem. It would be interesting to know to what extent small jurisdictions in this region are able to turn to a larger neighbour for assistance in this respect. I must say that in Jersey we are able to rely to a considerable extent on advice and help from the Judicial Studies Board in the United Kingdom, and some of our judges and magistrates are able to attend courses organised by the JSB. We have our own modest Judicial Training Programme which is principally concerned with induction courses for newly appointed members of the Youth Court and for Jurats (who are lay judges or assessors in our High Court). We are planning an expansion of that programme but resources

are very limited. One other way in which we do try to improve knowledge and judicial skills is by inviting distinguished judges and lawyers from outside the Island to address members of the judiciary. An Institute of Law was founded in Jersey in 2008 and offers lectures for the legal profession as part of the Continuing Professional Development programme. Nothing has yet focussed on the judiciary, but it may be possible to use that new resource in my jurisdiction to enhance judicial training.

### Appointment and removal

Perhaps I can conclude by saying a few words on the appointment of judges and their discipline and dismissal. On appointments, the Principles state

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

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

The Latimer House Guidelines provide that ‘appointments should be made by a judicial services commission ... or by an appropriate officer of state acting on the recommendation of such a commission.’

Most jurisdictions now have in place a judicial appointments commission, although there is considerable variance in the composition of such commissions. Two things seem to me to be important. The first is that the executive has no part to play in such a commission or in judicial appointments, other than, perhaps, to exercise a power of veto for very senior appointments such as that of the Chief Justice,

where it may be said that it is important for the government to have faith in the integrity and competence of the Chief Justice. The second is that a commission should be composed of a majority of judges or those with legal knowledge, but diverse in the sense that it is representative of the community.

Dismissal is more difficult. It is clear that one of the fundamental requirements for an independent judiciary is that judges and magistrates should be protected from capricious or improper dismissal or disciplinary process. We all know of Commonwealth countries where judges have been forced from office by the improper abuse of executive power. Yet there must of course be a means, at the end of the day, of removing a judge who has been guilty of serious misbehaviour or shown himself unable to perform his judicial duties. If a judge is under threat of removal, he must have the right to be fully informed of the charges, to be represented at the hearing, to make a full defence and to be judged by an independent and impartial tribunal. Even if there is general agreement on process, the application of these principles to particular cases can give rise to considerable scope for disagreement, as was shown by the Privy Council’s split decision in relation to the former Chief Justice of Gibraltar, who was ironically one of those involved in the drafting of the Latimer House Guidelines. The Guidelines lay down, finally, that disciplinary procedures should not include the public admonition of judges. The Chief Justice should deliver any admonitions in private.

### Conclusion

The Latimer House Principles have become the bedrock of Commonwealth values, including of course respect for the rule of law. They are worthy of study, and of continuous debate, not only by the judiciary but also by the legislature and by the executive in all the countries of the Commonwealth.

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# CURRENT THREATS TO JUDICIAL INDEPENDENCE

*The Hon M.L. Lehobla, Chief Justice of Lesotho. A paper delivered at the Second Judges' Colloquium of the Southern African Chief Justices' Forum, Livingstone, May 2011.*

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## Introduction

The theme 'Current Threats to Judicial Independence', is one of the ironically emotive issues albeit equally of contemporary significance. The term 'judicial independence' has been defined in various works by different jurists. The lowest common denominator in the literature is that the importance of this notion is beyond all question. However, the precise meaning and scope of the concept 'judicial independence' remain unsettled. As Schutz P (as he then was) put it in *Law Society of Lesotho v. The Prime Minister* (1988):

*'...independence of the judiciary is not a precise and immutable concept that has been handed down to us in a book with a black cover. But its essentials are easily perceived, as also its fundamental importance'.*

As we all know the term judicial independence, in its simplest form, merely refers to the fact that the courts should not be subject to direction of anybody or authority in the performance of their judicial function. The courts should only be subject to the constitution and the law from which they derive their very authority. In this new democratic era, the right-thinking members of our society wish for genuine independence and accountability of the judiciary which protects and promotes the highest values and aspirations of our community. A weak judiciary gradually loses respect and authority and is often looked upon with disdain.

Most progressive countries which embrace democratic dispensation and the rule of law, have judicial independence guaranteed and jealously guarded in their national constitutions. The diction employed in constitutional provisions that guarantee such independence is one that is usually carefully thought-of, to give assurance of the sanctity of the independence of the courts. The Executive arm of government is normally constitutionally mandated to ensure that

independence of the judiciary is protected and cherished.

In Lesotho, Article 188 (2) and (3) of the Constitution is the one in point. It briefly provides that the courts shall, in the performance of their functions be independent and free from interference and should be subject only to the constitution and any other law. Further that, the Government should accord such assistance as the courts may require to enable them to protect their independence, dignity and effectiveness.

Notwithstanding these guarantees, the notion of judicial independence constantly remains threatened, hence why it is a subject of interest in various fora. It is however generally accepted that independence of the courts has to be vigorously fought for, for the benefit of the general public – the people – who are in essence the primary beneficiaries of that right. As Judge Roger Warren once noted:

*Judicial independence has to be continually fought for – and won anew – each day. It is grounded in public respect for the courts and for the judicial function. Like respect, it cannot be demanded. It must be earned.*

Sharing almost similar sentiments, Lord Woolf, C.J is said to have lamented that: 'The independence of the judiciary is therefore not the property of the judiciary, but a commodity to be held by the judiciary in trust for the public'. I agree.

It is beyond all question that notwithstanding its significance, judicial independence is forever being tested, and to a large extent negatively, so to speak. Where do the threats to judicial independence emanate from? What are they? Can they be surmounted? These are questions that we now briefly turn to consider.

## Current threats to judicial independence

The threats to judicial independence usually rear their ugly heads in many forms and faces,



and emanate from various sources as well. The attempt here is not to provide an exhaustive inventory of such acts, but to paint a picture by picking some of the basic and common current threats.

### Executive interference

This is one of the most common threats to judicial independence which has always been there since inception of the concept of judicial independence. It cannot be doubted that today there is a growing concern that the notion of judicial independence is facing a strong challenge to its survival and we hear fervent arguments for cooperative governance by all organs of the state. The Executive (being the purse holder) nowadays claims the right to supervise and manage the administration of the courts. For an example from Lesotho see *The Judicial Officers' Association v The Prime Minister* (2005): the Executive wanted to place the Magistrates under the administration and control of the District Administrators who were responsible to the Ministry of Local Government, and that action was successfully challenged as violating the principle of separation of powers and independence of the courts.

It may be argued that whilst there should always exist meaningful communication link between the judiciary and the executive, care must always be taken to avoid sacrificing the autonomy and independence of the courts as guaranteed by the constitution. Interference by the Executive arm of government can be a threat to judicial independence in multifarious forms. Here are some of the examples:

*Resources.* Most judiciaries are not yet financially autonomous and rely on the Executive which holds the purse for resources (whether financial or human). The net effect of this is that the judiciary finds itself in an invidious position where it has to constantly beg from the Executive in order to perform certain judicial functions. A begging judiciary can never be independent or at least seen to be. It is gratifying to note that, in Lesotho, the Bill intended to give financial autonomy to the judiciary has just gone through parliamentary stages and has become law. This is a positive step which goes towards strengthening the independence of our courts.

*The Executive's role in judicial appointments.* In many of our Constitutions, the Executive branch of government plays an important role in the appointment of judges, especially of the Heads of our judiciaries. In Lesotho, for instance, the Chief Justice and the President of the Court of Appeal are appointed by the King acting in accordance with the advice of the Prime Minister in terms of our Constitution.

That the Prime Minister, being head of the Executive, advises the King as to who is to be appointed the head of the judiciary may smack of party politics and may become a contentious issue in certain circumstances. However, such fears had been seen in another light in *Ex parte Chairperson of the Constitutional Assembly in re: Certification of the Constitution of the Republic of South Africa* (1996) (quoted with approval in *Basotho National Party v The Government of Lesotho* (2002)) in the following terms:

*The mere fact...that the Executive makes or participates in the appointment of judges is not inconsistent with the doctrine of the separation of powers or with judicial independence required by [Constitutional principle]. In many countries in which there is an independent judiciary and a separation of powers, judicial appointments are made either by the Executive or Parliament or by both. What is crucial to the separation of powers and the independence of the judiciary is that it should function impartially and that it should function independently of the legislature. Appointment of judges by the Executive or a combination of the Executive and Parliament would not be inconsistent with [Constitutional principles].*

Notwithstanding this important reassurance, it is still desirable that the system of judicial appointments should not only be independent but should manifestly be seen to be so. Politicization of the judiciary can never be justified regardless of the popularity or goodness of motive and to seek to manipulate and draw the judiciary into the murky puddle of politicking is not desirable and can be a serious threat to independence of the courts.

In Lesotho, the existing practice in respect of the appointment of the Heads of Superior Courts may soon become history through the Sixth Amendment to the Constitution Bill,



2007. The Bill includes the Judicial Service Commission (JSC) in the appointment process. For instance, for the appointment of the Chief Justice, the Bill provides that:

*The Chief Justice shall be appointed by the King acting in accordance with the advice of the Prime Minister acting on the recommendation of the Judicial Service Commission.*

The same applies in respect of the appointment of the President of the Court of Appeal and this would go a long way towards curbing the manifest tendency of the Executive to interfere with the independence of the Judiciary. The involvement of the JSC in this manner may therefore insulate the functions of appointment of the Heads of the Superior Courts from suspicion of partisan political process while ensuring some level of accountability. This may go a long way in guaranteeing the independence of the judiciary since the process of judicial appointments is at the very heart of the concept of judicial independence.

*Execution of judgments against the government* It is often complained that the government (Executive) usually takes a long time or totally disregards the courts' decisions especially where it is a judgment debtor. Execution of judgments against the government is said to be a major problem. If those allegations are anything to go by, the effect of such disrespect is that public confidence in the courts would erode if people feel that the government which should be acting in a responsible exemplary manner just flouts the authority of the courts with impunity. This may be a serious threat to judicial independence.

### **Poor remuneration of judicial officers**

This may be one of the factors that may constitute threats to independence of the courts. Judicial officers who are not well remunerated become vulnerable targets of judicial corruption. They are amenable to compromise their independence and oath of office by accepting inducements from lawyers and litigants due to financial pressures. As Judge Thean, a retired judge from Singapore) puts it:

*Judges should be free from having their financial well-being dependent on the outcome of the cases they are*

*deciding...Once judges are adequately remunerated, such that they need not endure economic hardship, pecuniary gain is hardly a justification for any judge to sway his decision...The maintenance of a strong and independent judiciary depends in part on the payment of sufficient remuneration.*

The opposite to 'payment of sufficient remuneration' may therefore constitute a threat to independence of the courts.

### **Insufficient judicial training**

The judiciary can truly be independent if judicial officers are offered continuous judicial training to equip them with the necessary skills relevant to the dynamics of their judicial work. The opposite of that would be a threat to their independence since it will negatively reflect on the quality of their judicial decisions. Training of the judiciary is an acknowledgment that irrespective of the highest possible knowledge one may have gathered from a law school nothing can replace hands-on knowledge from law practice be it as a legal practitioner or judicial officer on the bench.

This is the training that one acquires not so much from the text books as from chambers of senior judicial officers. Even those should be a select few who are able to frankly acknowledge their previous mistakes in the process of the development of their skills in judicial practice. I should hasten to confess what would be my own apprehension of going on board an air plane whose pilot has just related to me fifteen or so near misses and near crashes he has had in the last ten or so years. Yet his experience is all the more vital if future air disasters are to be avoided. I seek to emphasize that vital judicial training is not something that a law school is equipped to provide. It is that special training that equips a judicial officer with ethical norms and standards, necessary to maintain competence, integrity and effectiveness.

### **Attacks by the media**

The media plays a very important watchdog role over the organs of state and it is often branded the fourth arm of government. Whilst objective criticism of any judicial pronouncement is welcome, sometimes the media reportage goes overboard by personal attacks the judges or making denigratory statements over judgments of the courts, or

gratuitous labeling of judges as ‘anti-government’, or as ‘executive-minded’, ‘reactionary’, ‘counter revolutionary’, or as ‘timid’, ‘corrupt’, ‘incompetent’ etc. All these may qualify as undue interference and may affect public confidence in the courts, but it is true that judicial officers must also have resilience to ward off the adverse effect of such statements and remain true to their judicial oath. As Chief Justice Gleeson of Australia once noted in his *A Changing Judiciary*:

*By comparison with our predecessors, modern judges might appear anxious to please. Sometimes we seem a little unclear as to exactly who we want to please, or what it is that might please them; and there are still some among us who have difficulty in regarding the justice system as a service industry...That we should value public confidence is beyond doubt. But our thinking about what public confidence means, and how it is to be maintained, requires some clarification...The confidence we seek from the public is confidence that we will pursue that objective with fidelity and integrity, even if to do so makes us unpopular, or causes dissatisfaction in some quarters. That confidence is not secured by seeking popular acclaim for our decisions, or by appearing to be responsive to threats.’*

### **Lack of judicial accountability**

The threats to judicial independence can also come from the judiciary itself, the so-called self-inflicted wounds. The judiciary as a public institution should also be accountable in its operations. The usual question would be accountable to whom? We know the courts account through the decisions they make, but the accountability we are referring to here is the one involving the clear ethical standards and norms that guide the judiciary and judicial conduct. Without such clear norms the judiciary may appear to be a law unto itself

and leave an open question as to ‘who should judge the judges?’, and that may undermine the very principle of judicial independence that the courts continually seek to assert. The Bangalore Principles of Judicial Conduct, 2002 and the UN Basic Principles on Independence of the Judiciary may serve as the guiding light as to how to develop the Ethical principles of our judiciaries that will govern the conduct of our judicial officers to preserve the honour, integrity and independence of our respective judiciaries.

### **Conclusion**

It is incumbent upon all the stakeholders – the three arms of government, the general public, the legal profession and the media to cooperate in one spirit, without compromising the tenets of good governance, to ensure that independence of the courts is secured and cherished. As Justice Thean correctly observed: ‘A judiciary that is perceived as weak and partial is a liability to a country’. The concept of judicial independence is the heart and soul of the judiciary and should be jealously guarded by our governments. Dr. Rajendra Prasad wrote:

*Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it...a Constitution, like a machine, is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them.*

Our African countries equally need honest men and women who will have the interest of their countries at heart, who will incessantly fight for and cherish the independence of the courts.

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# RESTORATIVE JUSTICE FOR CHILDREN: THE NEW ZEALAND EXPERIENCE

*His Honour Judge L J Ryan, District Court Judge of New Zealand A paper from the CMJA Conference in Kuala Lumpur. July 2011.*

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This paper is intended to be a relatively concise summary of the youth justice processes applicable to children and young persons in New Zealand with a particular emphasis on restorative justice. When using the term 'restorative justice' I use a definition from the Esmee Fairburn Foundation, 'an approach that seeks to repair the damage caused by an offender's crime through dialogue and negotiation involving the offender, the victim and the wider community'. The New Zealand Ministry of Justice's *Statement of Restorative Justice Values and Processes* declares that a restorative justice approach involves victims, offenders, their families and the community to 'collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible'. These processes are based on the values of participation, respect, honesty, accountability and empowerment.

The youth justice system in New Zealand today is based on the following assumptions:

- (a) That contact with the criminal justice system is often itself harmful.
- (b) That youth offending is often opportunistic behaviour which will be outgrown.
- (c) That young people should be confronted, held accountable for their offending behaviour and given opportunities to take responsibility for their actions by making amends to the victim(s) of their offence(s).
- (d) By involving a young person in a face-to-face meeting with the victim of the offence, the young person can see the effects of their conduct in human terms.

As the Principal Youth Court Judge of New Zealand, Judge Andrew Becroft, stated in an address to the Institute of Policy Studies Symposium in Wellington in 2005, the New Zealand Youth Justice approach is a world leader in restorative responses to youth offending. He pointed out that family group conferences (FGC's) are the 'jewel in the crown

of the restorative response'. They are as he says the essence or lynchpin of the system.

## Family Group Conferences

FGC's have a variety of functions depending on the stage of the process that they occur and the purpose of the convening of the conference. They do not emerge for a first time offender charged with a relatively minor offence because essentially the youth justice process is predominantly a diversionary one unless the offending is so serious as to warrant a child or young person being arrested. The relevant statute, the Children Young Persons and Their Families Act 1989 restricts when a child or young person can be arrested without warrant (s.214). When the legislation was first enacted the youth justice provisions applied only to young people between the ages of 14 and 17. Recently an amendment has been passed which brings children aged 12 and 13 under the youth justice umbrella in certain circumstances. There are only three situations where criminal proceedings can be commenced against a child. They are where the child is of or over the age of 10 years and the charge is murder or manslaughter, where the child is aged 12 or 13 and he or she is charged with an offence for which the maximum penalty is imprisonment for life or for at least 14 years, and where the child is aged 12 or 13 and is a previous offender which has its own definition under the Act.(s.272)

Prior to this amendment children under the age of 14 years were dealt with under the Care and Protection Provisions of the Act. A declaration could have been made that the child was in need of care and protection because he or she 'has committed an offence or offences the number, nature, or magnitude of which is such as to give serious concern for the wellbeing of the child'. (s.14(1)(e)) That course of action is still available in the case of a child and one of the objects of an FGC in cases such as these is to consider 'whether the public interest

requires that criminal proceedings should be instituted against the child' (s. 258(ba)(i)) or whether instead the child could be found to be in need of care or protection on the grounds mentioned above.

### **A restorative justice approach**

From the very beginning of the youth justice process for a young offender the structure offers a restorative approach. Not surprisingly, this starts with the police and what is referred to as the Youth Aid Section. Youth Aid Officers are specially appointed for their role by virtue of their experience, their suitability to deal with children and young people, their ability to communicate successfully with the young offender's families and their demonstrable acceptance of a rehabilitative and restorative response. The police practice is tailored to the principles enunciated in s.208 which make it clear that 'unless the public interest requires otherwise, criminal proceedings should not be instituted against the child or young person if there is an alternative means of dealing with the matter' and that criminal proceedings 'should not be instituted against the child or young person solely in order to provide any assistance or services needed to advance the welfare of that child or young person'. The Act in fact requires a police officer, when considering whether or not to institute criminal proceedings to specifically consider 'whether it would be sufficient to warn the child or young person, unless a warning is clearly inappropriate having regard to the seriousness of the offence and the nature and number of previous offences committed by the child or young person'.(s.209)

In the North Shore (Auckland City) where I sit in the Youth Court jurisdiction, I am advised that 60% of young offenders are dealt with by way of a formal warning. In most cases these are first offenders and the offending is relatively minor such as shop lifting or similar.

The next step up is alternative action. 30% of young offenders are dealt with in this way on the North Shore. This is the first time any victims become involved in the process because in determining whether or not to take alternative action as opposed to formally charging the young person with an offence, Youth Aid will take into account the views of the victim of the offending. More often than

not the alternative action will incorporate a requirement for reparation to be paid. There will be inevitably a demand for an apology whether in writing or face-to-face with the victim. Alternative action typically involves community work and often the victim will be invited to make suggestions as to an appropriate venue for that work to be undertaken. A plan is formulated and a timeframe imposed for its completion. I am informed that 95% of these young offenders complete the plan imposed. They are required to sign a contract.

An example is this contract in a case which involved arson. The terms are recorded on a simple form, signed by the young person, his or her parent and a police representative:

1. I will write a letter of apology, or I will make a personal apology. If I write a letter, the police will forward it on my behalf. This is due by [date].
2. I am prepared to do community work of 50 hours and will do this at ...
3. I agree to pay \$425 to the victim for the damage I have caused.
4. Non association with [named person(s)].
5. Curfew: Sun-Thurs 9 pm -7 am; Fri and Sat Midnight – 7 am.
6. Alcohol and drug ban: for duration of the plan.

IT IS A CONDITION OF THIS CONTRACT THAT I DO NOT REOFFEND. THIS CONTRACT MUST BE COMPLETED BY [date]

### **What happens at a Family Group Conference**

This is a creature of statute intended to involve the child or young person, victim and the young person's family, the police and the Ministry of Social Development, who are tasked with reaching a consensus outcome addressing the two key objectives of the CYPF Act in relation to youth offending. Specifically those objectives are for the young person to be held accountable for their offences and 'dealt with in a way that acknowledges their needs and will give them the opportunity to develop in responsible, beneficial and socially acceptable ways'.(s.4) Prior to the FGC, in certain instances, a risk and needs assessment will be undertaken.

The FGC's are convened by a Youth Justice Co-ordinator who is required to ensure as best he or she can, that those persons who should participate at the conference actually attend. Where there is an identified victim a serious effort is made to ensure that person engages in the process. The Police Youth Aid Section proactively makes contact with a victim when an FGC is to take place and that person is encouraged to attend. Contact is usually by way of telephone call where the process is explained. Where necessary in certain sensitive situations, a Police Youth Aid Officer will sometimes visit the victim and where appropriate the victim's family to give reassurance that attendance and involvement by them will be carried out in a safe way. At the conclusion of any plan that may be agreed upon at an FGC the Youth Aid Officer will usually follow up by way of letter to the victim explaining that the plan has been completed thus continuing engagement with the victim throughout the process which in some instances can take a lengthy period of time.

Depending on the type of FGC being convened there are different expectations that arise as to the purpose of that conference. For instance, if an 'intention to charge' FGC is convened in respect of offending by a child (aged between 12 and 14) the conference must consider whether the public interest requires that criminal proceedings should be instituted against the child and whether the child is in need of care and protection and if so whether the public interest might instead require an application for a declaration that the child is in need of care and protection.

There is a hurdle to overcome before the police can lay a charge in the Youth Court in respect of a young person where that person has not been arrested. There must be prior consultation between the police and the Youth Justice Co-ordinator as to the desirability of laying a charge in the Youth Court. If after consultation the enforcement officer still wishes to charge the young person it is mandatory that within 21 days of the Youth Justice Co-ordinator receiving the requisite notice from the enforcement officer, an FGC is convened. At this 'intention to charge' FGC the conference first determines whether the young person admits the charge and if he or she does, the meeting then decides what should be done and in addition decides whether the young

person should be prosecuted or whether he or she is dealt with in a different way.

Where a Youth Court remands a young person in custody an FGC must be convened within seven days of the remand and must be completed within the following seven days. The task of the conference in this situation (and the victim will be involved) is to consider whether the custodial remand should continue or whether some alternative placement can be considered. This can include the question of bail and appropriate terms and conditions, such as a curfew, non-association with named persons and prohibition on the use of drugs or alcohol.

Where a young person appears before the Youth Court and does not deny the charge a Youth Court Judge must direct the convening of an FGC. The conference is required to consider what action and/or penalties should result and recommend the appropriate way to deal with the young offender. This process is also required where a charge has been denied, but has been proved after a defended hearing. A Youth Justice Co-ordinator can under certain circumstances waive the requirement for a FGC if an intention to charge FGC was held in respect of the offence for which the young person is subsequently charged and does not deny. This avoids unnecessary duplication of the process. Before the Youth Justice Co-ordinator can reach the view that convening a further FGC would not serve any useful purpose, the Co-ordinator is required to consult with those people who would be entitled to attend that FGC in the normal course of events.

A Family Group Conference must consider whether a young person should be required to attend one or all of the following: a parenting education programme, a mentoring programme and an alcohol or drug rehabilitation programme and in the case of a parent or guardian having the care of a young offender whether that parent or guardian should be required to attend a parenting education programme.

### **Role of the victim**

In order for the FGC to satisfy the need for a restorative justice approach it is essential that the victim participates. In addition to the proactive steps taken by the police the victim is written to by the Youth Justice Co-ordinator



who is available for the victim to consult with. Support people can accompany a victim and the co-ordinator may present the victim's views to the conference. The co-ordinator can also permit a spokesperson to attend on behalf of the victim. The process is explained carefully to the victim and a short explanatory pamphlet is provided which describes what the conference should consider making it clear that the young offender is to be held accountable, is to be able to right their wrongs and change their behaviour. The following excerpt from the pamphlet is indicative of the description and information provided:

'The conference will look at:

- Practical ways the young person can right their wrongs, acknowledge that what they did was wrong and learn from their mistakes.
- Things that may have contributed to the offending and ways to help change their behaviour. This may include programmes that help with life skills, employment and education, or activities like team sports and mentoring. This has been shown to reduce the likelihood of them reoffending.'

Because restorative justice requires community involvement as well as the victim and the young offender and his or her family, police and the youth advocate, the attendance of health and education professionals and social workers is often a vital ingredient.

At the conclusion of the conference a plan is formulated with the agreement of all concerned. Where there is no agreement the young offender appears back in the Youth Court for the Judge to obtain a social work report and plan with a view to undertaking a sentencing exercise informed by the policies and principles of the Act. Proper completion of the plan in the case of a first offence or subsequent minor offending, will typically result in the young offender receiving no criminal record.

A booklet produced by Child Youth and Family Services '*Right the Wrong – What you Need to Know About Youth Justice*' includes the following real life story:

*Luke has turned his life around. . .*

*When Luke was arrested for robbery he ended up in Youth Court and the Judge*

*sent him to a Family Group Conference. Even though it was hard to face the victim, it was good to get a chance to say sorry. Luke felt stink about the robbery and ended up buying the family's kids some games and wrote them a card. It felt good to put things right. One of the awesome things about the meeting was having his family there. 'I didn't know so many people cared about me' said Luke. As part of his plan they sent him on Community Service, and he paid the victims back for some of the stuff he stole. He also went on a programme that taught him about his whakapapa and culture and he got into a rugby team. 'It showed me that there is another path I can go down' Luke said. 'Before that I didn't have dreams for the future.' Luke is now in Year 13 at school, is part of the Kapa Haka Group and wants to join the army when he leaves school. Kia kaha Luke.*

### **Restorative justice and the court**

The Principal Youth Court Judge in his paper 'Restorative Justice in the Youth Court: A Square Peg in a Round Role' postulates that the principles of the Act may be consistent with restorative justice processes but they do not explicitly mandate the use of those processes. As can be seen from this paper most of the restorative justice process occurs out of Court but the Youth Court itself is still based along traditional adversarial lines with the obvious purpose to achieve the goal of safeguarding individual rights. Thus decisions such as bail, sentences that involve participation in a programme and residence away from home must be decisions for a Court utilising sound legal principles.

The Court undertakes the role of an overseer in respect of FGC plans ensuring that the young person complies with them and in the event of noncompliance considers the imposition of a higher level of sanction that is appropriate in all the circumstances. Judge Becroft argues in his paper that perhaps a distinction should be drawn between process and the type of decision. He says 'while some decisions, such as bail or jurisdiction are for the Court to make, the actual process used to arrive at many decisions could take more of a restorative tone. This would involve improving aspects such as inclusion, support and control



for various stakeholders. This has the potential to improve outcomes for young people, their families and victims. However it is accepted that restorative justice in its purest form cannot be achieved simply by the adoption and use of various restorative techniques.’

Of course at the centre of the restorative justice approach is the involvement of the victim. The FGC encourages, at a face-to-face meeting, discussion and mutual agreement being reached in order to restore relationships. It has been described by Youth Court Judge Henwood as a ‘powerful event’. In the Courtroom however the victim has no rights to speak. They have no entitlement to attend the Youth Court. Although there is discretion on a Youth Court Judge to permit ‘any other person’ to be present that does not give the victim an entitlement to address the Court as of right. This is in particular contrast to the Sentencing Act and provisions in the Victim’s Rights Act which provide for victims to present statements to the Court in an adult sentencing and for the provision of victim impact statements. As a Youth Court Judge in a situation where the victim of an offence should have further input into the sentencing process beyond the reaches of the FGC, I can only request a social worker, when preparing a social work report and plan, to include input from the victim. That is unsatisfactory and hardly recognises any restorative justice process.

Perhaps if there was a weakness in the provision of a truly restorative approach in the Youth Court it would be ensuring community involvement. Community work is regularly part of every plan but I venture to say that is really paying lip service only to the need to require community participation in the youth justice process. Lay advocates are being

appointed. Usually they are members of the local community with an interest in youth justice but their role is quite limited in that they are appointed to provide a voice for families and to strengthen the relationship between the child or young person and his or her family group. A lay advocate is appointed to make sure the Court is aware of all cultural matters that are relevant to the matter before the Court and to represent the young offender’s family to the extent that those interests are not otherwise represented in the proceeding.

### **Conclusion**

In conclusion, New Zealand has continued to lead the way in youth justice and care and protection proceedings by the enactment of the Children Young Persons and Their Families Act 1989. It was a world leader in the introduction of the restorative justice approach by legislating for the Family Group Conference process. New Zealand however is a country with a population of little more than four million people and thus the proper and adequate resourcing of these processes has always been and will continue to be an issue. In order to achieve what I am sure is the achievable, Family Group Conferences and the provision of programmes, therapeutic support, educational support and health support must be adequately funded. Victims need to be able to participate in the Court processes instead of simply the out of Court processes. They should have the opportunity of addressing the Court in appropriate cases and a sentencing Judge should have access to all the information he or she would have were the victim the subject of adult offending instead of youth offending. There can be no justification for a lesser approach.

# LAW REPORTS

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## THE MASTERS' ASSOCIATION OF ONTARIO v HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

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30 March 2011, 2011 ONCA 243

ONTARIO COURT OF APPEAL, *Macpherson, Gillese and Laforme JJ.A.*

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*Litigation about judicial remuneration is surprisingly common in Canada. In this example, the court held that the rules governing the tenure of office and remuneration of the Case Management Masters in Ontario were in some respects unconstitutional.*

The office of Master has existed for many years in Ontario. In 1996 the traditional office began to be phased out and a new set of Masters, Case Management Masters, was introduced. After litigation had been started in 2001, a settlement was reached leading to legislative changes which gave the Case Management Masters enhanced tenure and remuneration. Nonetheless, the salaries of Case Management Masters had been \$155,000 in 2002, raised by 2009 to \$190,463; at the same dates the traditional Masters' salaries, the same as provincial court judges, rose from \$172,210 to \$248,057.

The judge at first instance held that two provisions relating to the tenure and remuneration of Case Management Masters were unconstitutional. On tenure, the judge held that the requirement in s. 86.1 of the Courts of Justice Act that the Attorney General concur in the recommendation about Case Management Masters continuing in office after age 65 was unconstitutional. On remuneration, the judge concluded that s. 53(1)(b) of the Courts of Justice Act was unconstitutional because the direct linkage between the salaries of Case Management Masters and a specific category of public servant (SMG3), without more, failed to provide for judicial independence.

The Crown appealed only the component of the application judge's decision relating to the remuneration of Case Management Masters. It

did not appeal the tenure component of the decision. The Crown's position was that, in light of their constitutionally and statutorily restricted jurisdiction and their limited role as final arbiter of disputes or guardians of the Constitution, Case Management Masters required a less stringent level of protection than other judicial officers. Accordingly, the Crown submitted that the current provisions governing the remuneration of Case Management Masters were sufficient to satisfy the essential conditions of judicial independence required for that office.

MACPHERSON JA referred to the leading cases, *Provincial Court Judges Reference* and *Provincial Court Judges' Association of New Brunswick v New Brunswick*. The three points that he drew from these cases were that the constitutional principle of judicial independence requires a 'special process' for dealing with the question of judicial remuneration, that the goal of the process is to be 'independent, effective and objective', and that there must be an 'independent body' involved in, at a minimum, making recommendations to governments about judicial remuneration. The phrases 'special process', 'independent, effective and objective' and 'independent body' were, admittedly, only general phrases. They were touchstones or guidelines, not rigid prescriptions. There was a need for flexibility in interpreting and applying these phrases with respect to the wide range of judicial officers performing judicial functions throughout Canada.

With respect to *objectivity*, the formula set out in the relevant Order-in-Council linked the salaries of Case Management Masters to an objectively chosen comparator, the SMG3 classification for senior public servants at the

Assistant Deputy Minister level. With respect to *effectiveness*, the first instance judge did not take issue with this component of the process. The fulcrum for the appeal was the ‘*independent*’ component of the current process for setting the remuneration of Case Management Masters. The Crown contended that flexibility was permitted in this domain and that, according to the court in *Ontario Deputy Judges Association. v Ontario* (2006), it is permissible to ‘link judicial remuneration... with the remuneration provided for an objectively-chosen comparator group.’ This was precisely what the 2001 settlement accomplished, said the Crown, and the respondents must live with their own choice.

In spite of the flexibility permitted by the case law, there were certain minimum requirements that grounded the ‘independent’ component of the special process for setting judicial remuneration. The most important requirement was that there must be a ‘body’ or an ‘entity’ or a ‘commission’ or a ‘person’ in the role of intermediary between the government and the judiciary and this intermediary must be independent of the government. In the case law, this requirement had been described as the need for ‘an institutional sieve between the judiciary and the other branches of government’ What was missing in the special process set out for Case Management Masters was that

there was no ‘body’ or ‘entity’ or ‘commission’ or ‘person’ between the government and the judiciary; there was no ‘institutional sieve’. The Crown contended that the institutional sieve was the SMG3 classification. However, that could not be. The SMG3 classification was established and controlled by the government; it was the precise opposite of an intermediary at arm’s length from the government.

MacPherson JA observed that with respect to all other judicial officers in Ontario – federally appointed judges, Ontario Court of Justice judges, Ontario Small Claims judges and deputy judges (who sit part-time), and justices of the peace – their remuneration was determined by the ‘special process’ recommended in *Provincial Court Judges Reference*. An independent body engaged in a process of hearing submissions from government and the judiciary and then made recommendations to the government about judicial remuneration. The composition, structure and procedure of these ‘commissions’ varied, but the core of the process was shared by all. By linkage to provincial court judges, this process also applied to the near-obsolete office of traditional Master. In his view, there was no reason for Case Management Masters to be the solitary exclusion from this shared, and constitutionally appropriate, picture.

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# CANADIAN BROADCASTING CORPORATION v CANADA (ATTORNEY GENERAL)

28 January 2011

SUPREME COURT OF CANADA, *Mclachlin CJ. and Binnie, Lebel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.*, 2011 SCC 2

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*Applying the Canadian Charter of Rights and Freedoms, the court held that limitations of media activity in respect of court cases, although they infringed the freedom of expression, were justified.*

DESCHAMPS J. said, ‘The open court principle is of crucial importance in a democratic society. It ensures that citizens have access to the courts and can, as a result, comment on how courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of judicial processes inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law. The right to freedom of expression is just as fundamental in our society as the open court principle. It fosters democratic discourse, truth finding and self-fulfilment. Freedom of the press has always been an embodiment of freedom of expression. It is also the main vehicle for informing the public about court proceedings. In this sense, freedom of the press is essential to the open court principle. Nevertheless, it is sometimes necessary to harmonize the exercise of freedom of the press with the open court principle to ensure that the administration of justice is fair. In this appeal, this Court must determine whether certain rules are consistent with the delicate balance between this right, this principle and this objective, all of which are essential in a free and democratic society.’

The Canadian Broadcasting Corporation and other media organisations wished to film, take photographs and conduct interviews in the public areas of courthouses, and also to broadcast the official audio recordings of court proceedings. The existing rules limited the places where the first of these activities might take place and prohibited the second. The appellants submitted that these rules

unjustifiably infringed the freedom of the press to which they are entitled.

Deschamps J noted that before the impugned measures were adopted, journalists could move about freely in the public areas of Quebec courthouses, with or without equipment for recording sound, filming or taking photographs. According to the evidence accepted by the first instance judge, ‘on-the-spot’ interviews make journalists’ reports more interesting. However, as a result of the way journalists went about their work, crowds would form in front of courtroom doors, it would be difficult to get through doorways and there would be crushes, races down hallways and jostling. The evidence also showed that media representatives did not always comply with special security measures implemented by courthouse administrators. In addition to affecting the serenity of hearings and decorum, the increased presence of journalists in courthouses was a source of great stress for witnesses and their families. Some participants even refused to appear in court for this reason. In June 2004, in response to certain incidents, a working group was set up, and its recommendations convinced the judges of the Superior Court that they had to act to restore order. They adopted the new rules and a ministerial directive applied the same principles to other courts in Quebec.

In their challenge to the rules, the applicants relied primarily on freedom of expression, including freedom of the press, as guaranteed by the Charter. The media organizations argued that courthouses are places where the protection of freedom of expression is strong and where there are no restrictions on the ability of the media to employ the means available to them to prepare more accurate reports.

The Court had noted on numerous occasions that the protection of those rights is not

without limits and that governments should not be required to justify every exclusion or regulation of a form of expression — whether it concerns the location or the means of employing that form of expression. What had to be determined was whether the activities the media organizations wanted to engage in were protected by the Charter and, if so, whether the limits on engaging in those activities that were imposed by the impugned provisions are justified.

The Court held that the activities were protected by the Charter. The right to freedom of expression was infringed. The question whether the impugned measures, while infringing freedom of expression, were justified, was to be resolved by applying the well-known test developed by Dickson CJ in *Oakes*. When a protected right is infringed, the government must justify the limit by identifying a pressing and substantial objective, demonstrating that there is a rational connection between the objective and the infringement of the right, and showing that the chosen means interferes as little as possible with the right and that the salutary effects of the measure outweigh its deleterious effects.

To constitute a justifiable limit to a right or a freedom, the objective of the impugned measure must advance concerns that are *pressing and substantial* in a free and democratic society. On the issue of filming, taking photographs and conducting interviews, the impugned measures had the following objectives: to maintain the integrity of and public confidence in the administration of justice; to ensure the impartiality of trials and the serenity of judicial hearings; to ensure the safety of litigants and their families and friends, and respect for their dignity and privacy; to maintain order and decorum in and near courtrooms; and to ensure that all users of courthouses have safe access to courtrooms and that they can move about freely and testify calmly and without fearing that members of the media will catch them off guard, invade their privacy and follow or even chase after them. The court found that these objectives were pressing and substantial.

At the second stage of the *Oakes* analysis, the court must determine whether there is a rational connection between the means used and the legislature's objectives. Here, the

defendant must establish a connection between the infringement and the benefit that was sought in adopting the means, and this is to be done either by providing concrete evidence or, where it is impossible to provide such evidence, on the basis of reason or logic. Here there was evidence which satisfied that test. It was therefore reasonable to expect that the measures would have a positive effect on the maintenance of the fair administration of justice by fostering the serenity of hearings and decorum and by helping to reduce, as much as possible, the nervousness and anxiety that people naturally feel when called to testify in court.

McLachlin J. (as she then was) summarized the third stage of the *Oakes* analysis as follows:

*The impairment must be 'minimal', that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.*

The Court held that the solution proposed in the impugned measures with regard to filming, taking photographs and conducting interviews fell 'within a range of reasonable alternatives'.

The official audio recordings of hearings reproduced the words of people who have participated in court proceedings and were compelled, either morally or legally, to do so. Such people were not free to refuse to appear. A person, whether a party or a witness, who was summoned to testify in court must address his or her testimony to the court, in the courtroom, and not to the media's audience outside the room. To broadcast the audio recordings of hearings would be to alter the forum in which the testimony is given. Audio recordings of hearings are made to conserve evidence. This method of capturing and conserving testimony is the modern alternative to having stenographers take notes in the courtroom.

The Court could not find that the prohibition against broadcasting these recordings adversely affected the ability of journalists to

describe, analyse or comment rigorously on what takes place in the courts. The negative effect that broadcasting the audio recordings would have on the proceedings and the real impact it would have both on those participating in the hearing and on the search for the truth inherent in the judicial process

were factors that had to be taken into account. To broadcast the recordings in the name of freedom of the press would undermine the integrity of the judicial process, which the open court principle was supposed to guarantee.

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# REGINA v CHAYTOR

1 December 2010, UKSC 52

SUPREME COURT OF THE UNITED KINGDOM, Lord Phillips of Worth Matravers, Lord Hope of Craighead, Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Brown of Eaton-Under-Heywood, Lord Mance, Lord Collins of Mapesbury, Lord Kerr of Tonaghmore and Lord Clarke of Stone-Cum-Ebony, 2010

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*In an important case of the separation of powers, the court held that Members of Parliament accused of dishonesty in respect of claims for expenses could be prosecuted in the courts and could not hide behind Parliamentary privilege.*

A number of Members of Parliament were accused of false accounting in respect of dishonest claims for expenses and allowances made while they were serving Members of Parliament. The defendants claimed that criminal proceedings could not be brought against them as their actions were protected by parliamentary privilege as part of ‘proceedings in Parliament’ for the purposes of article 9 of the Bill of Rights 1689 and because Parliament had ‘exclusive cognisance’ to regulate its own internal affairs. These claims were rejected.

LORD PHILLIPS OF WORTH MATRAVERS first addressed the question ‘who decides the issue?’

In the 17th and 18th centuries there was a dispute between the courts and the House of Commons, often acrimonious, as to who was the final arbiter of the scope of parliamentary privilege. This dispute was largely resolved in the course of the 19th century. Although the extent of parliamentary privilege was ultimately a matter for the court, it was one on which the court would pay careful regard to any views expressed in Parliament by either House or by bodies or individuals in a position to speak on the matter with authority.

On Article 9 of the Bill of Rights, Lord Phillips addressed the issue as to the meaning of ‘proceedings in Parliament’. The Bill of Rights reflected the attitude of Parliament, after the Restoration, to events in the reign of Charles I, and in particular the acceptance by the Court of King’s Bench that parliamentary privilege did not protect against seditious comments in the chamber. The primary object of the article

was unquestionably to protect freedom of speech in the House of Commons. The question was, having regard to that primary object, how far the term ‘proceedings in Parliament’ extended to actions that advanced or were ancillary to proceedings in the Houses.

In *Bradlaugh v Gossett* (1884) Stephen J said ‘I know of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice.’ In *Pepper v Hart* (1993) Lord Browne-Wilkinson said

*In my judgment, the plain meaning of article 9, viewed against the historical background in which it was enacted, was to ensure that Members of Parliament were not subjected to any penalty, civil or criminal, for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed.*

Lord Browne-Wilkinson made a similar observation in *Prebble v Television New Zealand Ltd* (1995).

In *Ex p Wason* (1869) the issue was whether a prosecution would lie against three persons, two of whom were members of the House of Lords, for conspiring to deceive the House. The court held that it would not. Cockburn CJ held, at p 576:

*It is clear that statements made by members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person. And a conspiracy to make such statements would not make the persons guilty of it amenable to the criminal law.*

*Ex p Wason* was distinguished by the Supreme Court of Ontario in *R v Bunting* (1885), where it was held that a conspiracy to bring about a change in the Government of Ontario by bribing members of the Legislative Assembly to vote against the Government was an indictable offence at common law committed at the time of the conspiracy itself and within the jurisdiction of the ordinary courts.

There was some authority for the proposition that the receipt of bribes by MPs was not cognizable in the courts (the Supreme Court of India in *Rao v State of India* (1998)) but the 'sparse' case-law supported the proposition that the principal matter to which article 9 is directed was freedom of speech and debate in the Houses of Parliament and in parliamentary committees. This was where the core or essential business of Parliament took place. In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it was necessary to consider the nature of that connection and whether, if such actions did not enjoy privilege, this was likely to impact adversely on the core or essential business of Parliament. If this approach were adopted, the submission of claim forms for allowances and expenses did not qualify for the protection of privilege.

There were good reasons of policy for giving article 9 a narrow ambit that restricted it to the important purpose for which it was enacted—freedom for Parliament to conduct its legislative and deliberative business without interference from the Crown or the Crown's judges.

Precedent, the views of Parliament and policy all pointed in the same direction. Submitting

claims for allowances and expenses did not form part of, nor was it incidental to, the core or essential business of Parliament, which consisted of collective deliberation and decision making. The submission of claims was an activity which was an incident of the administration of Parliament; it was not part of the proceedings in Parliament.

Lord Phillips reviewed at length the history of Parliament's claim to 'exclusive cognisance' He concluded that Parliament by both legislation and by administrative changes had to a large extent relinquished any claim to have exclusive cognisance of the administrative business of the two Houses. Decisions in relation to matters of administration were taken by parliamentary committees and it had been common ground that these decisions were protected by privilege from attack in the courts. A parliamentary report had distinguished such decisions and their implementation, expressing the view that the latter was not subject to privilege. Lord Phillips considered that view to be correct.

For these reasons he was satisfied that neither article 9 nor the exclusive cognisance of the House of Commons posed any bar to the jurisdiction of the Crown Court to try the defendants.

LORD RODGER OF EARLSFERRY and LORD CLARKE OF STONE-CUM-EBONY delivered concurring judgments.

LORD HOPE OF CRAIGHEAD, BARONESS HALE OF RICHMOND, LORD BROWN OF EATON-UNDER-HEYWOOD, LORD MANCE, LORD COLLINS OF MAPESBURY and LORD KERR OF TONAGHMORE agreed.

# BOOK REVIEWS

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## Writing of Judgments: A Practical Guide for Courts and Tribunals

By Dato' Syed Ahmad Idid

Research Assistant Umar A. Oseni

Considering the varying experience levels of judiciaries across the Commonwealth, proper judgment writing might not be common knowledge to all. Judgment writing is arguably the most crucial task a judge undertakes considering it shows litigants reasons for the ruling, judicial impartiality, and promotes the administration of justice. The author argued judicial writing has three overarching principles: accuracy, brevity, and clarity. One aspect of judicial writing is legal reasoning. There are two types of legal reasoning; deductive and inductive. *Deductive legal reasoning* (same as syllogism) follows a logical process where one starts with a major premise leading them to a minor premise which then allows them to draw up a conclusive thought. Opposite is *inductive legal reasoning* where one generalises an idea to produce a universal claim from observed instances. A second aspect of judicial writing is judicial reasoning which also has two opposing types. First is the *formalist model* wherein composing a judgment a judge must clarify legal rules in a systematic manner. The *realist model* on the other hand allows the judge to reach a conclusion and then later rationalize it through logical reasoning. He then states how a standard judgment contains evidence of both sides, the decision of the judge, and the reasons behind the decision. In terms of sequential content a judgment should generally follow this order: heading, name of parties and respective positions in the suit, opening paragraph outlining the focus, facts submitted by both parties, points for determination, decision on the points, final order, signature and date. Neutrality is another crucial aspect in general judgment writing.

Moving forward he moves to more specific examples of judgment writing, breaking down the

various judgments in common and civil law. Common law is characterised as judge-made law where judicial precedents are considered binding. There are again three types of judgments under this style. Single or sole judgments are where several different judges contribute to form a comprehensive judgment. Seriatim judgments are where all sitting judges write separate judgments and read them in open court emphasising judicial independence. Finally, single majority judgments are where one judge writes a single judgment voicing the opinion of the court. In civil law systems judges have no role in making laws, instead they make decisions through the application of the law. Judgments are usually concise, to the point, and belong to the court as an institution rather than individual judges. He also discusses in detail decision writing in Indonesia and the Philippines' focusing on the drafting process. Avoiding grammar mistakes and using plain language are key elements to this. The author then sets out to explain the role of personal perspective in judgment writing. He admits there are some instances where all other options have been exhausted and a judge relies on personal reasoning to make a decision, but when this is the case the structure and content of the decision will be critically examined. Once again impartiality is essential when using ones personal perspective.

Concluding the author focuses on the delivery of a court judgment. A delay in producing a written judgment can be frustrating and a 90 day period is ample amount of time to complete the entire process. He uses Australia, Guyana, and Nigeria as good examples of Commonwealth nations who use the 90 day rule. He calls on Malaysia to adopt a similar system providing examples of shortcomings in their current system. Undoubtedly this publication is a great reference tool for all judges to use in their judicial writing process. It outlines all of the general principles while still providing specific examples in many instances.

## **Towards a Justice Delivery System for Children in Bangladesh A Guide and Case Law on Children in conflict with the Law**

By Justice M Imman Ali

Published by UNICEF Bangladesh 2010

[http://www.unicef.org/bangladesh/Justice\\_for\\_Children\\_2010.pdf](http://www.unicef.org/bangladesh/Justice_for_Children_2010.pdf)

With children accounting for 50% of the population in Bangladesh and Bangladesh being one of the first countries to ratify the Convention on the Rights of the Child, this publication sets out the importance of the rights of the Child. Despite this, the implementation of the Children's Act in Bangladesh leaves a lot to be desired according to the author. The publication is divided into different chapters, relating to the international legal framework, including the Convention on the Rights of the Child and the international standards relating to Justice for Children.

The work begins with establishing the international historic background to the Rights of the Child. Despite Bangladesh having signed the convention, has not changed all its legislation to comply with its international obligations. The author raises the issue of domestic application of the CRC by Bangladeshi courts and outlines the new thinking on Justice for children which considers the rights of children not only in conflict with the law but also in contact with the law. He then reviews children in Conflict with the law under the Children Act of 1974. Its main contention is the formal definition of a child and the discrepancy between the Act (defining a child as below the age of 16) and the CRC (defining a child as below the age of

18). Furthermore, he discusses the problem of age determination by police officers due to the low rates of birth registration in Bangladesh, although admitting improvements have been made in this area. Moving forward he delves into the domains of arrests, bail, and pre-trial detention highlighting the various rights children possess. In particular it discusses the roles of various actors including police and probation officers, parents, Magistrates, as well as temporary custody services. Justice Ali then focuses on jurisdiction of courts in terms of qualifications for determining if a court can act as a Juvenile Court. Moreover, it establishes two conditions a Juvenile Court needs to fulfil, namely jurisdiction over the person and over the offense. It also discusses in detail the challenges in determining whether or not the court has jurisdiction over the person, most importantly with age determination. The author then sets out procedures that need to be followed by the Juvenile Courts in order to assure constitutional guarantees are protected and a fair trial ensues. Likewise, he then lays out the principles of sentencing under the Child Act. Above all, it focuses on determining the best interest of the child and the various options the Court has. The work concludes with custody and detention procedures as well as conditions for both. Also he provides a summary of the key principles of the separate regime for children under the Children Act and issues that need to be addressed in the future.

The publication is clearly set out and a useful background to the rights of the child in Bangladesh, but is also relevant to other jurisdictions where the same issues are being discussed and where countries have ratified but not fully implemented the CRC.

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